

CANADA / JUDGMENT

PG Low Cost Towing v. Insight Progressive Holdings Ltd.

2017 BCSC 1969

COURT

Supreme Court of British Columbia

DECIDED

5 October 2017

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2017 BCSC 1969 PG Low Cost Towing v. Insight Progressive Holdings Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

PG Low Cost Towing v. Insight Progressive Holdings Ltd.,

2017 BCSC 1969

Date: 20171005

Docket: 1752356

Registry: Prince George

Between:

PG Low Cost Towing & Auto Ltd.

Plaintiff

And

Insight Progressive Holdings Ltd., North Central Bailiffs Ltd.

Defendants

Before: The Honourable Madam Justice Church

Oral Reasons for Judgment

In Chambers

Agent for the Plaintiff:

D. Duncan, Articled Student

Appearing on behalf of the Defendants:

Loris Bedetti and Mark Edward Moir

Place and Dates of Hearing:

Prince George, B.C.

September 20 & October 2, 2017

Place and Date of Judgment:

Prince George, B.C.

October 5, 2017

- [1] THE COURT: This matter is on the list today for decision.
- [2] On April 1, 2017, the plaintiff PG Low Cost Towing & Auto Ltd. ("PG Lows Cost Towing") and the defendant Insight Progressive Holdings Ltd. ("Insight") entered into a commercial lease agreement whereby Insight agreed to lease to PG Low Cost Towing a business premises located at 220 Queensway Street and 953 Second Avenue in Prince George for a term of one year.
- [3] The lease agreement contained various terms governing the various rights and obligations of the landlord and tenant. It was a term of the lease that the tenant would pay rent of \$6,133.33 per month, commencing on June 1, 2017, two months after the lease began. It was also a term of the lease that the tenant would pay its proportionate share of the operating costs for the premises for the entire term of the lease, commencing on April 1, 2017.
- [4] In terms of the landlord's obligation, the lease provided that the landlord covenanted with the tenant for quiet enjoyment and permitted the tenant to use the premises as a commercial towing company. The landlord warranted that the premises were suitable for such use.
- [5] On the same day that the lease was executed, Timothy Scanlan, the director of the plaintiff, had the premises inspected by an inspector on behalf of the City of Prince George. As a result of that inspection, Mr. Scanlan came to believe that the premises were not properly zoned for the operation of his towing business. He also came to believe that he could not get a proper business licence from the City of Prince George due to the results of the inspection. He raised the issue with Loris Bedetti, the director of Insight, and was advised that Mr. Bedetti would "deal with" the rezoning issue.
- [6] The plaintiff occupied the premises on or after April 1, 2017 and received invoices from the landlord with respect to the tenant's monthly operating costs. The plaintiff disputed the calculation of property taxes on those invoices, and did not pay any of the operating costs after April 1, 2017.

- [7] By June 1, 2017, the plaintiff concluded that Insight had not taken any steps to rezone the property, and therefore refused to pay any rent. The plaintiff alleges that it could not operate its business on that premises without such zoning change. Despite that assertion, the plaintiff continued to occupy the premises for business purposes related to the operation of a commercial towing enterprise.
- [8] On September 12, 2017, Ed Moir, a bailiff and representative of the defendant North Central Bailiffs Ltd. ("North Central Bailiffs") attended at the premises and advised Mr. Scanlan that he was there to distrain for rent. It is the actions of the bailiff during that distress that are the subject matter of the Chambers application before me.
- [9] The plaintiff alleges that the distress was unlawful and, by way of a Chambers application filed on September 19, 2017, the plaintiff seeks various declarations from this court. For the purposes of this chambers hearing, the plaintiff seeks a declaration that the lease agreement between the plaintiff and the defendant Insight was terminated and a declaration that the defendants wrongly distrained the assets listed in the notice of seizure dated September 12, 2017. The plaintiff also seeks costs of this application.
- [10] Although each of the parties makes various allegations about the actions of the other regarding the events of September 12, 2017, it would appear from the affidavit materials that there is no dispute with respect to the following facts regarding what happened on September 12, 2017 and the days that followed:
1. The two assets of the tenant that were seized by North Central Bailiffs were the 1998 Ford tow truck and the 1992 Freightliner wrecker. At the time of their seizure, these vehicles were not parked on the premises, but were located nearby and were visible from the premises.
 2. The vehicles were moved back onto the premises by Mr. Scanlan and his father. The bailiff, Ed Moir advised them that he considered that the two vehicles were distrained, despite their location, because they were assets of the tenant. The bailiff further advised that the purpose of moving the vehicles back onto the premises was to secure them inside the building.
 3. The bailiff also seized other items on the premises as ownership of those items could not be determined.
 4. The bailiff engaged Trident Locksmiths to change the locks on the premises during the seizure. All of the locks on the building were changed while the bailiff was conducting an inventory of the assets in the building. The bailiff retained the new keys for the premises in his possession at the conclusion of the seizure.
 5. The bailiff provided the tenant with a notice of seizure. The notice of seizure incorrectly described the name and incorporation number of the tenant.
 6. Timothy Scanlan signed a document entitled, "Security Agreement". That document provided that in consideration of the bailiff not removing the items seized from the premises, the tenant authorized the bailiff to act as its agent to change the locks and secure

the premises containing the goods so that it might have an opportunity to raise funds to pay the arrears of rent. The Security Agreement further provided that if the arrears of rent were not paid in five days, the goods seized could be sold without further notice and the tenant would be held liable for any deficiencies. The last paragraph of the Security Agreement says the following:

I agree and confirm that I have given these instructions to you, and that by changing the locks at my request, that there is NO FORFEITURE OF THE LEASE, nor is it an abandonment of the distress, by you or by the landlord.

7. At the same time, Timothy Scanlan also signed a document entitled, "Bailee's Undertaking". That document provided that in consideration of the bailiff withdrawing its demand and possession of the goods under seizure, Mr. Scanlan agreed to act as bailee without remuneration and hold the goods in his possession at the premises. He also agreed to provide reasonable care of the seized goods and deliver the goods over to the bailiff on request, and he agreed that the bailiff could use a key to gain access to the seized goods.
8. Mr. Scanlan was not permitted back onto the premises at the conclusion of the seizure and he was not provided with copies of the new keys.
9. The notice of seizure demanded payment of \$40,421.45, made up of the following amounts: \$31,436.48, arrears of rent for four months and operating costs for six months; \$2,954.40, late charges imposed by the landlord; \$859.77, interest at 2.5 percent, imposed by the landlord; \$550, seizure fee, imposed by the bailiff; \$845, time of the bailiff, charged at \$84.50 per hour; \$4.50, mileage of the bailiff, at 0.75 cents per kilometre; \$3,525.06, commission charged by the bailiff; and \$246.23, GST. The notice of seizure set out that if this amount was not paid on or before five days from the date of the notice, the bailiff would cause the vehicles to be sold "as the lease permits and the law allows".
10. There were further interactions between Mr. Scanlan and the bailiff on September 15, 2017, when Mr. Scanlan attempted to retake possession of the two tow trucks or, to use his words, "rescue the vehicles". Matters became heated and the RCMP were eventually called to keep the peace. Mr. Scanlan ultimately did not retake possession of the tow trucks, and the bailiff moved the vehicles off the premises and secured them at North Central Bailiffs' own compound. After the vehicles were moved off the premises, the tenant was not permitted back onto the premises.
11. North Central Bailiffs continues to be in possession of the 1992 Freightliner wrecker, but no longer has possession of the 1988 Ford tow truck. At some point after September 15, 2017, North Central Bailiffs released the truck to Andrew James Pamplin, dba Black Sheep Automotive Group, who claimed an interest in the vehicle. At the time the vehicle was released to Mr. Pamplin, the vehicle was registered in the name of the plaintiff. The plaintiff and Mr. Pamplin are engaged in litigation in Provincial Court with respect to that vehicle. The parties had reached the terms of a settlement on January 26, 2017, but the settlement was not concluded. According to the court record, non-payment of the settlement amount

"results in dismissal of the settlement".

12. Since September 12, 2017, Mr. Scanlan has not been permitted to resume occupancy of the premises.
- [11] In terms of the law, the right to distrain for arrears of rent arises as an incident of the relationship of landlord and tenant. It is a common law self-help remedy that allows the landlord to hold goods of a tenant which are on the leased premises. The common law right allows the landlord to seize the tenant's goods and hold them, and the right to sell the tenant's goods arises under the Rent Distress Act of British Columbia.
- [12] Generally speaking, distress can only be levied against the goods of a tenant that are found on the leased premises. One exception to this general rule is set out in s. 11 of the Rent Distress Act in situations where a tenant fraudulently or clandestinely removed personal items from the leased premises to prevent the landlord from distraining for rent arrears.
- [13] The Rent Distress Act also prohibits the landlord from distraining against goods found on the premises that belong to someone other than the tenant.
- [14] One of the key requirements for a lawful distraint is that it can only be carried out during the term of the lease. If the lease is forfeited, the right to distrain comes to an end. The reason for that is that the remedies are inconsistent with one another. The right to distrain arises from the landlord-tenant relationship, and if that relationship comes to an end, the right to distrain also comes to an end. The landlord cannot have both the remedies of forfeiture and distress at the same time.
- [15] When goods have been seized, the landlord must impound and secure the goods for safe custody until the cause of the distress, usually non-payment of rent, is satisfied, or the statutory period has elapsed, at the expiration of which the goods can be lawfully sold by reason of the tenant failing to pay the outstanding rent.
- [16] Goods may be impounded on the premises or they may be removed to an impound off the premises.
- [17] When the landlord impounds the goods on the premises, a common practice is for the landlord and the tenant to enter into a walking possession agreement. This permits the tenant to continue to have the use of the goods and to avoid the expense and inconvenience of having a "man in possession". The tenant typically agrees that in consideration of the landlord not leaving a man in close possession and leaving the goods in their existing position, he will not remove or allow any of the goods to be removed from the premises. This is also known as a Bailee's Undertaking.

- [18] Because impounding is a necessary part of the legal distress, the landlord may take the step of changing locks on the premises to secure the goods that have been seized. However in doing so, the tenant may not be excluded, and the landlord is never entitled to lock up the whole of the premises so as to exclude the tenant therefrom, except with the tenant's express consent. Rather than do that, the landlord must remove the goods that have been distrained.
- [19] Distress is a remedy that must be exercised with some caution. The landlord and its agent, usually a bailiff, must be careful not to inadvertently terminate the lease in the course of the distress. Changing the locks on the premises may terminate the lease even where the locks were changed for the purpose of maintaining possession of the goods that are distrained.
- [20] In this case, on September 12, 2017, the landlord through its agent North Central Bailiffs seized the tenant's goods and changed the locks of the premises. Mr. Moir of North Central Bailiffs took the position that the Security Agreement signed by Mr. Scanlan constituted consent to not only changing the locks but was also the tenant's agreement to, as he described it, a "five-day voluntary lockout". That is not what that the Security Agreement says and such an interpretation is inconsistent with the other provisions of the Security Agreement and the provisions of the Rent Distress Act.
- [21] A security agreement can, in certain circumstances, constitute consent on the part of the tenant to changing the locks without terminating the lease, provided that the tenant is not excluded from the premises. Such exclusion would be inconsistent with the lease continuing in effect as generally a lease is terminated by a landlord who deprives the tenant of lawful possession.
- [22] In this case, the Bailee Undertaking that Mr. Scanlan signed clearly contemplated the tenant remaining in possession of the premises and leaving the goods on the premises subject to the landlord's seizure and the right of the bailiff to re-enter the premises and remove the goods.
- [23] Security agreements of the kind relied on in this case often include a provision setting out an acknowledgement by the tenant that it may continue to use and occupy the premises and conduct its business from the premises, and the tenant will be permitted to recover its goods upon payment of the rent arrears and costs.
- [24] The form of the Security Agreement in this case did not include any such provision and simply authorized the landlord to change the locks and secure the premises. It did not authorize the landlord to lock up the whole of the premises so as to exclude the tenant and there was no express consent by the tenant to such action.
- [25] The Security Agreement was not, as the bailiff suggested, a voluntary five-day lockout. There was no express consent of the tenant to remain locked out for five days, and such an interpretation of the document would be entirely inconsistent with the Bailee's Undertaking which specifically contemplated the tenant remaining in possession of the premises and the

goods, subject to the seizure by the landlord, and the landlord's right to take possession of those goods. The five days referred to in the Security Agreement related solely to when the goods seized might be sold in the event the arrears of rent were not paid.

- [26] It appears that the bailiff in this case fundamentally misunderstood the remedy that he was tasked with undertaking on September 12, 2017.
- [27] In my view, when the bailiff changed the locks and excluded the tenant from the entire premises on September 12, 2017, the tenant was denied access to the premises without his express consent. The tenant was prevented from entering the premises by the landlord, and was thus deprived of lawful possession when there was no evidence it was necessary to change the locks to protect the landlord's right to distrain, particularly after the tenant had signed the Bailee's Undertaking. If the bailiff continued to have concerns about the security of the goods seized despite the Bailee's Undertaking, he should have impounded those goods off the premises.
- [28] By changing the locks on the premises and then closing the business to everyone, including the tenant, the landlord by its agent was not merely protecting the distrained goods, but was terminating the lease.
- [29] The actions of the landlord conveyed that the tenant would have to pay the arrears of rent and costs before it could recover its goods and be allowed to continue to carry on its business at the premises. It was clear from the affidavit of Mr. Moir and his submissions that, in addition to changing the locks to secure the goods that had been seized, the landlord and its agent North Central Bailiffs had no intention of allowing the tenant to re-enter the premises to carry on with the lease unless and until the money owing was paid.
- [30] As was the case in *Country Kitchen Limited v. Wabush Enterprises Limited*, [1981] N.J. No. 3, the landlord by its actions:

... attempted "to have his cake and eat it, too", i.e. to enjoy the fruits of both forfeiture and distraint at the same time or at least whichever one suited its purpose. While, from a practical point of view, it is understandable that the landlord wished to protect its position as best it could, this, under the common law at least, it was not entitled to do so.

- [31] There were other aspects of this distress that were concerning. It is clear from the evidence that the two principle chattels seized, the two tow trucks, were not located on the premises at the time of the distraint. Despite his belief to the contrary, the bailiff was not authorized to seize the tenant's goods or chattels that were not located on the premises. The tow trucks could be seized after they were moved back onto the premises but those goods were not lawfully distrained until they were physically present on the premises.

- [32] Although the circumstances with respect to why Mr. Scanlan and his father moved the vehicles back onto the premises are disputed, Mr. Moir agreed that the tow trucks were parked near the premises and in plain view, from which I infer that there was no suggestion by the landlord that the vehicles had been fraudulently or clandestinely removed from the premises by the tenant to prevent distraint, which would have invoked the exception set out in s. 11 of the Rent Distress Act.
- [33] The bailiff was unable to provide me with any authority for the fees and costs that were added to the principal arrears owing under the lease, and the fees and costs imposed by the bailiff appear to be considerably in excess of those permitted by the schedule to the Rent Distress Act. It may well be that the bailiff was relying on some other statutory authority to impose such fee, but Mr. Moir was unable to advise me what such authority might be.
- [34] Another aspect of the distress that is very concerning relates to the decision by North Central Bailiffs to release the 1988 Ford tow truck to Mr. Pamplin. Section 3(6) of the Rent Distress Act describes the material that a person claiming ownership of property must provide to establish that the tenant does not own the goods distrained. That section provides that the owner of the property should make a statutory declaration containing an inventory of the property and alleging that it is his or her property and that the person who is liable for rent has no right or interest in the property (emphasis added).
- [35] The declaration signed by Mr. Pamplin at Exhibit C of the affidavit of Mr. Moir described not having received payment for the vehicle and attending a settlement conference in a Small Claims action between Mr. Pamplin and the plaintiff where he alleged it was agreed that, if the settlement payment was not made, the truck would be returned.
- [36] In addition to this declaration, North Central Bailiffs had a copy of the vehicle registration document for the 1988 Ford tow truck which clearly indicated that it was registered in the name of the tenant, and a copy of the settlement conference record which describes the agreement that had been reached on January 26, 2017. The latter document provided that non-payment would result in the dismissal of the settlement, not in the return of the truck. It made no mention of returning the truck to Mr. Pamplin in the event of non-payment.
- [37] While Mr. Pamplin may well have a very good claim for the return of the 1988 Ford tow truck, that claim has not yet been determined by the Provincial Court, and in the face of the current registration document showing that the tenant was the registered owner of that vehicle, North Central Bailiffs gave the vehicle to Mr. Pamplin at its peril.
- [38] Given the limited scope of this chambers application, it is not necessary for me to make any finding for orders in respect of this aspect of the distress. As I said at the outset, however, the remedy of distress for rent is a remedy that must be exercised with some caution, and in my view that did not happen in this case.

- [39] On the basis of the evidence before me and the submissions of the parties, I have concluded that the landlord terminated the lease on September 12, 2017, when its agent North Central Bailiffs changed the locks and excluded the tenant from the premises. It follows from this finding that the distress for rent that occurred as part of the same transaction was therefore not lawful.
- [40] I therefore grant the relief sought in paragraphs 1 and 2 of the plaintiff's notice of application filed September 19, 2017, namely a declaration that the lease agreement between the plaintiff and the defendant Insight Progressive Holdings Ltd. was terminated by Insight Progressive Holdings Ltd. on September 12, 2017, and a declaration that the defendants wrongfully distrained all of the assets listed in the notice of seizure dated September 12, 2017.
- [41] As the plaintiff has been entirely successful in its application, I am also granting the plaintiff the costs of this application, to be assessed.

"The Honourable Madam Justice Church"

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