

CANADA / JUDGMENT

S.E. Fraser Enterprises Ltd. v. W & W Parker Enterprises Ltd.

2010 BCCA 201

COURT

British Columbia Court of Appeal

DECIDED

15 April 2010

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2010 BCCA 201 S.E. Fraser Enterprises Ltd. v. W & W Parker Enterprises Ltd. COURT OF APPEAL FOR BRITISH COLUMBIA Citation: S.E. Fraser Enterprises Ltd. v. W & W Parker Enterprises Ltd., 2010 BCCA 201 Date: 20100415 Docket: CA037567 Between: S.E. Fraser Enterprises Ltd. Appellant (Plaintiff) And W & W Parker Enterprises Ltd. Respondent (Defendant) Before: The Honourable Mr. Justice Lowry The Honourable Madam Justice D. Smith The Honourable Madam Justice Bennett On appeal from: Supreme Court of British Columbia, October 1, 2009, (S.E. Fraser Enterprises Ltd. v. W. & W. Parker Enterprises Ltd., 2009 BCSC 1347, Vancouver Registry S083680) Oral Reasons for Judgment Counsel for the Appellant: K.J. MacDonald Counsel for the Respondent: P.J. Dougan Place and Date of Hearing: Vancouver, British Columbia April 15, 2010 Place and Date of Judgment: Vancouver, British Columbia April 15, 2010

- [1] LOWRY J.A.: This litigation arises out of a dispute concerning a commercial lease involving several issues, but the appeal pertains only to a question of an option to renew. The tenant, S.E. Fraser Enterprises Ltd., entered into the subject lease for a five-year term commencing October 1998 for the continued operation of a pharmacy. The tenant was granted the option to renew for two additional terms (2003-2008 and 2008-2013). The tenant exercised the first option. The current landlord, W & W Parker Enterprises Ltd., purchased the premises in 2005. The question is whether the landlord granted an option to renew for a further five years (2013-2018) by giving the following signed statement to the tenant in 2006: This is an official letter that I am going to give [the tenant] an additional 5 (five) year option. (This mean there will be two 5 (five) year option (sic).)
- [2] For reasons indexed as 2009 BCSC 1347, in particular at paras. 14-28, Madam Justice Ross concluded no option was granted to renew the lease for the additional period (2013-2018).
- [3] In August 2006, the tenant sought the option of what would actually be a third renewal of the lease (two in addition to the first which had been exercised) because it wished to sublet some of its space to a group of doctors. Significant improvements were to be made. The doctors wanted, and the tenant agreed to, a three-month rent-free renovation allowance for what was to be the sublet space to permit the necessary construction. The doctors also

wanted the option of remaining in the space beyond 2013. The landlord's consent to the sublease was required. The landlord wanted the space occupied and so consented to it being sublet and, according to the tenant, waived the associated administration fee as its contribution to the renovation allowance. The statement concerning the additional option to renew was then given to the tenant and shown, as the landlord understood it would be, to the doctors to rely upon.

- [4] In October 2006, the tenant executed a sublease agreement with the doctors for a term of three years. The sublease granted the doctors an option of renewing it for one further five-year period (2008-2013) subject to the tenant exercising its option to renew the head lease for that period. There appears to have been no obligation on the tenant to exercise its option to renew the head lease for that period and no provision for the grant of any option to renew the sublease beyond 2013.
- [5] The judge reasoned as follows:
- [27] ... I have concluded that the Tenant has not established that the Landlord granted a further option to renew. First, the language of the August 16, 2006 document is not unequivocally contractual but rather appears to be a statement of intention. Second, I agree with the submission of counsel for the Landlord that it appears that no consideration was provided for such an amendment. Finally, I note that the sublease does not refer to such an additional term. Given the doctor's interest in the possibility of security of tenure over the longer term, it seems to me that if an additional renewal term had been granted, it would have been referenced in the sublease. I accept that the prospect of an option to renew for an additional term was discussed but conclude that such discussions did not culminate in a concluded agreement to grant a further option.
- [28] In the result, I dismiss the Tenant's application for a declaration that the Lease contains a further option to renew for the period October 1, 2013 to September 30, 2018.
- [6] The tenant contends the judge erred in respect of each of the three considerations she addressed. It attaches importance to the words "This is an official letter" employed by the landlord as being indicative of an unanswered intention to be contractually bound. It says consideration is to be found in the tenant having entered into the sublease, given the landlord's desire to have the space occupied, and the value of the improvements to its premises, as well as the tenant's loss of the rent-free renovation allowance. The tenant says the failure of the doctors to obtain an option for the renewal of the sublease beyond 2013 does not mean the option was not granted to the tenant in respect of the head lease. The tenant maintains the statement the landlord made in August 2006 was an offer which was accepted by the tenant when it entered into the sublease with the doctors consistent with the doctrine of unilateral contract, citing: Chitty on Contracts, 30th ed., vol. 1 (London: Sweet & Maxwell, 2008) at 185, para. 2-078, and *Calgary Hardwood & Veneer Ltd. v. Canadian National Railway Co.* (1977), 74 D.L.R. (3d) 284 (Alta. S.C.), *aff'd* [1979] 4 W.W.R. 198 (Alta. C.A.).

- [7] In my view, the landlord's statement that it was going to give the tenant an additional five-year option is of no contractual force. It is at best a strong statement of what, at the time, the landlord intended to do and the statement was given to the tenant in the absence of any consideration for it having been made. The tenant was obliged to do nothing. It was in no way bound to enter into the sublease with the doctors. It may be that, the tenant having subsequently done so, there was considerable benefit to the landlord, but at the time the statement was given to the tenant, there was no basis on which the landlord could compel the tenant to enter into any transaction with the doctors. The landlord was given nothing in return for the statement it gave and no enforceable contract was made.
- [8] Further, the statement cannot be said to have been an offer that was open to the tenant to accept by entering into the sublease. The statement makes no mention of the sublease. It is not worded as an offer; it is no more than a statement of intention.
- [9] The tenant's case in this regard is pleaded as follows:
8. By written memorandum dated August 16, 2006 the Defendant granted to the Plaintiff an option to renew the Lease for an additional 5 year term, being the period of October 1, 2013 to September 30, 2018.
- [10] It is significant that the case as tried was confined to a case in contract. The tenant did not seek to make out any case of estoppel based on reliance or claim any form of equitable relief. The tenant alleged only that the landlord had "granted" an option to renew the lease beyond 2013 which, by stating it was "going to give" the tenant the option, in the absence of any consideration, the landlord clearly did not do.
- [11] Given that it can on no account be said the landlord granted the option to the tenant in any contractual sense, I see no error in the judge's conclusion and I would dismiss the appeal.
- [12] D. SMITH J.A.: I agree.
- [13] BENNETT J.A.: I agree.
- [14] LOWRY J.A.: The appeal is dismissed. "The Honourable Mr. Justice Lowry"

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