

CANADA / JUDGMENT

Shape Abbotsford West Limited Partnership v. 577374 Ontario Ltd.

2020 BCSC 1153

COURT

Supreme Court of British Columbia

DECIDED

7 August 2020

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2020 BCSC 1153 Shape Abbotsford West Limited Partnership v. 577374 Ontario Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Shape Abbotsford West Limited Partnership v. 577374 Ontario Ltd.,

2020 BCSC 1153

Date: 20200807

Docket: S163171

Registry: Vancouver

Between:

Shape Abbotsford West Limited Partnership

by its General Partner Shape Abbotsford G.P. Ltd.,

and Hoopp Realty Inc.

Plaintiffs

And

577374 Ontario Ltd. carrying on business as

Nutrition House, and the said Nutrition House

and Nutrition House Canada Inc.

Defendants

Corrected Judgment: The text of the judgment was corrected at paragraph 52

on October 7, 2020.

Before: The Honourable Mr. Justice Mayer

Reasons for Judgment

Counsel for the Plaintiffs:

T. Boyd

Counsel for the Defendants:

G.N. Harney

Place and Date of Trial/Hearing:

Vancouver, B.C.

July 16, 2020

Place and Date of Judgment:

Vancouver, B.C.

August 7, 2020

Introduction

- [1] The Plaintiffs Shape Abbotsford West Limited Partnership by its General Partner Shape Abbotsford G.P. Ltd., and Hoopp Realty Inc. (collectively the "Plaintiffs") bring this summary trial application pursuant to Rule 9-7 of the Supreme Court Civil Rules.
- [2] The Plaintiffs seek an order that they be granted judgment against the Defendants 577374 Ontario Ltd. carrying on business as Nutrition House ("577374") and Nutrition House Canada Inc. ("Nutrition House").
- [3] The Plaintiffs' claim arises from an alleged breach of a tenancy agreement between them and 577374 and an alleged breach of a related, subsequent agreement between them and Nutrition House. The Plaintiff seeks judgment against both defendants in the amount of \$128,271.42 along with contractual interest to the date of judgment.
- [4] Nutrition House cross-applies pursuant to Rules 9-6 and 9-7 for an order dismissing the claims brought against it. It denies that it was a party, guarantor or indemnitor to the Lease. It says that the subsequent agreement alleged by the Plaintiffs is not enforceable as it does not establish all of the essential elements of a contract.

Background

- [5] The Plaintiffs are a real estate holding company who own and lease space within the High Street Shopping Centre in Abbotsford, British Columbia.

- [6] 577374 is an Ontario company in the corporate group of, and wholly owned by Nutrition House. Nutrition House is in the business of selling natural health products through individual corporate stores.
- [7] On May 10, 2013, the Plaintiffs entered into a lease with 577374 to lease a unit at the High Street Shopping Centre (the "Lease").
- [8] Relevant terms of the Lease include the following:
- a) The term of the Lease was for ten years commencing in August 2013 and ending in July 2023;
 - b) The Plaintiffs would have the right to terminate the Lease if 577374 failed to pay the rental amount due under the Lease and would be entitled to contractual interest on unpaid rent; and
 - c) In addition to their damages for breach of the Lease the Plaintiffs would be entitled to recover their costs including legal costs in enforcing the Lease terms on a full indemnity basis.
- [9] From the outset, the business of 577374 did not go well and the company fell behind on its rent. 577374 complained that it was unable to attract sufficient business. The parties were hopeful that increased occupancy within the High Street Shopping Center, including the opening of a Steve Nash Fitness location, would result in increased revenues for 577374.
- [10] In the summer of 2014, the parties carried out discussions in an attempt to deal with 577374's rental arrears and that company's concerns regarding the lack of business at its rented premises. These discussions included the following exchanges:
- a) On July 30, 2014, the Plaintiffs wrote to 577374 proposing to pay a monthly marketing contribution of \$2,500 per month commencing August 1, 2014 and continuing for the lesser of 8 months or until the Steve Nash Fitness location opened - so long as 577374 paid on-going monthly rental payments of \$5,713.48. The Plaintiffs advised that they were prepared to establish a payment plan for the outstanding rental balance, which at that time was \$29,671.57.
 - b) After subsequent discussions, on or about August 27, 2014 Wayne Parent, the president of Nutrition House, sent an email to the Plaintiffs stating that the following points summarize our conversation and agreement:
 - i. Shape properties will provide Nutrition House a monthly \$2,500 marketing contribution commencing on August 1, 2014 up to and including the month the Steve Nash Fitness location opened for business;
 - ii. The current rental balance of \$35,385.05 (including August rent) will be paid over a period of 36 months at no interest, and the first rental balance payment will not be due until the [Steve Nash] gym is open; and

iii. Nutrition House will commence making regular monthly rental payments effective September 1, 2014.

In this email Mr. Parent inquired whether the Plaintiffs would be paying a marketing contribution of \$5,000 for the months of August and September 2014.

- c) In a reply email sent September 2, 2014 from Markus Griesser, on behalf of the Plaintiffs, Mr. Griesser stated that the Plaintiffs agreed with the rental payment terms outlined in the August 27th email. With respect to the marketing contribution, he clarified that the \$2,500 marketing contribution would be paid for each month that regular monthly rental payments were made, and therefore would be made commencing in August 2014 if rent was paid for that month.
- [11] Despite an exchange of further emails on September 2, 2014, the parties did not come to an agreement regarding payment from the Plaintiffs of a \$2,500 marketing contribution for the month of August 2014, in the absence of a regular monthly rental payment being made for that month.
- [12] Starting in September 2014, Nutrition House commenced payment of monthly rent to the Plaintiffs and the Plaintiffs commenced payment to Nutrition House of the monthly \$2,500 marketing contribution.
- [13] The Steve Nash Fitness location opened in February 2015 and the Plaintiffs ceased paying the marketing contributions. Despite this, 577374's business did not improve. Nutrition House made monthly rental payments until April 2015, and none afterwards, and 577374 abandoned the leased premises on February 1, 2016. By notice of termination dated March 2, 2016 the Plaintiffs terminated the Lease.
- [14] The lease premises were re-let by the Plaintiffs to a new tenant in September 2016 who after the expiry of a three or four month rent-free period, began paying rent on January 1, 2017.
- [15] The Plaintiffs claim, against all of the defendants, rental arrears to March 2, 2016 in the amount of \$90,217.75, damages suffered during the period when the lease premises were vacant in the amount of \$49,576.37 and for the legal costs of this action on a solicitor and own client basis.

Position of the Parties

The Position of the Plaintiffs

- [16] The Plaintiffs contend that 577374 is responsible for payment of all of the amounts claimed, pursuant to the terms of the Lease. Further, by virtue of the alleged agreement between themselves and Nutrition House formed August 27, 2014, which they described in the hearing before me as a supplemental agreement (the "Supplemental Agreement"), they contend that Nutrition House is also responsible, as in effect a guarantor, for the bulk of the amounts owed by 577374.

- [17] During the hearing before me the Plaintiffs modified their claim advising that they were not seeking legal costs on a solicitor and own client basis and certain additional (yearly) rental payments from Nutrition House.
- [18] With respect to the Supplemental Agreement, the Plaintiffs say that an interpretation of that agreement, read as a whole, giving its words their ordinary and grammatical meaning, and in consideration of the surrounding circumstances at the time the agreement was formed, justifies their claim against Nutrition House.
- [19] In this respect, the Plaintiffs refer to the reasons of the British Columbia Court of Appeal in *Canaccord Genuity Corp. v. Reservoir Minerals Inc.*, 2019 BCCA 278 in which the Court referred to the process for contractual interpretation set out by the Supreme Court at paras. 47, 48 and 57 of *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 and the principles of contractual interpretation set out at para. 52 of *RBC Dominion Securities v. Crew Gold Corporation*, 2016 ONSC 5529, *aff'd* 2017 ONCA 648.
- [20] The Plaintiffs say that the mere fact that the Supplemental Agreement does not clearly set out certain terms, which the defendants contend include when the marketing contribution payment was to commence and how long Nutrition House would be responsible for paying 577374's rent, does not mean that the agreement should be found unenforceable. Rather, the Plaintiffs say that this Court should strive to give the words of this agreement meaning. In this respect the Plaintiffs rely on the reasons of the set out at paras. 134 to 136 of *Wang v. Laura W. Zhao Personal Real Estate Corporation*, 2019 BCSC 1624, and the authorities cited therein, including in particular *Argo Ventures Inc. v. Choi*, 2019 BCSC 85, paras. 127-136, and *Pass Creek Enterprises Ltd. v. Kootenay Custom Log Sort Ltd.*, 2003 BCCA 580, para 17.
- [21] The Plaintiffs also contend that if I find that the Supplemental Agreement is ambiguous with respect to their claim that Nutrition House is responsible for payment of rent after the Steve Nash Fitness location opened in February 2015, I may consider post contract conduct in determining the parties' intention. In particular, they say I may consider the fact that Nutrition House continued to pay 577374s rent until April of 2015. For the statement of the law concerning post contracting conduct, the Plaintiffs rely on the decision of the British Columbia Court of Appeal in *Wade v. Duck*, 2018 BCCA 176 at para 28.

The Position of the Defendants

- [22] 577374 does not challenge that it is liable for the damages claimed by the Plaintiffs and does not dispute the Plaintiffs' calculation. It is noteworthy that 577374 is either in or will shortly be placed into bankruptcy and therefore the chances of recovery against that party by any of its creditors are low.

- [23] During the hearing before me, despite its pleadings to the contrary, Nutrition House conceded that it entered into the Supplemental Agreement in August 2014 but contend that the agreement is void for uncertainty. It says that any ambiguity in the Supplemental Agreement with respect to its obligation to pay 577374's rent should be resolved in its favour.
- [24] Nutrition House contends that it did not agree to take responsibility for all contractual obligations of 577374 to the Plaintiffs under the Lease but only agreed to pay the Plaintiff 577374's rent on an interim basis, until the opening of the Steve Nash Fitness location. It denies that it is responsible for paying the rental balance outstanding as at August 27, 2014.
- [25] In the alternative, Nutrition House says that, at most, it should only be responsible for payment of rent from the date of the Supplemental Agreement until the Lease was terminated by the Plaintiffs on March 2, 2016.

Issues

- [26] All parties agree, as do I, that the issues in dispute are suitable for determination by summary trial having regard to the factors set out in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*, (1989) 36 B.C.L.R. (2d) 202, at para. 48 (C.A.) and the additional factors referred to in *Gichuru v. Pallai*, 2013 BCCA 60, at para. 31.
- [27] As I have already outlined above, there does not appear to be any dispute that the Supplemental Agreement was entered into between the Plaintiffs and Nutrition House, as evidenced by the exchange of correspondence between July 30, 2014 and September 2, 2014. There is no disagreement that the written terms of the Supplemental Agreement were those set out in the email from Wayne Parent, president of Nutrition House, to Markus Griesser on behalf of the Plaintiffs dated August 27, 2014.
- [28] With respect to the obligation to commence payment of the outstanding rental balance owing on August 27, 2014, over 36 month period after the Steve Nash Fitness location opened, the Supplemental Agreement is silent on whether this was an obligation of 577374 as tenant or Nutrition House. As a result there is a requirement to determine the parties' intention with respect to who would bear this payment responsibility, 577374 or Nutrition House, based on the circumstances prior to formation of this agreement.
- [29] With respect to payment of rent on a go-forward basis the Supplemental Agreement states that Nutrition House will commence making "regular monthly rental payments" effective September 1, 2014. The agreement does not state when this obligation ceases.
- [30] The issues to be decided include the following:
- a) Did Nutrition House agree to pay 577374's rental balance as of August 27, 2014 in the amount of \$35,385.05 over a 36 month period starting after the Steve Nash Fitness location opened?

- b) Did Nutrition House agree to pay 577374's regular monthly rental from September 1, 2014 until the month on which the Steve Nash Fitness location opened (being February 2015) or to the date of termination of the Lease?
- c) Did Nutrition House agree to pay any other amounts, including contractual damages which 577374 is responsible for breaching the Lease?

Analysis and Decision

General Principles of Contractual Interpretation

- [31] At paras. 19 and 20 of its decision in *Cannaccord* the British Columbia Court set out the general principles of contractual interpretation:
 - [19] The basic process for contractual interpretation was outlined by the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53:
 - [47] The overriding concern is to determine "the intent of the parties and the scope of their understanding". To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning .
 - [48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement.
 - [57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement. The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract. While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement.
- [Citations omitted.]
- [20] The chambers judge recognized the principles of contractual interpretation, quoting, at para. 37 of his judgment, from *RBC Dominion Securities Inc. v. Crew Gold Corporation*, 2016 ONSC 5529, *aff'd* 2017 ONCA 648 at para. 52:
 - (1) When interpreting a contract, the court aims to determine the intentions of the parties in accordance with the language used in the written document and presumes that the parties have intended what they have said.

- (2) The court construes the contract as a whole, in a manner that gives meaning to all of its terms, and avoids an interpretation that would render one or more of its terms ineffective.
- (3) In interpreting the contract, the court may have regard to the objective evidence of the "factual matrix" or context underlying the negotiation of the contract, but not the subjective evidence of the intention of the parties.
- (4) The court should interpret the contract so as to accord with sound commercial principles and good business sense, and avoid commercial absurdity.
- (5) If the court finds that the contract is ambiguous, it may then resort to extrinsic evidence to clear up the ambiguity.
- (6) While the factual matrix can be used to clarify the intention of the parties, it cannot be used to contradict that intention or create an ambiguity where one did not previously exist.

The \$35,385.05 Rental Balance

- [32] I find that between July 30 and September 2, 2014, Mr. Parent was negotiating a marketing contribution and an arrangement with respect to payment of past-due rent and prospective rent on behalf of Nutrition House.
- [33] First, the correspondence leading up to the formation of the Supplemental Agreement, including that in April, July and August 2014 suggests that the negotiation was between the Plaintiffs and Nutrition House. This includes the following:
- a) In April 2014, Wayne Parent wrote to the Plaintiffs in his capacity as president of Nutrition House seeking rent relief for the lease premises at the High Street Shopping Center.
 - b) The emails dated July 24 and August 27, 2014, which led to the formation of the Supplemental Agreement were sent by Wayne Parent. Both emails include an email signature line showing Mr. Parent's name and his title President, "nutrition house Canada Inc".
- [34] In addition, from a common sense perspective, the requirement in the Supplemental Agreement that the \$2,500 per month marketing payment be made by the Plaintiffs to Nutrition House and the requirement that Nutrition House commence paying regular monthly rental payments supports a finding that the Supplemental Agreement was intended to bind those parties.
- [35] The context of the Supplemental Agreement was one in which 577374 was losing money, with an obvious upstream loss to its parent, Nutrition House. The correspondence prior to formation of this agreement suggests that Nutrition House was seeking to stop the bleeding in the short term, by deferring past-due rental payments owed by its subsidiary until after the Steve Nash Fitness location opened, and to increase its subsidiary's sales by obtaining and utilizing the monthly \$2,500 marketing contribution.

- [36] I note that under Section 16.02(e) of the Lease any amendments to its terms required the parties to agree in writing, with such agreement to be signed by an authorized representative of the parties. No such written amendment exists between the Plaintiffs and 577374. Accordingly, it can not be said that the Supplemental Agreement was intended to require 577374 to pay the outstanding rental balance over a 36 month period as this would constitute an impermissible amendment to the Lease.
- [37] Applying the principles set out in RBC Dominion Securities, despite the fact that the Supplemental Agreement did not specify who would be responsible for making the outstanding rental balance payments, the only logical conclusion to be drawn is that the parties intended that that Nutrition House would make these payments.
- [38] The Steve Nash Fitness location opened on February 1, 2015. Accordingly, I find that Nutrition House agreed to pay, and is liable to pay, the Plaintiffs \$35,385.05 being the outstanding rental balance as at August 27, 2014 and pre-judgment interest on this amount accruing after February 2018 (that is, 36 months from February 1, 2015).
- [39] There is nothing in the Supplemental Agreement which would make Nutrition House liable for contractual interest as set out in the Lease and the objective evidence does not support a finding that the parties had this intention. That is, Nutrition House did not agree to guarantee 577374's contractual obligations to the Plaintiffs under the Lease.

Regular Monthly Payments

- [40] The Supplemental Agreement provides that Nutrition House will commence making "regular monthly rental payments" to the Plaintiffs effective September 1, 2014. Regular monthly rental payments is not defined in the Supplemental Agreement nor is this term defined in the Lease.
- [41] The evidence establishes that Nutrition House made rental payments in the amount of \$6,146.74 from September 2014 until April 2016. According to the statement of account issued by the Plaintiffs these monthly rental payments included an amount for base rent and a contribution towards operating costs, property taxes and electricity. I expect that regular monthly payments made prior to September 2014 also included amounts for these items.
- [42] Nutrition House asks this Court to conclude that the parties intended that Nutrition House would only pay 577374's regular monthly rental from September 1, 2014 until the month on which the Steve Nash Fitness location opened. In effect, it submits that this Court should read words into the Supplemental Agreement.
- [43] I find that the words of the Supplemental Agreement are clear and unambiguous. No reading is warranted. Nutrition House agreed to pay 577374's monthly rent without a specified end date. There is nothing in the evidence which would allow me to conclude that the parties intended that this obligation would end when the Steve Nash Fitness location opened.

- [44] In this case, the Lease was terminated on March 2, 2016. In my view after March no "regular monthly rental" would have been payable and Nutrition House's obligation to pay 577374's regular monthly rent ceased. I make this finding on the assumption that regular monthly rent would be payable in advance, as is typical in commercial leases, and therefore the obligation to pay rent for March would have existed prior to termination of the Lease. If I am incorrect in this respect then regular monthly rent would only be payable by Nutrition House through until the end of April 2016.
- [45] Accordingly, I find that Nutrition House agreed to pay, and is liable for, payment of 577374's monthly rental for the eleven month period commencing May 1, 2015 through until the end of March 2016. This includes the monthly amount payable for base rent, operating costs, property taxes and electricity. On the assumption that monthly charges for operating costs, property taxes and electricity would not have changed from the previous eight months during this period (no submissions in this respect were made by the parties) I find that Nutrition House is liable to the Plaintiffs for rent of \$67,614.14 (11 x \$6,146.74).
- [46] As I found with respect to interest on the rental account balance, there is nothing in the Supplemental Agreement which would make Nutrition House liable for contractual interest as set out in the Lease and the evidence does not support a finding that the parties contemplated such a term. Accordingly, Nutrition House will pay pre-judgment interest on the relevant amount accruing from the date each month's rent was payable to the date of trial.

Contractual Damages

- [47] As I have already outlined, the Plaintiffs concede that Nutrition House is not liable for payment of the Plaintiffs' legal costs of enforcing the lease on a solicitor and client own basis. That is a requirement under the Lease which the Plaintiffs do not suggest was an obligation imposed upon Nutrition House in the Supplemental Agreement.
- [48] Despite their position on legal costs the Plaintiffs seek an order that Nutrition House pay contractual damages owing by 577374 of approximately \$49,000, consisting of lost rental revenue from the time that the Lease was terminated to January 1, 2017 when the Plaintiffs began to collect rent from a new tenant. In effect, the Plaintiffs suggest that Nutrition House guaranteed payment of such damages.
- [49] There is nothing in the Supplemental Agreement which provides that Nutrition House guaranteed all contractual damages that 577374 was liable for under the lease. Nor is there anything in the factual matrix which suggests, on an objective basis, that the parties intended that Nutrition House would guarantee all of 577374's obligations under the lease, including the requirement to pay contractual damages. The word "guarantee" or similar language did not arise in any of the communication exchanged between the parties during the summer of 2014.

[50] As I have already found with respect to payment of rent after August 27, 2014, the Supplemental Agreement is clear and unambiguous - it required Nutrition House to pay "regular monthly rental" and not damages arising from 577374's breach of the Lease.

Conclusion

[51] In summary I grant judgment against Nutrition House in favour of the Plaintiffs as follows:

- a) in respect of the outstanding rental balance owing on the Lease as at August 27, 2014, the amount of \$35,385 and pre-judgment interest on this amount accruing after February 2018; and
- b) in respect of regular monthly rent payable for the month of September 2014 and for each month thereafter to and including March 2016, the amount of \$67,614.14, and pre-judgment interest accruing from the date each month's rent was payable to the date of trial.

[52] I grant judgment against 577374 in favour of the Plaintiffs in the gross amount of \$139,794.12 with contractual interest from March 2, 2016 to the date of judgment and costs on a solicitor and own client basis to be assessed.

[53] I dismiss the cross application of Nutrition House.

"Mayer J."

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