

CANADA / JUDGMENT

Forough v. Bayard

2010 BCSC 1105

COURT

Supreme Court of British Columbia

DECIDED

5 August 2010

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2010 BCSC 1105 Forough v. Bayard IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Forough v. Bayard, 2010 BCSC 1105 Date: 20100805 Docket: S117274 Registry: New Westminster Between: Dr. Farzin Forough Plaintiff And Louis Bayard Defendant Before: Master Keighley Reasons for Judgment Counsel for the Plaintiff: G.A. Pyper The Defendant, Louis Bayard: Appearing on his own behalf Place and Date of Hearing: New Westminster, B.C. March 11, 19, April 15 and July 7, 2010 Place and Date of Judgment: New Westminster, B.C. August 5, 2010

- [1] The plaintiff entered interlocutory judgment against the defendant on June 4, 2009 and now seeks an assessment of damages and an order for costs.
- [2] In or about December 2007, the plaintiff purchased three commercial property units from the London Trading Company Ltd. ("London") and received, from London, assignments of three leases under which London was lessor and the defendant was lessee. For the sake of simplicity the three units, in which the defendant operated a leather clothing business, will be referred to as Units 11788, 11796, and 101. The first of these units were located at 11796 Fraser Street, Maple Ridge and the remaining unit located at 22456 Lougheed Highway, Maple Ridge.
- [3] In or about November 2008, the defendant fell into arrears in payment of rent and the plaintiff commenced this action.
- [4] In or about August 2009, the plaintiff and defendant entered into an agreement whereby the defendant would, commencing September 1, 2009, retire the accumulated arrears of \$18,149.90 by monthly payments of \$750 until the outstanding balance was fully paid. The arrangement was secured by a promissory note (the "promissory note") which purported to provide for daily interest of .15% on the outstanding balance. That provision fails to comply with the provisions of the Interest Act, R.S.C. 1985, c. 1-15, but, in any event, the plaintiff is not pursuing a claim for interest under the promissory note. The promissory note also provided that should the defendant default in payment of any amount secured by it, the entire balance owing became immediately due and payable.

- [5] The promissory note included unpaid rent up to the end of August 2009. The defendant provided a series of post-dated cheques for the instalments due under the terms of the promissory note.
- [6] The December 1, 2009 cheque for \$750 was returned to the plaintiff marked "NSF". On December 23, the defendant provided a replacement cheque.
- [7] The monthly rental cheques for the three leased units were also returned "NSF" in December 2009. At that point, the monthly rentals payable for the three units were: Unit 11788 \$830.93 Unit 11796 \$1,316.53 Unit 101 \$1,855.42
- [8] The defendant provided a replacement cheque in the amount of \$812 to be applied to the rental owing on Unit 11788, leaving a balance of \$18.93.
- [9] In an attempt to salvage their relationship, the parties entered into three new lease agreements made as of December 1, 2009, which adjusted the rentals payable as follows: Unit 11788 \$817.34 Unit 11796 \$1,356.26 Unit 101 \$1,845.23
- [10] The defendant made none of the payments due under the three new leases and on January 22, 2010, was evicted from the properties by order of Madam Justice Holmes.
- [11] The plaintiff now claims for the following:
- a. Outstanding balance owing on promissory note;
 - b. NSF charges of \$45 for each of the three cheques;
 - c. Late payment charges of \$50 for each of the six cheques, December 2009 and December 2010;
 - d. Arrears of rental;
 - e. Three months rent for February, March, April 2010;
 - f. Interest of .08% per day;
 - g. Legal fees, and;
 - h. Costs.
- a. The Promissory Note
- [12] The defendant takes no issue with the amount owing under the promissory note. I am satisfied that the plaintiff should have judgment for the outstanding balance of \$14,399.90.
- b. NSF Charges
- [13] Each of the three new leases contain the following clause: INTEREST ON ARREARS LATE CHARGES

22. If the Lessee is in arrears of payment of rent or otherwise a late payment charge of \$50.00 shall be payable by the Lessee to the Lessor, and in addition, interest at the rate of 0.08% per day shall be charged on such arrears and be due and payable by the Lessee to the Lessor as it accrues. No waiver by the Lessor or payment of such late payment charge or interest shall prejudice or affect the right of the Lessor to payment of such in the event of any later default by the Lessee. Any cheque or other payment made by the Lessee to the Lessor which is dishonored [sic] by the financial institution upon which it is drawn shall result in the Lessee, in addition to any other liability of the Lessee, being liable to pay forthwith to the Lessor a charge of \$45.00.
- [14] The plaintiff will have judgment for the sum of \$435 with respect to three NSF cheques.
- c. Late Payment Charges
- [15] Paragraph 22 also provides for late payment charge of \$50. The plaintiff will have judgment for the sum of \$300 representing late payment charges on each of the three units for December 2009, and January 2010. Again, the provision with respect to interest is not enforceable pursuant to the provisions of the Interest Act.
- d. Arrears of Rental
- [16] Rent was unpaid for Units 11796 and 101 for December 2009, and paid late for Unit 11788. The defendant made no payments for January 2010. I am satisfied that the plaintiff should have judgment for the sum of \$7,220.32, comprised of the following: Unit 11796 - December and January (2 x \$1,356.26) \$2,712.52 Unit 101 - December and January (2 x \$1,845.23) \$3,690.46 Unit 11788 - January only \$817.34 TOTAL \$7,220.32
- e. Three Month Rental Penalty
- [17] Each of the three new rental agreements contain the following clause: INSOLVENCY AND BANKRUPTCY
- (r) THAT in case the Lessee shall become insolent or bankrupt or make an assignment for the benefit of creditors, or being an incorporated company if proceedings be begun to wind up the said company, or in case of the non-payment of rent at the times herein provided, or in case the Premises or any part thereof become vacant and unoccupied or unused for a permitted purpose for a period of ten (10) days or be used by any other person or persons, or for any other purpose than as hereinbefore provided, without the written consent of the Lessor, this Lease shall, at the option of the Lessor, cease and be void, and the term hereby created expire and be at an end, anything hereinbefore to the contrary notwithstanding, and the then current month's rent and three months' additional rent shall thereupon immediately become due and payable, and the Lessor may re-enter and take possession of the Premises as though the Lessee or his servants or other occupant or occupants of the Premises were holding over after the expiration of the said term and the term shall be forfeited and void.

[18] Accordingly, the gross claim would amount to:

- a. Unit 11796 (3 x \$1,356.26) \$4,068.78
- b. Unit 101 (3 x \$1,845.23) \$5,535.69
- c. Unit 11788 (3 x \$817.34) \$2,452.02 TOTAL \$12,056.49

[19] The plaintiff has a duty to mitigate its losses and, in fact, was able to re-let the premises promptly. He was, however, obliged by the condition of the premises, he says, to allow the new tenants of Unit 11788 and 11796 one month free rental to assist them with repair costs and the tenant of Unit 101, two months free rental for the same reason. Accordingly, he claims:

- a. Unit 11796 \$1,356.26
- b. Unit 11788 \$817.34
- c. Unit 101 \$3,690.46 TOTAL \$5,864.06

[20] The defendant says that he should be entitled to credit for a rent deposit equal to one month's rent paid to his first landlord, London, with respect to each of the three units. In the material before me, however, is a document signed by the defendant, dated June 8, 2007, entitled "Estoppel Certificate", which confirms that with respect to each unit "no rent has been paid in advance under this Lease except for the current month's rent".

[21] The claim for a rent deposit credit is disallowed. The plaintiff will have judgment under the penalty provision for the sum of \$5,864.06.

f. Interest of .08% Per Day

[22] As previously indicated, a provision for interest in the lease fails to comply with the provisions of the Interest Act and is disallowed.

g. Legal Fees

[23] The plaintiff claims reimbursement for legal fees incurred since August 2009, and relies on the following provision in the lease agreement: THAT if the Lessor shall suffer or incur any damage, loss or expense or be obliged to make any payment for which the Lessee is liable hereunder by reason of any failure of the Lessee to observe and comply with any of the covenants of the Lessee herein contained then the Lessor shall have the right to add the cost or amount of any such damage, loss, expense or payment to the rent hereby reserved, and any such amount shall thereupon immediately be due and payable as rent and recoverable in the manner provided by law for the recovery of rent in arrears.

[24] I am not satisfied that this provision envisages the payment of legal fees on a solicitor/client basis. The claim for legal fees is disallowed. Damage to Premises

[25] The plaintiff claims the sum of \$10,680.32 being the cost of necessary repairs performed on the rental premises. No affidavit evidence was obtained from the parties performing the repairs, and I am left with some uncertainty as to the condition of the premises at the commencement of the leases, the extent to which damage was the result of reasonable wear and tear, or to what extent, if any, the premises were reconditioned or improved for the benefit of the new tenants. I will allow the plaintiff's claim for a glass repair partially completed by the defendant and the amount of the invoice is \$1,038.30. The balance of the damage claim, which has not been proven to my satisfaction, is denied. Summary

[26] The plaintiff will have judgment for the following: Promissory Note \$14,399.90 NSF charges \$435.00 Late charges \$300.00 Arrears of rent \$7,220.32 Three month penalty \$5,864.06 Damage to premises \$1,038.30 TOTAL \$29,257.58

h. Costs

[27] I have reviewed the plaintiff's draft Bill of Costs and I am prepared to allow the following amounts: Item Description Number of Units Claimed Allowed 1B Correspondence, conference, instructions, investigations or negotiations by a party after the commencement of the proceeding to the completion of the trial or hearing, for which provision is not made elsewhere in this tariff 30 5 1C Correspondence, conferences, instructions, investigation or negotiations by a party after the trial or hearing to enforce any final order obtained in that trial or hearing, for which provision is not made elsewhere in this tariff 10 10 16 Preparation for an application or other matter referred to in Item 17, for each day of hearing where hearing commenced

(a) where unopposed - January 22, 2010

(b) where opposed - March 11, 2010, March 19, 2010, April 15, 2010 and July 7, 2010 2 6 3 3 2 3 3 3 3 17 Interlocutory application or other application for which provision is not made elsewhere in this tariff, for each day

(a) where unopposed - January 22, 2010

(b) where opposed - March 11, 2010, March 19, 2010, April 15, 2010, and July 7, 2010 4 10 4 5 5 5 5 31 Process relating to entry of an order - January 22, 2010 and July 7, 2010 1 1 Total number of units: Multiply by until value 55 \$110.00 Subtotal: GST 5% PST 7% \$6,050.00 \$302.50 \$423.50 TOTAL \$6,776.00

[28] Disbursements and taxes are allowed as claimed, at \$808.47, for total costs of \$7,584.47. "Master Keighley"

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