C.A. No. 02827

NOVA SCOTIA COURT OF APPEAL

Cite as: Fancy Pastry Shop Ltd. v. Phoenicia Foods Ltd., 1993 NSCA 166

Matthews, Chipman and Freeman, JJ.A.

BETWEEN:

FANCY PASTRY SHOP LIMITED and HALIM LABA	)	Fern M. Greening
	)	A. Douglas Tupper
	)	for the Appellants
Appellants	)	
	)	
- and -	)	
	)	David G. Coles
	)	Stephen McGrath
	)	for the Respondents
PHOENICIA FOODS LIMITED and MOUAWAD AZAR	)	
	)	
	)	
Respondents	)	Appeal Heard:
	)	September 20, 1993
	)	
	)	
	)	Judgment Delivered:
	)	September 30, 1993
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THE COURT: Appeal allowed with costs to the appellants at trial in the amount of $3,000.00 plus disbursements and on appeal at $1200.00 plus disbursements per reasons for judgment of Matthews, J.A.; Chipman and Freeman, JJ.A. concurring.

MATTHEWS, J.A.:

This appeal concerns the interpretation of the terms of an agreement of purchase and sale (the agreement) and a lease.

On February 22, 1982, the appellants agreed to sell to the respondent Azar a retail bakery business in Halifax which the appellants had operated for several years. Among the terms of the agreement Azar purchased the good will, equipment and certain improvements to the store for $30,000.00. The agreement also provided for a lease of that part of the premises owned by the appellants from which the bakery shop was operated. The appellant Laba continued to operate a bakery out of part of the premises not leased to Azar. Laba required the retail store as an outlet for the sale of his bakery products. The terms of the agreement reflected the intent of Laba to repurchase and again operate the business. It provided for repurchase of the equipment, including any new equipment used in connection with the business and the good will for $30,000 which was the same amount as the sale. In neither circumstance was that amount broken down into component parts.

On March 18, 1982, the appellant, Fancy Pastry Shop Limited as lessor, and the respondent, Phoenicia Foods Limited as lessee, executed the lease as required by the terms of the agreement. A clause of that lease contained the same repurchase clause as in the agreement. The lease was for a period of five years, with option to the lessee to renew for a further five years. On November 3 1986, the lessee exercised that option, with the lease to expire on March 15, 1992.

In October, 1991, Azar purchased the premises directly across the street from the leased premises with the intention of moving the business there. Azar, through his solicitor, notified Laba of his intent to vacate the leased premises and move the business to his new location and invited Laba to take possession prior to the termination date of the lease, by letters dated October 22 and November 26, 1991. Azar placed signs in the leased premises stating his intent to move and also signs in the new store prior to moving.

On December 16, 1991, that is, some three months prior to the expiration of the

lease, Azar moved to his new store. The retail business previously operated from the leased premises was from that time forward operated by Azar out of the new store. He testified that he visited the leased premises daily to obtain stock which he continued to store there.

A clause of the lease stipulated that if the leased premises "shall be vacated and remain unoccupied for fifteen (15) days", Laba was entitled to terminate the lease and repossess the premises "by force or otherwise".

After Azar moved, Laba, by his counsel, notified Azar that he had breached and terminated the lease by leaving the premises vacated and unoccupied for fifteen days contrary to the terms of the lease. On January 6, 1992, purportedly acting under the terms of a clause in the lease protecting the premises, Laba entered the premises and changed the locks. He complained of the "deplorable state of the premises" and demanded rent for the balance of the term.

The respondents, the plaintiffs at trial, claimed the stipulated $30,000 for the equipment and good will. The appellants, as defendants, refused to pay that sum on the grounds that:

> "(a) Azar had transferred all the good will of the old store to his new location three months before the expiration of the Lease, leaving no good will for Laba to repurchase; and
>
> (b) Azar had breached the Lease by (i) failing to maintain the demised premises; and (ii) leaving the demised premises vacated and unoccupied for 15 days. Under clause 17, these breaches discharged Laba's obligation to pay $30,000 for the repurchase of the equipment and good will."

The appellants also counterclaimed for the costs of repairs and the rent for the balance of the term.

The trial was held on January 14 and 15, 1993. The trial judge rendered his written decision on January 29, 1993. He concluded that Azar was entitled to

> "the return of $30,000.00 effective January 6, 1992. From this sum, however, must be deducted the sum of

> $7,826.26, being the cost of the repairs to the building attributable to Azar's failure to maintain the premises properly. Azar is also entitled to pre-judgment interest at the rate of 7% per annum from January 6, 1992 on the sum of $22,173.74."

The order dated February 16, 1993 provided:

> "IT IS ORDERED the Plaintiff shall receive from the Defendant the sum of $22,173.74 together with Prejudgment interest in the amount of $1,658.41 and Legal Costs in the amount of $3,000.00 and Disbursements in the amount of $657.57 for a total of $27,489.72."

The appellants contend that the trial judge erred:

> "1. In failing to find Azar's breach of the covenants to maintain and repair the demised premises discharged Laba's obligation to pay $30,000 for the repurchase of the good will;
>
> 2. In finding Laba was obligated to accept Azar's early termination of the Lease and repurchase the good will before March 15, 1992;
>
> 3. In finding there was good will remaining for Laba to repurchase before and on the termination of the Lease; and
>
> 4. In finding Azar did not breach the Lease by leaving the demised premises vacated and unoccupied for 15 days."

In argument the appellants joined issues 2 and 3, thus making three grounds of appeal.

The trial judge had difficulty with the credibility of both Laba and Azar.

> "Neither Laba nor Azar gave evidence which can be totally accepted. Their perceptions of the facts have grown and developed over the ten years of a rancorous relationship. I am not convinced that either of the parties deliberately lied. Each, however, participated in selective observations and memory. I will, therefore, make my findings of fact based on observations of independent parties and what I consider to be reasonably acceptable."

As to issue one, the trial judge, after reviewing some of the pertinent evidence

held:

> "On January 6, 1992, Laba retook possession of the premises. The condition of the premises are not such as would have justified Laba's re-entry pursuant to clauses 12 and 6 of the lease."

In my view there was sufficient evidence upon which the trial judge could rely to so decide. I would not disturb that finding which is at least in part, a finding of fact.

I will now consider the remaining issues. They entail a review of some of the terms of the agreement and the lease.

In reaching his conclusions as to these other issues the trial judge examined the terms of the lease and the conduct of the parties in relation thereto. He remarked:

> "During the first part of December, 1991, Azar moved. Eventually he had everything in the new store that he needed to operate and simply closed the doors to the old store, leaving some stock there and some material in the refrigerators and freezer. He came and went from the premises on a daily basis, removing stock as needed. The demised premises, however, had all the appearance of being closed. Directly across the street was the new store and presumably customers were able to see clearly and easily that the successor premises were open and available. Mr. Azar said customers would come to the old store and go away, rather than come to the new store. I do not accept that evidence. Many of the customers for ethnic foods travelled some distance to obtain the goods and it is logical to assume they went to the new store to obtain the goods."

Clause 12 of the lease provides:

> "12. If the rent or additional rent, or any part thereof, shall be unpaid for fifteen (15) days after any of the days on which the same ought to have been paid, and after seven (7) days written notice to the Lessee, or in the case of the breach of non-performance of any of the covenants or agreements herein contained on the part of the Lessee to be kept, observed or performed, or in the event the Demised Premises shall be vacated and remain unoccupied for fifteen (15) days, or in case of the seizure of or forfeiture of the term for any of the causes mentioned in this Lease, then and in any case the then current month's rent, including additional rent and the rent due for the balance of the

> term including additional rent shall immediately become due and payable, and it shall be lawful for the Lessor at any time thereafter to enter upon the Demised Premises or any part thereof in the name of the whole by force or otherwise, as it may see fit, and the same to have again, repossess and enjoy as of its former estate, anything herein contained to the contrary notwithstanding, and no acceptance of rent subsequent to any breach or defaults other than non-payment of rent and no condoning, excluding or overlooking by the Lessor on previous occasions of breaches or defaults similar to that for which re-entry is made shall be taken to operate as a waiver of this condition, nor in any way to defeat the rights of the Lessor hereunder."

The trial judge's pivotal finding is:

> "I must decide if Azar's actions in this case amounted to a breach of clause 12 of the lease which required the tenant not to permit the premises to 'be vacated and remain unoccupied for fifteen (15) days...' I find on the facts that Azar did not vacate the store. He had attempted to co-operate with Laba, as expressed in his solicitor's letters. While the store appeared closed, as it was, it was not vacated and did not remain unoccupied."

Based primarily on that finding he concluded that

> "Laba was not entitled to take possession of the premises and, accordingly, is not entitled to rent for the premises from January 6, 1992 to March 12, 1992."

With deference, the trial judge should not have viewed the terms of the lease in isolation. The primary instrument is the agreement of purchase and sale. As a term of that agreement the parties agreed to enter into the lease, an integral part of the agreement. The agreement clearly contemplates that the business be carried out and continue to be carried out, in the leased premises.

Some of the pertinent clauses of the agreement are:

> "1.01 The Vendor owns certain premises situate at the corner of Agricola and North Street, in the City of Halifax, wherein it has conducted a retail outlet engaged in the sale of certain ethnic foods and in bread stuff;

> 1.02 The Vendor is prepared to sell the business and to lease a portion of the premises to the Purchaser, and the Purchaser has agreed to purchase the said business and to lease the premises.
>
> NOW THEREFORE THIS AGREEMENT WITNESSETH that in consideration of the mutual covenants herein contained, and upon the terms and conditions hereinafter set forth, the parties hereto agree as follows:
>
> 1. The Vendor hereby sells, transfers and assigns and the Purchaser hereby buys the following:
>
> > (a) The good will of the business carried on by the Vendor under the name of Fancy Pastry Shop Limited in the retail sales outlet division only, with the exclusive right to the Purchaser to represent himself as carrying on such business in continuation of the Vendor, and to use any words indicating that the business is so carried on, including the use of all licenses, rights and privileges connected with the said business, save and except the name 'Fancy Pastry Shop';
> >
> > (b) A lease of the real property owned by the Vendor on Agricola Street in which the said business is carried on, subject to the conditions set out in Schedule "A" hereto annexed;
>
> 6. The parties agree that the business location will continue to be the exclusive outlet for the retail sales of the bread stuff products of Fancy Pastry Shop Limited according to the following terms and conditions:
>
> ..."

Schedule "A" to the agreements sets out the terms and conditions of the lease which was to be drafted. Clause 7 is of some importance.

> "7. TERMINATION
>
> It is agreed that on the expiration of the term and provided that the Tenant is not at that time in default

> under any of the terms and conditions and covenants of the lease, that the Landlord will repurchase the equipment and good will sold to the Tenant on the 1st day of March, 1982, for the sum of $30,000.00 (the original purchase price).
>
> PROVIDED THAT the purchase price shall include all new equipment brought on to the premises and used in connection with the business by the Purchaser."

Clause 17 of the lease provides:

> "The Lessee covenants that it will at end of the term or the earlier termination of this Lease for any cause, yield up the demised Premises broom clean and in good and tenantable repair, destruction as herein provided and reasonable wear and tear only excepted. The Lessee may remove from the Demised Premises at any time during the term and any renewal thereof or within thirty (30) days after the termination thereof any or all of the Lessee's fixtures, articles and improvements upon or fixed to the Demised Premises as long as the Lessee makes good any damage caused in any such removal, but any fixtures, articles and improvements not removed within thirty (30) days after the termination of this Lease shall become the property of the Lessor without payment being made therefor.
>
> It is agreed that on the expiration of the terms and provided that the Tenant is not at that time in default under any of the terms and conditions and covenants of the lease, that the Landlord will repurchase the equipment and good will sold to the tenant on the lst day of March, 1992, for the sum of $30,000.00 (the original purchase price).
>
> PROVIDED THAT the purchase price shall include all new equipment brought on to the premises and used in connection with the business by the purchaser."

As the trial judge found, Azar moved "during the first part of December, 1991." That was some three months prior to the expiration of the lease. The trial judge also found that Azar "simply closed the doors to the old store. ...The demised premises, however had all the appearances of being closed." The new store was then "open and available to

customers". Indeed, I must point out, the signs in both stores invited them to the new site. Azar left the store virtually empty, with no intention to continue to use it as a retail store.

In my view this action on the part of Azar was contrary to the intent of the agreement and in violation of the term of both the agreement and the lease. A reading of the agreement and the lease in conjunction therewith, in my opinion, demonstrates the intent that the leased premises continue as a retail store and be available to the appellants as such at the date of the termination of the lease.

The fact that the demised premises continued to be used by Azar to store some stock and material is not determinative of the issue. The fact is that the store was not open to the public. Patrons were invited across the street to the new location. The store was closed and thus vacated for the purposes intended. Azar attempted to remove the good will from the demised premises to his new store.

The comments of Roscoe, J., as she then was in **Queen Square Development Ltd. v. Financial Collection Agencies Ltd.** (1989), 94 N.S.R. (2d) 229 are of assistance. She wrote at p. 234:

> "**Black's Law Dictionary** (Revised 4th Ed.) defines the relevant words as follows:
>
> > 'Vacant. Empty; unoccupied; ...Deprived of contents, without inanimate objects. It implies entire abandonment, nonoccupancy for any purpose.
> >
> > Unoccupied. Within fire policy exempting insurer from liability in case dwelling is 'unoccupied', means when it is not used as a residence, when it is no longer used for the accustomed and ordinary purposes of a dwelling or place of abode, or when it is not the place of usual return and habitual stoppage. ... Hence a mere temporary absence of occupants of dwelling house from such premises, with intention to return thereto does

> not render dwelling 'unoccupied'.
>
> Desert. To leave or quit with an intention to cause a permanent separation.
>
> Abandon. To desert, surrender, forsake, or cede. To relinquish or give up with intent of never again resuming one's right or interest. ... It includes the intention, and also the external act by which it is carried into effect.'
>
> 20. The plaintiff argues that by ceasing to operate its business in the premises and removing all its furniture and equipment that was useful, the defendant has fallen within the meaning of these words. The defendant, on the other hand, says that by leaving some of its furniture in the premises, maintaining keys to the premises, and periodically inspecting the premises, it has not been breached this term of the lease.
>
> 21. I find that by moving its business to Dartmouth and leaving only furniture which it later determined had no value, the defendant left the premises, or at least a substantial part thereof, vacant and unoccupied and, therefore, was in breach of its covenant as a tenant. It follows that the landlord was entitled to re-enter the property and terminate the lease and is, therefore, now entitled to three months additional rent."

Although Roscoe, J. had to consider the word "vacant" and the relevant words in clause 12 are "shall be vacated and remain occupied" her decision is otherwise apt.

The leased premises were vacated within the terms and concepts of the agreement and lease when Azar left those premises and moved to his new store about three months prior to the expiration of the lease.

In respect to the question of good will the trial judge commented in part:

> "The good will which Azar purchased in 1982 was the right and ability to be able to walk into the store, fully stocked and running, with a certain number of reliable customers ready and willing to continue to do business at that store. Azar, by correspondence from his solicitor, gave Laba the same opportunity. If Laba had been cooperative with Azar at the time of the

> letters of October 22, 1991 and November 26, 1991, he had the opportunity to do exactly what Azar had done ten years earlier. Azar, through his solicitor, gave every indication he intended to co-operate with Laba."

The trial judge continued:

> "The Agreement and lease both contemplate the 'repurchase' of the good will and equipment. That word contemplates a further transaction. It did not contemplate merely the repayment of the sum of $30,000. But Azar, by his correspondence of October 22 and November 26, 1991, demonstrated that he was ready, willing and able to complete the repurchase contemplated."

The fact that, as the trial judge said "Azar, by correspondence from his solicitor, gave Laba the same opportunity" is not determinative of the issue. That "opportunity" only took effect with Azar vacating the premises prior to the termination of the lease. Azar had no right to vacate the premises prior to that time. As at the date of the termination of the lease, Laba, as did Azar, should have been "able to walk into the store, fully stocked and running, with a certain number of reliable customers ready and willing to continue to do business at that store".

Apparently the trial judge relied upon the correspondence from Azar's solicitor in reaching his conclusions. He should not have done so. Both counsel agreed, before us, that the two letters are irrelevant. In essence, in this respect, they invite an early termination of the lease. However, the obligation of Azar under the terms of the agreement and lease remained. The "trigger" date was that of the termination date of the least not the unilateral date (suggested) by Azar.

I would allow the appeal. Azar breached the terms of the agreement and lease by leaving the leased premises vacated and unoccupied for a period in excess of 15 days. Laba was not obligated to accept Azar's invitation to take possession of the premises prior to the termination of the lease nor was he obligated to repurchase the good will prior to that time.

By vacating the premises prior to the date of the termination of the lease and moving to new premises in the manner he did, no good will remained for Laba to repurchase as contemplated in the agreement and lease. It follows that the appellants are not obligated to pay to the respondents any amount for repurchase of good will.

Under the agreement the appellants sold certain equipment and improvements to the respondents. The evidence discloses that some of this remained in the premises at the time that the appellants took possession, that is, January 6, 1992. Counsel informed this court that some was of no value and the respondents disposed of it. The appellants should pay to the respondents the value of the equipment and improvements as of January 6, 1992. If the parties are unable to agree upon that value then I would remit the matter to the trial judge for his assessment of that amount.

The respondents should return to the appellants the sum of $27,532.22 paid by the appellants to the respondents in accordance with the trial judge's decision and the order thereunder.

The respondents should pay to the appellants rent for the demised premises from January 6, 1992 to March 15, 1992 at the rate of $1,712 per month for a total of $5136.00.

I would award costs to the appellants at trial in the amount of $3,000.00 plus disbursements and on appeal at $1200.00 plus disbursements.

J.A.

Concurred in:

Chipman, J.A.

Freeman, J.A.

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C.A. No. 02827

NOVA SCOTIA COURT OF APPEAL

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- and -	)	
PHOENICIA FOODS LIMITED and MOUAWAD AZAR	)	