S.C.A. No. 02562

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Clarke, C.J.N.S.; Jones and Freeman, JJ.A.

BETWEEN:

ARTON HOLDINGS LIMITED and LAHAVE DEVELOPMENTS LIMITED Appellants - and - GATEWAY REALTY LIMITED Respondent	)	Gerald R. P. Moir Brian W. Stilwell for the Appellants John P. Merrick Duncan R. Beveridge Darlene A. Jamieson-Fraser for the Respondent Appeal Heard: April 9, 1992 Judgment Delivered: April 10, 1992

THE COURT: Appeal dismissed with costs per oral reasons for judgment of Clarke, C.J.N.S.; Jones and Freeman, JJ.A. concurring.

The reasons for judgment of the Court were delivered orally by:

CLARKE, C.J.N.S.:

The facts underlying this appeal from the September 5, 1991 decision of Mr. Justice Kelly and the order based thereon are set forth in his decision which is reported in 106 N.S.R. (2d) 180.

After reviewing and studying the voluminous record before us and considering the lengthy written submissions and the persuasive oral arguments of counsel which we heard yesterday, we have unanimously come to the following conclusions.

1. At page 200 (106 N.S.R. (2d)), para. 77, the trial judge states:

> "In the result, in the absence of Zellers as a party, and in the absence of sufficient evidence to discharge the plaintiff's burden, I do not find that Zellers breached its contractual obligation."

This is a finding favourable to the appellants. It has not been appealed by the respondent. It stands. See s. 6(d) of the lease which provides in part, "Nothing herein contained shall preclude the Tenant from assigning this lease or subletting the leased premises in whole or in part."

2. There was valuable consideration for the agreement made between Gateway and Arton/LaHave on May 11, 1988. Gateway was the landlord. Arton/LaHave was the assignee. Even though its execution fell between the agreement to assign dated November 19, 1987 and the execution of the assignment in final form on April 27, 1989, the latter was a formality. The substance and fact of the Zellers assignment was no secret to the parties on May 11, 1988.

3. The legal effect of the May 11, 1988 agreement between Gateway and Arton/LaHave was one of incorporation by amendment to the main lease. Accordingly, as between these parties, the lease was amended.

4. The trial judge made, among others, the following significant findings of fact:

First, at p. 202, para. 82:

> "Paragraph two of this agreement (he is referring to the May 11, 1988 agreement) is a provision of an enforceable contract whereby Arton/LaHave agrees on the manner it will deal with the former Zellers space. With this agreement, the obligation of Arton/LaHave became clear - it was to use its "best efforts" to sublease the Zellers space to tenants "suitable to maintain the existing viability" of the Plaza. It is a specific enunciation of the manner it will exercise its tenancy rights, either as a clarification of its tenancy obligations, as an amendment to the lease clause allowing it to "go dark", or as a collateral agreement to the same effect."

Second, at p. 209, para. 108:

> "It would appear from all of the evidence that Arton/LaHave had two tenants ready and willing to occupy 15,000 to 20,000 square feet of the 60,00 (SIC) square foot space when Zellers left but failed to capitalize on these opportunities. Arton/LaHave also was advised by Gateway that it had interested department store companies who would fill the space. However, it clearly had no interest in accepting a department store in the premises, principally because it would strengthen the Plaza and make it a viable shopping center and a competitive force for the Bridgewater Mall. I find that Arton/LaHave failed to make proper and reasonable efforts to discharge its obligations under the lease, including the obligation to honestly search out tenants to maintain the viability of the Plaza. Arton/LaHave acknowledged that was their obligation by their agreement of May 11, 1986 (SIC 1988) and they failed to fulfill it. In addition, they acted in bad faith in failing to deal with the real prospects of K-Mart and Towers presented by Gateway. Gateway encouraged Arton/LaHave to enter into a lease with a department store tenant and gain any financial benefits that might flow from such a lease. Instead, Arton/LaHave rejected the prospect of certain tenancy from one of these prospects because it believed the resulting benefit to the Plaza would have a harmful effect on its own Bridgewater Mall."

Third, at p. 209, para. 109:

> "... Even accepting its other obligations, I have no difficulty concluding that the efforts of Arton/LaHave to fulfill its obligations under its assigned lease and the May 11th, 1988 agreement were so insignificant as to constitute a clear inference that it intended to act in "bad faith". I

> therefore find Arton/LaHave in breach of its contractual lease obligations to Gateway."

After a detailed review of the record, we are satisfied that there was adequate and sufficient evidence before the Court to support these findings and conclusions reached by Mr. Justice Kelly.

5. On November 10, 1988, Mr. Rodney of Gateway wrote to Zellers requesting that they vacate the premises. He received no reply. On December 18, 1988, he commenced an action against Zellers alleging that the assignment of the lease was invalid and the restrictive covenant in the Arton lease in restraint of trade. In January, 1989, LaHave and Arton were joined as defendants. In January, 1989, Zellers deleted the clause from the lease. With the removal of the clause, Mr. Rodney of Gateway approached Mr. Hurst of Arton/LaHave but attempts to negotiate failed because of the pending action. On April 19, 1989, K-Mart forwarded a draft lease to Mr. Rodney. On May 26, 1989, Mr. Rodney wrote to Mr. Hurst as follows:

> "I have been trying to tell you for the last couple of weeks that I have been in contact with two (2) potential tenants whom I feel would be suitable to maintain the existing viability of the Bridgewater Plaza and whom I feel should become tenants in the space vacated by Zellers.
>
> I sincerely believe that it is your responsibility, now that Zellers has released you from the restrictions dealing with leasing my premises, to use your best efforts as quickly as possible to place proper tenants in the vacant building.
>
> I hate to set time limits but as you know I have a responsibility to my other tenants and I believe that you should show some desire to carry out our original agreement.
>
> I would appreciate you indicating to me, before the 15th of JUNE, what your intentions may be. Again, I am sure that you realize how important this is to Gateway Realty and the tenants in our Mall."

There was no reply. On June 16, 1989, Gateway wrote to LaHave and Arton. The letter provided in part:

> "We require that immediate arrangements be made for a suitable replacement tenant. Notification of our position in this regard has been given to you on numerous occasions, including our letter of May 26, 1989. We must ask that you confirm to us by no later than 5:00 p.m. Monday, June 26, 1989 that you are prepared to engage in meaningful negotiations with a view to leasing the space to a suitable tenant such as Towers. Should you fail to do so, we will consider your failure to be a breach of your obligations. In such event, this is to notify you that we will have no alternative but to consider that any rights you may claim to the property will have been terminated as of that date."

Arton and LaHave refused to deal with Gateway unless Gateway signed a release of any liability that the companies had to Gateway. This included the agreement of May 11, 1988. At the end of June, 1989, Gateway took possession of the store and changed the locks on the premises.

The failure of Arton/LaHave to perform the several obligations to which it had contracted under the May 11, 1988 agreement (now the lease) amounted to the breach of a fundamental term in the lease. It also constituted a default under s. 12 of the lease and entitled Gateway to rescind the contract of lease. The failure of Arton/LaHave to respond to the demands of Gateway in a timely fashion, or at all, is supported by the evidence. In our opinion the appellants had ample notice of the default by the actions of Gateway. In our view the failure of Arton/LaHave to exercise their "best efforts" to find a suitable tenant or tenants had the effect of literally destroying the viability of Gateway's Plaza Shopping Centre, contrary to any expectation in the original lease. We agree that as a result, the deteriorating situation at the Plaza Shopping Centre became intolerable.

6. We find the relief ordered by the trial judge is appropriate in the circumstances. The appeal is dismissed with costs to the respondent in one bill of costs.

C.J.N.S.

Concurred in:

Jones, J.A.

Freeman, J.A.