
CANADA / JUDGMENT

North Vancouver (District) v. Babyeats

2014 BCSC 890

COURT

Supreme Court of British Columbia

DECIDED

21 May 2014

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2014 BCSC 890 North Vancouver (District) v. Babyeats Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

North Vancouver (District) v. Babyeats Ltd.,

2014 BCSC 890

Date: 20140521

Docket: S112089

Registry: Vancouver

Between:

District of North Vancouver

Plaintiff

And

Babyeats Ltd., Rachel Dempster,

and Ross Dempster

Defendants

Before: The Honourable Madam Justice Sharma

Reasons for Judgment

Counsel for the Plaintiff:

D. Howieson

Counsel for the Defendants:

K.J. Spears

and J. Straith

Place and Date of Hearing:

Vancouver, B.C.

March 5, 2014

Place and Date of Judgment:

Vancouver, B.C.

May 21, 2014

I. INTRODUCTION

- [1] The plaintiff District of North Vancouver applies for summary judgment pursuant to Rule 9-6 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 (the "Application"). The plaintiff claims the defendants breached a lease agreement and seeks an award of \$144,306.82 plus interest, and costs on a solicitor-client basis.
- [2] The plaintiff says the defendants are not entitled to be heard because they have not filed a response to the Application. The plaintiff says its evidence clearly establishes its entitlement to the relief sought.
- [3] The defendants unsuccessfully applied for an adjournment at the start of the hearing, saying they intend to amend the pleadings and file a counterclaim. The defendants also argued that the case is not suited for summary judgment because judgment on the Application will not dispose of the claim in its entirety and there are genuine triable issues.

II. DISPOSITION

- [4] I find in favour of the plaintiff and award \$98,551.34 plus interest, as specified below, and costs.
- [5] The procedural history of this case is critical to this conclusion, so I review it in some detail later.

III. BACKGROUND

- [6] First, I briefly review the factual background to this case.

A. The Parties

- [7] The plaintiff is a municipality but has the same capacity as an individual to enter into contracts pursuant to the Community Charter, S.B.C. 2003, c. 26, s. 8. The plaintiff owns lands and premises known as the Lynn Valley Town Centre (the "Town Centre"), located at 1233 Lynn Valley Road, North Vancouver, BC. The Town Centre is a mixed-use development containing a library, public space, and commercial units.
- [8] The defendant Babyeats Ltd. ("Babyeats") is a federally registered corporation and the defendant Rachel Dempster is listed as director of the company.

B. The Lease

- [9] On April 1, 2008, Babyeats entered into a five-year lease with the plaintiff (the "Lease") for space in the Town Centre (the "premises"). The defendants, Ross and Rachel Dempster, signed the lease as covenantors and were jointly and severally liable to perform Babyeats' obligations under the Lease.
- [10] At all relevant times, Patrick Murphy was the plaintiff's manager of real estate services and supervised management of the Town Centre. He says that the defendants expressed an interest in the premises in 2007. Rachel Dempster signed an offer to lease on November 30, 2007. Mr. Murphy says the following about that offer:

I recall being concerned about the company's ability to pay rent under the lease given that its business model was unproven. The District [of North Vancouver] made no extraordinary effort to secure the company as a tenant. Nevertheless the company kept pushing for the ground floor location. After other potential lease deals for the premises waned, plus enthusiastic presentations from the company, we did the deal. A lease was entered into dated February 4, 2008 and signed by Mr. and Mrs. Dempster as authorized signatories for the defendant Babyeats. They also signed as covenantors to the company.

- [11] Clause 3 of the lease sets the basic rent at \$28.00 per square foot for the first year, \$30.00 per square foot for the second and third years, and \$32.00 for the fourth and fifth years. Gross rent is comprised of basic rent plus taxes and the defendants' proportionate share of operating costs for the Town Centre. Clause 3.6 states interest on arrears of gross rent will be 5% above the prime rate charged by the Royal Bank of Canada (at its main branch to its most favoured commercial customers) at the time that the basic rent or additional rent became due, compounded monthly.
- [12] Clause 14.2 of the lease lists the landlord's termination rights, which include a right to terminate when basic or additional rent remains unpaid for more than five days after delivery of a demand, or if the tenant has on more than one occasion not paid rent by the due day. Clause 14.6 enables the landlord to re-enter the premises and alter the premises to re-lease them to someone else. It also describes in what order and to what debts any money received in payment for arrears will be applied.

- [13] Clause 21.10 states that any covenantor to the lease agrees to be bound by the tenant's obligations including payment for gross rent. It also states that the covenantors will indemnify the landlord in case of the tenant's default, and that the landlord can enforce its rights against the covenantors as if they were tenants rather than just sureties.

C. The Breach

- [14] The plaintiff hired property managers for the Town Centre. By May 2009, the property manager told the plaintiff that the defendants had failed to pay the gross rent on a number of occasions. Mr. Murphy, Mr. and Mrs. Dempster, the plaintiff's legal department, and the Town Centre property manager all discussed the unpaid rent and the Dempsters' desire to revise Babyeats' business model.
- [15] Those communications resulted in an agreement dated May 7, 2009, between the plaintiff and Babyeats as tenant, and Mr. and Mrs. Dempster as covenantors (the "May Agreement"). Recital C of the May Agreement states that "[Babyeats] and the [Dempsters] have defaulted in their obligation to pay Basic Rent and Additional Rent in accordance with the lease, and as at April 30, 2009 the amount of outstanding arrears is \$58,213.74."
- [16] The May Agreement details the defendants' outstanding arrears as follows:
- (a) The amount owing was reduced to \$45,193.74 (the Initial Rent Arrears);
 - (b) The Initial Rent Arrears constituted a liquidated debt;
 - (c) Interest would accrue on the Initial Rent Arrears at the reduced rate of 5% per annum rather than the interest rate in the lease;
 - (d) The defendants would pay the Initial Rent Arrears with the reduced interest in specified monthly payments starting June 1st, 2009 up to and including June 1st, 2011;
 - (e) During the term of the May Agreement the gross rent was due and payable in equal weekly installments on or before the 1st, 8th, 15th and 22nd day of each month.
- [17] Despite the May Agreement and repeated requests for payment, the defendants did not pay the Initial Rent Arrears and in fact missed further gross rent payments resulting in the accumulation of further arrears. The property manager sent a demand letter dated October 27, 2010, saying the defendants owed \$64,432.32 in arrears. Payment was demanded by November 5, 2010. No payment was made.
- [18] In late November 2010, Babyeats ceased operating at the premises. The plaintiff sent a letter to the defendants saying they were contravening clause 4.4 of the Lease, which required tenants to stay in operation during the term of the Lease. The letter repeated the demand for payment of the arrears.

- [19] The plaintiff hired a bailiff. The defendants made two payments to the bailiff: the first in December 2010 for \$10,500 and the second in January 2011 for \$2,250. Mr. Murphy confirms that the plaintiff applied these amounts (less the bailiff's fees of \$1,250) towards the rent arrears in compliance with clause 14.6 of the Lease.
- [20] During the hearing, an error was noticed in the evidence. The plaintiff says the December payment to the bailiff was \$10,500, whereas exhibit "J" to Mr. Murphy's affidavit sworn December 14, 2012, shows the defendants only paid \$9,500 in December 2010. This mistake was carried into the plaintiff's calculation of amounts owed by the defendants in the Application. The result is that the amount being sought by the plaintiff is \$1,000 less than the amount actually owed. Quite properly, plaintiff's counsel conceded the mistake was of its own making and therefore it sought no adjustment to its claim.
- [21] In February 2011, the plaintiff formally terminated the Lease, exercised its right of re-entry and took possession of the premises. The space has since been re-let.

IV. PROCEDURAL HISTORY

A. The Notice of Civil Claim and Response

[22] The plaintiff's notice of civil claim was filed April 1, 2011, and the defendants' response to civil claim on April 21, 2011.

[23] The response admits the following facts contained in the notice of civil claim:

- the original demand for payment was on October 27, 2010;
- they ceased operating at the premises on November 26, 2010;
- the cessation was contrary to the terms of the Lease;
- they were notified on or around November 30, 2010, that they were in default of the Lease;
- they made payments to the bailiffs which were then applied towards the rent arrears, and
- they were informed that the plaintiff decided to terminate the Lease.

[24] The response then asserts the plaintiff made misrepresentations to the defendants and withheld material information both prior and subsequent to the signing of the Lease. In particular, the defendants claim the plaintiff:

- failed to disclose problems that design professionals identified with the design of the premises for retail purposes;
- ignored the advice of design professionals regarding the library's location;
- misrepresented who the "anchor tenants" were to be;
- misrepresented that hourly parking would be available in front of the premises;
- failed to add amenities to attract pedestrian traffic;

- misrepresented the signage that would be allowed;
- did not allow adjustment to the signage;
- forced tenants to remove signage;
- restricted advertising;
- did not complete construction deficiencies within a reasonable time;
- did not carry out duties as a landlord in a sufficiently reasonable time;
- restricted the use of retail space in such a manner as to restrict traffic flow;
- organized events at the Town Centre that disrupted the commercial activities; and
- misrepresented the character of the Town Centre in circumstances where the plaintiff ought to have known that the Town Centre would be "a financial disaster".

[25] The defendants claim that as a result of these fundamental misrepresentations and the material non-disclosure of information, the lease is void ab initio. In the alternative, the defendants claim that they are entitled to setoff in damages any amounts they owe to the plaintiff.

B. Document Disclosure

[26] On November 14, 2011, the plaintiff obtained a court order compelling the defendants to produce their list of documents. The plaintiff was awarded costs of that application in any event of the cause.

[27] On March 28, 2012, the plaintiff had to apply to the court to receive copies of the documents from that list, as well as from the defendants' amended and supplemental lists. On April 10, 2012, the court ordered the defendants to pay the plaintiff the costs of that application in the amount of \$550, on or before April 23, 2012, in any event of the cause.

C. Summary Judgment

[28] The plaintiff filed this Application on December 19, 2012, and set it for hearing, by consent, on January 17, 2013. The January hearing was adjourned to May 21, 2013, by consent at the request of defendants' counsel.

[29] Plaintiff's counsel wrote to defendants' counsel on January 11, 2013, March 1, 2013, and April 29, 2013, confirming that the matter would be heard on May 21, 2013, and that no response to the Application had been received. Defendants' counsel did not respond.

[30] Plaintiff's counsel sent another letter dated May 15, 2013, this time saying he was left to conclude from the lack of any response that the defendants were not contesting the Application.

- [31] In response, defendants' counsel sent an email dated May 15, 2013 to plaintiff's counsel saying "[the defendants] indeed intend to vigorously defend this action and are contesting both the amount and liability". That email asked for the Application to be adjourned, and for timelines and dates be set to exchange affidavits and conduct cross-examinations. Plaintiff's counsel responded by letter that day. The plaintiff did not consent to an adjournment and put the defendants on notice that "[a]ny application to adjourn must also address the issue of potential prejudice to our client's ability to obtain and to enforce an order of payment".
- [32] On May 21, 2013, defendants' counsel applied for an adjournment. They had not filed a response to the Application. The court granted the adjournment but set deadlines for the defendants to (a) file a response to the Application, (b) amend their response to civil claim, and (c) complete examinations for discovery. The court also granted the plaintiff leave to set this Application for hearing at the end of July and awarded the plaintiff costs thrown away.
- [33] The defendants filed no response to this Application, did not amend their response to the notice of civil claim, and no examinations for discovery occurred, or were even set to occur. The plaintiff thus set the Application down to be heard on July 30, 2013.
- [34] By email dated July 12, 2013, plaintiff's counsel confirmed that the matter was set for hearing on July 30, 2013. The plaintiff confirmed its position that the defendants were out of time to respond to the Application.
- [35] Defendants' counsel appeared on July 30 and again asked for an adjournment. The court granted the adjournment with the following terms:
1. The defendants pay the plaintiff's costs of \$1,500 forthwith, and
 2. If costs are not paid by August 26, 2013, the plaintiff is at liberty to set the Application for a hearing at any time.
- [36] Those costs remain unpaid.
- [37] The correspondence also reveals that defendants' counsel failed to sign and return the May 21, 2013 form of order in a reasonable amount of time, thus forcing the plaintiff to set down an appointment before the Registrar in August 2013. That hearing did not go ahead because defendants' counsel signed the plaintiff's proposed form of order immediately prior to the start of the hearing.
- [38] On December 17, 2013, plaintiff's counsel wrote to defendants' counsel seeking agreement on a new hearing date but warned that if no response came, a date would be set unilaterally. Defendants' counsel did not respond. On January 15, 2014, plaintiff's counsel sent a letter confirming the Application was set for March 5, 2014.

- [39] The first communication from defendants' counsel was Mr. Spears speaking with plaintiff's counsel on March 4, 2014, claiming he thought the hearing was set for March 15, 2014 (a Saturday). He said he had not read the plaintiff's affidavits which were delivered on December 17, 2013. He referred to materials that had apparently been prepared in response to the Application, yet a response was never filed or delivered to the plaintiff.
- [40] At the hearing before me on March 5, 2014, defendants' counsel again applied for an adjournment, which I denied.
- [41] The plaintiff submits the defendants' failure to file a response to the Application ought to deprive them of a right to have their submissions considered and the court should treat the Application as uncontested. The plaintiff says its material easily demonstrates its entitlement to judgment in this case.
- [42] The plaintiff seeks the following orders:
- (a) judgment against the defendants jointly and severally in the amount of \$144,306.82;
 - (b) an order awarding interest;
 - (c) an order that the defendants jointly and severally pay the plaintiff such further damages as are recoverable under the terms of the Lease;
 - (d) an order granting the plaintiff solicitor-client costs.
- [43] The defendants say this case is not suitable for summary judgment and that it is premature to decide it. They also claim that a decision on the Application will not entirely dispose of the claim, thus creating the risk that two different courts will have to assess the same set of facts, which should be avoided.

V. ISSUES

1. Can I hear the defendants?
2. Should I hear the defendants?
3. Calculation of Damages

VI. ANALYSIS

1. Can I hear the defendants?
- [44] The Application is brought pursuant to Rule 9-6 which governs the procedure for summary judgment. The purpose of summary judgment is to give parties and the court a tool to efficiently dispose of claims or defences lacking in merit. The Supreme Court of Canada articulated the importance of this tool in *Canada (Attorney General) v. Lameman*, 2008 SCC 14 at paras 10-11:

- [10] This appeal is from an application for summary judgment. . The summary judgment rule serves an important purpose in the civil litigation system. . It prevents claims or defences that have no chance of success from proceeding to trial. . Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. . It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. . Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.
- [11] For this reason, the bar on a motion for summary judgment is high. . The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial": The defendant must prove this; it cannot rely on mere allegations or the pleadings: If the defendant does prove this, the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal: Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried: The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts: [citations omitted]
- [45] The position in British Columbia is the same. The Court of Appeal states the applicable legal test in *Tahvili v. HSBC Bank Canada*, 2004 BCCA 22 at para. 13:
- [13] The test to be applied on a Rule 18 application for summary judgment is well-settled: is there a bona fide triable issue? See *Memphis Rogues Ltd. v. Skalbania* (1982), 38 B.C.L.R. 193, 29 C.P.C. 105 (C.A.); *Ewachniuk v. Abraxis Holdings Ltd.*, 2003 BCCA 611 at para. 3.
- Although Rule 9-6 replaced Rule 18 of the former Rules of Court, the jurisprudence developed for former Rule 18 has been applied to Rule 9-6: *GFS British Columbia Inc. v. Olive U Foods Ltd.*, 2014 BCSC 113 at para. 15. It is, however, acknowledged that "Rule 9-6 is more robust than its predecessor and changes made to the procedure suggest it will be a more effective tool for disposing of claims or defences lacking in merit at an early stage": *Allan Seckel & James MacInnis*, *British Columbia Supreme Court Rules Annotated 2014* (Toronto: Carswell, 2013) at 358-359.
- [46] The applicant for summary judgment must establish that it is "clearly manifest" that a genuine issue for trial does not exist: *Tahvili* at para. 13. There is no definitive rule as to what steps must be taken to resist an application for summary judgment. Instead, as stated in *Montroyal Estates Ltd. v. D.J.C.A. Investments Ltd.* (1984), 55 B.C.L.R. 137, 1984 CanLII 775 (C.A.) [*Montroyal Estates*] at para. 12:
- [12] In essence, if the defendant is bound to lose, the application should be granted, but if he is not bound to lose, then the application should be dismissed.
- [47] If the court is satisfied no genuine issue for trial exists, it must pronounce judgement: Rule 9-6(5) of the Supreme Court Civil Rules. Accordingly, I must grant the plaintiff summary judgement if I am satisfied the defendants are "bound to lose".

- [48] Rule 9-6(3) of the Supreme Court Civil Rules provides two different avenues for a party to respond to a summary judgment application. Rule 9-6(3)(a) allows a party to allege that the applicant's originating pleading does not raise a cause of action. This does not apply to the case at bar.
- [49] Rule 9-6(3)(b), on the other hand, provides that "any other response" to a summary judgment application "may not rest on the mere allegations or denials in [the] pleadings but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial". The Court of Appeal commented on the necessity of affidavit evidence for obtaining summary judgment in *International Taoist Church of Canada v. Ching Chung Taoist Association of Hong Kong Limited*, 2011 BCCA 149 at paras. 13-14:
- [13] Rule 9-6 does not contain a provision prohibiting the receipt of evidence. The rule replaces R. 18 in the previous rules. Rule 18 required affidavit evidence. I find it curious that R. 9-6 does not specifically provide for affidavit evidence except in response to a plaintiff's application. It is inconceivable to me, however, that a plaintiff could overcome a filed defence and obtain summary judgment under the new rule in the absence of sworn evidence that proves the claim. A claim for a liquidated sum under a contract, for example, surely would require sworn evidence under the rule to prove the contract, breach of the contract and the amount owing.
- [14] It is also inconceivable to me that a defendant could obtain summary judgment without presenting sworn evidence establishing that the claim is without merit. In either case, if the court is faced with oath against oath it is most unlikely that it could grant judgment to the plaintiff or dismiss the claim, as the case may be.
- [50] In my view, the difference in wording between Rule 9-6(3)(b) and Rule 8-1(9) is significant. Rule 8-1(9) governs the general procedures for responding to applications:
- (9) A person who is served with documents referred to in subrule (7) of this rule and who wishes to respond to the notice of application (in this subrule called the "responding person") must do the following within 5 business days after service or, in the case of an application under Rule 9-7, within 8 business days after service:
- (a) file an application response;
 - (b) file the original of every affidavit, and of every other document, that
 - (i) is to be referred to by the responding person at the hearing, and
 - (ii) has not already been filed in the proceeding;
 - (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - (i) a copy of the filed application response;

(ii) a copy of each of the filed affidavits and documents, referred to in the application response under subrule (10) (b) (ii), that has not already been served on that person;

(iii) if the application is brought under Rule 9-7, any notice that the application respondent is required to give under Rule 9-7 (9).

[51] Under Rule 8-1(9) there is no general obligation to adduce evidence when responding to an application; a respondent can, of course, file and serve an affidavit they wish to rely on at the application hearing but a respondent can equally file a response without adducing supporting evidence. The court also has the discretion under Rule 8-1 to allow a respondent to contest an application even if no response was filed: *British Columbia (Director of Civil Forfeiture) v. Crowley*, 2013 BCCA 89 at paras 76-77.

[52] The plaintiff argued that I should hear the Application as if it was uncontested because of the defendants' failure to file a response, and suggested it would be contrary to the both the wording and spirit of the Supreme Court Civil Rules to hear them.

[53] The issue before me is the proper interpretation of Rule 9-6(3)(b), and specifically, whether I have the aforementioned discretion to hear the defendants notwithstanding their failure to file any evidence in response.

[54] In my view, it would render the specific wording in Rule 9-6(3)(b) meaningless if the requirement to produce evidence was ultimately still subject to the court's discretion. I thus conclude that the specific wording in Rule 9-6(3)(b) removes the court's discretion where a respondent files no evidence in response to an application for summary judgment.

[55] The purpose of a summary judgment is to efficiently weed out those claims that have no merit with minimal cost to litigants and minimal use of court resources. One way Rule 9-6 works towards that goal is to make it difficult for a party to drag out a meritless proceeding for the sake of delay.

[56] This case is a good illustration of why the summary judgment rule exists and demonstrates why Rule 9-6 should not be interpreted as allowing a discretion to still hear a respondent in the absence of sworn evidence to support its position. Despite ample time, three adjournments, and two awards of costs against them, the defendants filed no response to this Application. The defendants sought an adjournment each time based on a stated "intent" to file evidence and amend pleadings. No steps have been taken to do either. They have admitted the essential elements of the plaintiff's claim: a contract existed and they breached it. They allege a number of facts which they say make the case unsuitable for summary trial. Although not stated as such, they also argue that a genuine issue for trial exists in their asserted right to "set-off". The set-off claim is vague and does not appear to arise from the facts alleged in the response to civil claim.

[57] There is no evidence whatsoever that supports any of the allegations in the response to civil claim. Allowing the defendants to contest the summary judgment application would garner no such evidence, and therefore does not assist the court to resolve the issues on summary

judgment. What it would do, however, is put the court in the untenable position of having to decide if a "genuine issue" for trial exists based solely on the pleadings and counsel's submissions. . Rule 9-6(3) is clear that in responding to an application for summary judgment, the respondent cannot "rest on the mere allegations or denials in [the] pleadings". Yet that is all the defendants could do if they were allowed to contest this Application despite not filing a response with supporting evidence.

- [58] In my opinion, that is why Rule 9-6(3) requires evidence as part of any response to an application for summary judgment, other than simply claiming there is no cause of action under Rule 9-6(3)(a). Rule 9-6(3)(b) is not merely a procedural nicety; it is a mandatory requirement that the court has no discretion to set aside.
- [59] The defendants say the plaintiff's failure to address the defence of "set-off" in its materials is fatal to the Application for summary judgment. At first blush, this argument seems consistent with the principle that it is the applying party's burden to demonstrate it is manifestly clear that no triable issue exists: *Montroyal Estates* at para. 11.
- [60] If accepted, however, this argument would set up a catch-22 that defeats the very purpose of summary judgment as a tool to efficiently dispose of claims or defences lacking in merit. The defendants fail to identify facts and present evidence substantiating defences asserted in their response to civil claim, but at the same time rely on the existence of that claim alone to prevent summary judgment. The plaintiff would be in the position of having to disprove a claim lacking any evidentiary support. In essence, they would have to "guess" what the defendants intended to argue. In my view, is an absurd result and I am obliged to interpret the Supreme Court Civil Rules in a way to avoid absurdity.
- [61] In my view defendants' counsel's conduct in failing to respond in a timely manner frustrates rather than promotes the purpose of the Supreme Court Civil Rules. It is precisely this type of delay that Rule 9-6 was designed to prevent.
- [62] For the above reasons, it would be an error of law to allow the defendants to contest the Application in the absence of a filed response with supporting evidence.

2. Should I hear the defendants?

- [63] Even if I had the discretion to hear the defendants in this case, I would decline to do so because of this case's procedural history.
- [64] The defendants' non-compliance with court orders is significant. The defendants were ordered to file a response to the Application, conduct discoveries and cross-examinations. There are at least two purposes to these orders. It is necessary to ensure compliance with the Supreme Court Civil Rules and the timely progress of litigation. But it is also to allow the defendants a chance to generate evidence in support of their contention that the case is not suitable for summary judgment. The defendants gave the same reason for the delay each time they asked the court to grant an adjournment. A reasonable conclusion is that the evidence in support of the defendants' case simply does not exist (although I was not asked

to and am not making that finding).

- [65] The only evidence that explains why the defendants have not complied with the court orders and have failed to amend their pleadings is in the affidavit of Mr. James Straith (co-counsel for the defendants with Mr. Spears). This affidavit was sworn on March 5, 2014, and provided by the defendants in support of their request for a further adjournment, but they also sought to rely on it to support their opposition to the Application. Paragraph 3 of Mr. Straith's affidavit states "[d]efendants' counsel has had a very busy litigation schedule over the summer and into the fall of 2013".
- [66] This statement does not, in my view, explain why two court orders were ignored. It is not unusual for counsel to have busy litigation schedules and it certainly does not excuse counsel from fulfilling their professional duties.
- [67] This evidence lacks details about the "busy schedule" and in what way that schedule prevented counsel from paying costs (one of the terms of the orders not complied with) and filing pleadings. Defendants' counsel did not communicate their scheduling difficulties to plaintiff's counsel, and failed to respond to plaintiff's counsel in a reasonable fashion. It also does not appear that defendants' counsel informed the court about scheduling difficulties on the two previous occasions an adjournment was sought (May and July, 2013). I note that the affidavit of Ashley Swartz, a "colleague" of Mr. Spears, which was also provided to me at the hearing in support of the adjournment, claims evidence was gathered in May and June, 2013, so there was certainly no reason for the court not to be informed about that evidence in July.
- [68] Even if the schedule crunch occurred after July 2013, which is not the evidence before me, diligent counsel would realize the upcoming problem, contact opposing counsel, discuss the issue, and if necessary make the required court applications. That did not happen. No doubt taking these steps adds to what defendants' counsel claim was an already busy schedule, but it cannot be a surprise to defendants' counsel that litigation can be very demanding on one's time. That is not a unique circumstance.
- [69] More importantly, there is a pattern of defendants' counsel not responding or defending this case in a timely fashion that extends outside the summer and fall of 2013. The defendants have successfully delayed the hearing of this case and avoided summary judgment since December 2012 while apparently not putting any effort into adducing evidence that substantiates their claims in the response to civil claim. The plaintiff has tried to have this Application heard on four separate occasions (January 17, 2013; May 21, 2013; July 30, 2013; and March 5, 2014). Defendants' counsel has been largely unresponsive to plaintiff's counsel and unprepared each time the Application was set down for hearing.

- [70] The facts asserted by the plaintiff supporting its claim are not controversial and are thoroughly set out in its Application with supporting affidavits. The facts in the defendants' response to civil claim are not complex and have apparently been known to them since April 2011. Despite this, the defendants have done nothing to respond to the Application. I agree with the plaintiff that acceding to the defendants' position on this point would be tantamount to approving the defendants' "flouting" the Supreme Court Civil Rules.
- [71] Defendants' counsel's reasons for the lack of progress are insufficient. Mr. Straith's affidavit states that "steps have been taken to prepare a draft amended statement of defence and counterclaim". Mr. Straith does not describe what steps were taken, what material was prepared, or the timing of that preparation. No examinations for discovery were requested, much less scheduled.
- [72] Ms. Swartz's affidavit states she "believes" the defendants prepared detailed materials in late May and June, 2013 concerning the issue of amendments and counterclaim and addressing the issue of inducement. I note that was almost a year ago.
- [73] Ms. Swartz does not state how she has direct knowledge about facts relating to this litigation. She does not state what her relationship is to defendants' counsel's law firm, other than to say she is a "colleague". I find her evidence unreliable. I also note the jurat exists on a page by itself which is improper.
- [74] None of this is the best evidence. If the personal defendants indeed prepared material, I would expect sworn evidence from one of them stating that.
- [75] In my view, the evidence explaining the defendants' failure to comply with court orders is insufficient. In such circumstances, it would be inconsistent with the purpose of the Supreme Court Civil Rules to exercise my discretion (if I had such discretion) to allow the defendants to oppose this Application.

3. Calculation of Damages

- [76] The plaintiff has established through its evidence and submissions that it is entitled to summary judgment and, for the reasons noted above, this Application is uncontested. The defendants were in breach of contract by failing to pay monies owing under the May 2009 Agreement and the Lease. Judgment is awarded against the defendants, jointly and severally.
- [77] The plaintiff has established it is entitled to payment of the Initial Rent Arrears (\$45,193.74) plus interest on that amount calculated for the period June 1, 2009 to June 1, 2011, at the rate of 5% per annum (as set out in the May Agreement).
- [78] The plaintiff seeks \$35,999.60 in termination costs comprised of costs to secure the premises and the amount of unpaid taxes and operating costs attributable to the premises up until June 1, 2011, when the premises were re-let.

[79] Termination costs are explained in clause 14.6(c) of the Lease. This clause is far from a model of clear drafting. Reviewing that clause and the affiant's evidence and attachments, I am satisfied that the plaintiff has demonstrated it is entitled to:

- \$358.40 - cost of securing the premises;
- \$6,615.00 - property taxes attributable to the premises; and
- \$3,851.20 operating costs attributable to the premises.

[80] The plaintiff also claims property management fees but the plaintiff's entitlement to this was not explained or demonstrated in sufficient detail for me to conclude that this claim properly arises from clause 14.6.

[81] The plaintiff also claims \$24,595.20 for the commission plus taxes paid to Colliers for finding a new tenant. I am not satisfied that the whole fee is recoverable within the wording of clause 14.6(c). The clause states the tenant shall pay "expenses in connection with re-letting". The Lease was to expire in 2013; the new lease extends beyond when the Lease would have expired but the commission paid to Colliers is calculated as a percentage of the amounts to be paid in total under the new lease. Also, I assume the plaintiff would have hired someone to re-lease that property when the Lease expired even if the breach had not occurred. In the absence of better evidence on this point, I decline to grant this award.

[82] The plaintiff claims "future rent loss". The new lease has lower rates than in the Lease. The loss is the difference between the net present value of basic rent payable under the Lease and the rate now being paid over the unexpired portion of the Lease. Clause 14.6 state the tenant is responsible after termination for any deficiency in gross rent between the lease rates. Gross rent would include the proportionate share of taxes and operating costs but those have already been awarded; the plaintiff appropriately calculated the future rent loss from differences in basic rent. The plaintiff provided evidence supporting its claim in the amount of \$42,533.00 and I award that amount.

[83] The total of the termination costs and future rent loss is \$53,357.60. The plaintiff is entitled to court-ordered interest on that amount. The Lease provides that interest on rent arrears is calculated at five points above the Royal's Banks premium rate, the plaintiff conceded it had not provided evidence confirming what the Royal Bank's premium rate was and sought, in the alternative, court ordered interest, which I do award.

VII. ORDERS

[84] In summary, I grant the plaintiff:

- a) An order awarding judgment against the defendants, jointly and severally, for \$98,551.34;
- b) An order awarding interest as follows:
 - i. at the rate of 5% per annum on \$45,193.74 for the period June 1, 2009, to June 1, 2011;

ii. at the court-ordered interest rate on \$53,357.60.

c) Costs.

"Sharma J."

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Prepared on 26 October 2026 · Esheria