

CANADA / JUDGMENT

Unrau v. 1140218 BC Ltd.

2020 BCSC 1559

COURT

Supreme Court of British Columbia

DECIDED

21 October 2020

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2020 BCSC 1559 Unrau v. 1140218 BC Ltd. IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Unrau v. 1140218 BC Ltd., 2020 BCSC 1559 Date: 20201021 Docket: SS214649 Registry:

New Westminster Between: Ricky Unrau and Lisa Unrau Plaintiffs And: 1140218 BC Ltd. and

Sukhchain Singh Dhaliwal Defendants Before: The Honourable Mr. Justice G.C. Weatherill Oral

Reasons for Judgment Counsel for the Plaintiffs: D.J. Letkemann The Defendants: No

appearances Place and Date of Trial: New Westminster, B.C. October 21, 2020 Place and Date of

Judgment: New Westminster, B.C. October 21, 2020

Introduction

- [1] This is an action by the landlord plaintiffs commenced on May 10, 2019 for breach of a commercial lease dated November 24, 2017 (the "Lease") in respect of two adjacent warehouse buildings in Abbotsford, British Columbia comprising a total of 31,200 sq. ft. (the "Leased Premises"). The defendant, 11401218 BC Ltd. ("1140 BC") was the tenant under the Lease. The defendant Dhaliwal, a director of 1140 BC, was and is the guarantor of 1140 BC's obligations under the Lease. Mr. Dhaliwal agreed, inter alia, to indemnify and save the plaintiffs harmless from: any and all loss, costs, damages, or liability whatsoever arising out of any failure by the Tenant to perform any and all of the terms, covenants, conditions, and provisions of this Lease.
- [2] Although the Lease stipulated that the lease term was ten years, it also stipulated that the lease term commenced on February 15, 2018 and terminated on February 14, 2027, which is a period of only nine years. The plaintiffs conceded that an error was made by their solicitor who drafted the Lease and that they can only claim damages on the basis that the Lease was for a term of nine years.
- [3] 1140 BC commenced occupation of the Leased Premises on February 15, 2018 and paid the required monthly rent, albeit late, until November 2018 when it ceased paying rent and abandoned the Leased Premises.
- [4] By letter dated April 15, 2019 from the plaintiff's counsel to the defendants, the plaintiffs demanded the rent owing under the Lease. No response to the demand letter was received.

- [5] By letter dated May 9, 2019, from the plaintiff's counsel to the defendants, the plaintiffs accepted the defendants' repudiation of the Lease, terminated the Lease and advised that they intended to claim damages.
- [6] This action was commenced the following day.
- [7] The defendants did not respond to the action or otherwise defend it in any way. On September 5, 2019, the plaintiffs obtained default judgment with damages to be assessed.
- [8] On October 25, 2019, the plaintiffs obtained judgment against the defendants in the amount of \$221,075.86, representing the unpaid rent to April 15, 2019, together with interest on that amount to the date of the default judgment in the amount of \$18,847.37. The plaintiffs' claim for general damages for breach of the balance of the term of the Lease was adjourned and ordered to be assessed at trial.
- [9] Before me today is the trial of that assessment.
- [10] Although the defendants were served with the Notice of Trial on February 13, 2020, they have taken no steps to participate in the process, including making no appearance at the Trial Management Conference held on September 1, 2020.
- [11] I am advised that, on the morning of trial, Mr. Dhaliwal telephoned the Registry and indicated he thought the trial was proceeding by telephone, that he was told it was not, that it was being held in person and that if he wished to attend it was necessary to attend the New Westminster Courthouse as soon as possible. He apparently responded that, as he would be driving from Mission, he would not be able to attend until approximately 11:15 a.m., at which time he intended to seek an adjournment. Counsel for the plaintiffs advised the court that he too had informed Mr. Dhaliwal of the necessity for him to attend in person.
- [12] Mr. Dhaliwal did not attend, either at 11:15 or otherwise, although he was paged after the morning recess. The trial proceeded in his absence.

Background

- [13] The plaintiff, Ricky Unrau, was the only witness to give evidence at the trial. In addition to providing the requisite evidence regarding the Lease and payments received thereunder, he testified that the plaintiffs have been able to mitigate their damages to some extent by leasing a portion of the Leased Premises to one of their companies, Twin 3PL Logistics Ltd. for a short period of time. In addition, they have recently entered into the following lease agreements in respect of the Leased Premises with the following tenants:
- a) Conventus Solutions Ltd. for 16362 sq. ft. for a term commencing January 15, 2020 and expiring December 31, 2024;
 - b) Gezim Sopjani for 6,500 sq. ft. for a term commencing July 1, 2020 and expiring June 30, 2015; and

- c) 12028450 Canada Inc. for 7550 sq. ft. for a term commencing August 1, 2020 and expiring on July 31, 2023. (collectively the "Mitigation Leases").
- [14] Each of the Mitigation Leases contains an option to renew in favour of the tenant.
- [15] There is no suggestion that the steps taken by the plaintiffs to mitigate their damages were unreasonable.
- [16] After questioning by the court, Mr. Unrau conceded that it is "more than likely" that the plaintiffs will be able to continue to lease the Leased Premises after the expiry of the terms of the existing leases, either because the existing tenants will exercise their respective option to renew or by leasing to another tenant.

Analysis

- [17] I am satisfied that the notice of termination issued by the plaintiffs on May 9, 2019 was sufficient notice to the defendants that the plaintiffs were accepting the defendants' repudiation of the Lease as putting an end to it, thereby entitling the plaintiffs to claim for the damages suffered by them as a result of having lost the benefit of the Lease for the unexpired term of it: see 491506 B.C. Ltd. v. McElmoyle, 2004 BCSC 1075 at paras. 41-49.
- [18] I am also satisfied, on the whole of the evidence presented by the plaintiffs at trial, that they have met the onus upon them to prove they have suffered damages as a result of the repudiation by the defendants of the Lease.
- [19] Regarding the damages suffered by the plaintiffs to the date of trial, I find their loss is be calculated by subtracting the actual amounts received in rent, both from Twin 3PL Logistics Ltd. and pursuant to the Mitigation Leases, from the amount that would have been received under the Lease had the defendants not been in breach of it, namely \$400,424.78, inclusive of GST. The plaintiffs are entitled to judgment against the defendants, jointly and severally, in that amount for the period May 1, 2019 to and including October 21, 2020. Regarding the necessity of including GST on the award of damages in these circumstances, see: Vancouver Canucks Limited Partnership v. Canon Canada Inc., 2013 BCSC 866 at paras. 259-261.
- [20] In addition to the foregoing, the plaintiffs seek an award of damages for loss of rental income in the future, from November 1, 2020 to February 14, 2027. They have calculated that loss by taking the present value of the difference between the amount that would have been payable by the defendants under the Lease and the total amount that will be payable under the Mitigation Leases. That calculation comes to \$1,329,666.47, based upon a discount rate of 2%.
- [21] As indicated above, Mr. Unrau testified it was more than likely that the Leased Premises will continue to be leased beyond the expiry of the present terms of the Mitigation Leases. A determination of whether the rent that will be received after that time will be equal to, more or less than the rents payable under the Mitigation Leases would be pure speculation. In my view, the plaintiffs are required to demonstrate a real and substantial possibility that there

will be a shortfall as compared with the income they would have received under the Lease. They have not done so.

- [22] I find that the plaintiffs are entitled to an award of damages against the defendants, jointly and severally, in an amount equal to the present value of the difference between (a) the amount that would have been payable under the Lease during the respective terms of the Mitigation Leases and (b) the total amount that is payable under the current terms of the Mitigation Leases in respect of the areas of the Leased Premises covered by each of the Mitigation Leases. All amounts will be inclusive of GST. The plaintiffs have liberty to provide that calculation to me by way of a memorandum, through the Registry, together with a form of Order.
- [23] The plaintiffs are entitled to interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79 on the damages awarded to the date of trial, as well as post-judgment interest on the total award thereafter. Costs
- [24] The plaintiffs are entitled to their costs of the action at Scale B. "G.C. Weatherill J."

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