SUPREME COURT OF NOVA SCOTIA
Citation: Toulany v. Raidan, 2013 NSSC 180

Date:20130613
Docket: Hfx No. 397848A
Registry: Halifax

Between:

Nabil Toulany

Appellant

v.

Raidan Raidan and Ferial Yehya
Salim Allahham

Respondents

Judge: The Honourable Justice Patrick J. Duncan

Heard: February 11, 2013, in Halifax, Nova Scotia

Counsel: Wayne Francis, for the Appellant

Lisanne Jacklin, for the Respondents, Raidan Raidan and Ferial Yehya

Mr. Salim Allahham, Respondent, self-represented

By the Court:

Introduction

[1] The owner of a commercial property appeals against the decision of a Small Claims Court Adjudicator which dismissed his claims against former tenants. He also alleges errors by the Adjudicator in making awards of damages against him and in favour of those same former tenants.

Background

[2] The appellant, Nabil Toulany, is the owner of a building in Lake Echo, Nova Scotia. For many years he operated a convenience store and pizza take out on the ground floor of the building. He lives upstairs.

[3] In April 2006, Mr. Toulany sold the pizza and the convenience store businesses to the respondents, Raidan Raidan and Ferial Yehya, for the sum of $40,000. These parties also entered into a lease of the ground floor of the building that housed these businesses. The lease was for a term of five years at a monthly rent of $2,000.

[4] In October 2010, Mr. Raidan sold the businesses to the respondent, Salim Allahham who, as part of the transaction, also entered into a sublet of the premises.

[5] Subsequently, a dispute arose between Mr. Toulany and Mr. Allahham as a result of Mr. Allahham's allegation that Mr. Toulany was using the tenant's propane supply in parts of the building occupied by Mr. Toulany. Mr. Allahham wanted to be compensated for this.

[6] In February, 2011 Mr. Toulany issued a Notice to Quit the premises by March 5, 2010 on the basis that Mr. Allahham was in possession without his consent, owed him rent and allowed the premises to deteriorate. On March 9, 2010 a Solicitor's letter was sent to the respondent Allahham demanding that he vacate the premises on March 11, 2010. It cited Mr. Allahham's "continued failure to pay outstanding rent and maintenance expenses and to maintain the premises in a safe condition." On March 11, Mr. Toulany took possession of the premises and locked out Mr. Allahham.

[7] The appellant alleges that the premises were left in a serious state of disrepair and unable to be leased out in that state. Over the ensuing months, Mr. Toulany undertook renovations to the premises and in October, 2010 leased them to a new tenant.

[8] Arising from these events, a series of claims were initiated in Small Claims Court. Mr. Toulany sought damages for lost rent and repair of damages to the premises. Mr. Allahham claimed damages arising from an alleged breach of the lease by the landlord for wrongfully evicting him. He also claimed against Mr. Raidan and Ms. Yehya for alleged losses suffered in the sub-let. Mr. Raidan and Ms. Yehya made claims against Mr. Toulany.

[9] The matter was heard in Small Claims Court over four hearing days, followed by a decision of May 15, 2012 in which the Adjudicator held:

1. Mr. Toulany wrongfully terminated the lease and so his claim was dismissed.

2. Mr. Allahham's claim against Mr. Raidan and Ms. Yehya alleging losses from the sub-let agreement were dismissed as "Mr. Allahham suffered no loss".

3. Mr. Toulany was ordered to pay Mr. Raidan the sum of $500 plus costs of $182.94 for a total of $682.94. The principal amount was ordered to compensate him for propane that Mr. Raidan paid for but which Mr. Toulany used.

4. A further claim of Mr. Raidan's against Mr. Toulany, alleging damages from a diminishment of the area of the rented premises, was dismissed.

5. Mr. Toulany was ordered to pay Mr. Allahham the sum of $25,000 together with interest and costs for a total of $27,182.94 intended to compensate Mr. Allahham for the destruction of his business and his investment by reason of the wrongful eviction.

Grounds of Appeal

[10] On this appeal Mr. Toulany acknowledged that the original lease as between Mr. Toulany and Mr. Raidan and Ms. Yehya was validly assigned to Mr. Allahham.

[11] Mr. Toulany appeals alleging that the Adjudicator erred in law by ruling that:

1. The tenants were not in default of the lease as of March 11, 2010;

2. Even if the tenants were in default, they were entitled to notice of such default and an opportunity to rectify the default of the terms of the lease before re-entry was permitted;

3. The landlord did not have the right to re-enter the premises on March 11, 2010 under the terms of the lease;

4. Actions taken by the landlord amounted to an implied waiver of his right to re-enter under the terms of the lease;

5. Mr. Toulany should not be awarded damages for the tenant's' default;

6. Mr. Toulany owed Mr. Raidan and Ms. Yehya damages for use of the propane;

7. Mr. Toulany was liable to Mr. Allahham in damages for the closure of his business when evicted.

Standard of Review

[12] The statutory basis upon which an appeal may be advanced is found in the **Small Claims Court Act** R.S.N.S. 1989 c. 430:

> 32 (1) A party to proceedings before the Court may appeal to the Supreme Court from an order or determination of an Adjudicator on the ground of
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> (a) jurisdictional error;
>
> (b) error of law; or

> (c) failure to follow the requirements of natural justice,
>
> by filing with the prothonotary of the Supreme Court a notice of appeal.

[13] In this case, the basis of the appeal is an alleged error in law.

[14] Saunders J. (as he then was), writing in *Brett Motors Leasing Ltd. v. Welsford* (1999) 181 NSR (2d) (NSSC) 76 considered the scope of what constituted an "error of law":

> 14 One should bear in mind that the jurisdiction of this Court is confined to questions of law which must rest upon findings of fact as found by the Adjudicator. I do not have the authority to go outside the facts as found by the Adjudicator and determine from the evidence my own findings of fact. "Error of law" is not defined but precedent offers useful guidance as to where a superior court will intervene to redress reversible error. Examples would include where a statute has been misinterpreted; or when a party has been denied the benefit of statutory provisions under legislation pertaining to the case; or where there has been a clear error on the part of the Adjudicator in the interpretation of documents or other evidence; or where the Adjudicator has failed to appreciate a valid legal defence; or where there is no evidence to support the conclusions reached; or where the Adjudicator has clearly misapplied the evidence in material respects thereby producing an unjust result; or where the Adjudicator has failed to apply the appropriate legal principles to the proven facts. In such instances this Court has intervened either to overturn the decision or to impose some other remedy, such as remitting the case for further consideration.

[15] The Supreme Court of Canada distinguished questions of law, of fact and of mixed fact and law in the following terms, as set out by Iaccobucci J. in *Canada*

(Director of Investigation Branch and Research) v. Southam Inc. [1997] 1 S.C.R. 748:

> 35 ... Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what "negligence" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact. I recognize, however, that the distinction between law on the one hand and mixed law and fact on the other is difficult. On occasion, what appears to be mixed law and fact turns out to be law, or vice versa.

[16] Determinations of credibility and the weight to attach to the evidence are not questions of law. That findings of fact are accorded a high degree of deference was made clear in *Davison et al v. Nova Scotia Government Employees Union* 2005 NSCA 51:

> 61 Findings of fact will not be reversed on appeal unless the trial judge made a palpable and overriding error. The same degree of deference is paid to inferences drawn from the evidence and to all of the trial judge's findings whether or not they are based on findings of credibility: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, per Iacobucci and Major, JJ. at paras. 10 and 23 to 25.

> 62 The "palpable and overriding error" standard underlines that a high degree of deference is paid on appeal to findings of fact at trial. An error is palpable if it is one that is plainly seen or clear. An error is overriding if, in the context of the whole case, it is so serious as to be determinative in the assessment of the balance

> of probabilities with respect to that factual issue: see *Housen v. Nikolaisen*, supra, at paras. 1 to 5 and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at paras. 78 and 80. Thus, not every misapprehension of the evidence or every error of fact by the trial judge justifies appellate intervention. The error must not only be clear, but "overriding and determinative."

[17] The point was re-enforced by the Nova Scotia Court of Appeal in *McNaughton v. Ward* 2007 NSCA 8, which held:

> 34 While the appellant casts all of the grounds of appeal as errors "in law," the first three are, with respect, conclusions that derive from the trial judge's factual findings, assessment of the witnesses, and evaluation of the evidence. These are functions well within the jurisdiction of the trial judge, who enjoys a significant advantage in seeing and hearing the witnesses first hand. Such determinations draw a high degree of deference and will not be disturbed on appeal absent palpable and overriding error. As directed in such cases as *Housen, supra*, and *H.L. v. Canada (Attorney General)*, 2005 SCC 25, "palpable" refers to a mistake that is clear, in other words, plain to see; whereas "overriding" is an error that is shown to have affected the result. Both elements must be demonstrated. We, sitting as an appellate court, will not interfere with a trial judge's findings of fact unless we can plainly discern the imputed error, and the mistake is such that it discredits the result.

[18] I will add that an appeal against the decision of a Small Claims Court Adjudicator is further restricted by the absence of a record of the testimony given in the hearing.

[19] It is within this legal framework that the court must consider the appeal of the Adjudicator's decision. A court must ask whether, in light of the proven facts, the Adjudicator applied the appropriate legal principles.

Interpretation of the Contract

[20] The principal arguments underlying this appeal are based upon contractual interpretation.

[21] Commercial leases are different from residential leases. In Nova Scotia, unlike other provinces, there is no legislation that provides definitions and instruments for the interpretation of a commercial lease. For this reason I must be guided by the common law principles with respect to the interpretation of contracts as I consider this particular lease.

[22] In *Canada (Attorney General) v. Rostrust Investments Inc*. 2010 ONSC 3986 Polowin J., reviewed some general legal principles to follow in the interpretation of contracts:

[39] I turn now to the general legal principles applicable when interpreting a contract. These principles were summarized in the decision of the Ontario Court of Appeal in *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, [2007] O.J. No. 1083 (Ont. C.A.). The Court of Appeal held at paragraph 24, that a commercial contract is to be interpreted as follows

> (a) 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;
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> (b) by determining the intention of the parties in accordance with the language they have used in the written document and based upon the "cardinal presumption" that they have intended what they have said;
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> (c) with regard to objective evidence of the factual matrix underlying the negotiation of the contract, but without reference to the subjective intention of the parties; and (to the extent there is any ambiguity in the contract),
>
> (d) in a fashion that accords with sound commercial principles and good business sense, and that avoid a commercial absurdity.

[40] Thus, to the extent that it is possible to do so, a contract should be construed as a whole and effect should be given to all of its provisions. Further, its provisions should be read, not as standing alone, but in light of the contract as a whole and the other provisions thereof (see *Scanlon v. Castlepoint Development Corp*. [1992] O.J. No. 2692 (Ont. C.A.) at para. 89. In addition, it is a cardinal rule of the construction of contracts that the various parts of the contract are to be interpreted in the context of the intentions of the parties as evident from the contract as a whole (see *B.C. Checo International Ltd. v. British Columbia Hydro and Power Authority*, 1993 CanLII 145 (SCC), [1993] 1 S.C.R. 12 (S.C.C.) at para. 9). The court's aim is to advance the intention of the parties at the time they entered into the contract. (See *Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.*, 1979 CanLII 10 (SCC), [1980] 1 S.C.R. 888 (S.C.C.) at page 10). There should not be an ex post facto reconstruction of intention.

The issue of intention was considered in the case of *Toronto-Dominion Bank v. Leigh Instruments Limited (Trustee of)*, [1998] O.J. No. 2637 (Ont. Gen. Div.); aff'd 1999 CanLII 3778 (ON CA), (1999), 45 O.R. (3d) 417 (C.A.). Winkler J., as he then was, stated the following at paragraphs 403-405, 407 410:

> PRINCIPLES OF CONTRACTUAL INTERPRETATION
>
> 403 The aim of the court, in construing a written agreement, is to determine the intentions of the parties to the agreement, and in this regard, the cardinal presumption is that the parties have intended what they have said. Their words must be construed as they stand. see: **Chitty on Contracts** Volume 1, General Principles, 27th ed. (1994) at 580.
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> 404 Where the agreement has been reduced to writing, the parol evidence rule operates to prohibit the introduction of extrinsic evidence to vary the written contract. This rule of interpretation is enunciated in G.H.L. Fridman, **The Law of Contract in Canada**, 3rd ed. (Toronto: Carswell, 1994) at app. 455-456:
>
> > The fundamental rule is that if the language of the written contract is clear and unambiguous, then no extrinsic parol evidence may be admitted to alter, vary, or interpret in any way the words used in the writing.
>
> see also: *Hawrish v. Bank of Montreal*, 1969 CanLII 2 (SCC) [1969] S.C.R. 515 per Judson J.
>
> 405 This is consistent with the principle that where a document purports on its face to be the final and conclusive expression of the parties' agreement, the document will be taken to be a reliable record of the parties' latest agreement, and evidence of the negotiations leading up to it will not be admissible ...

407 The court need not be confined to a strict, literal interpretation of the language of the document however, and may admit evidence of the "factual matrix" or circumstances surrounding the conclusion of the agreement as an aid in interpretation. ...

408 The Supreme Court of Canada has adopted the notion that a court may look at evidence of the surrounding circumstances when construing a document. In *Hill v. Nova Scotia (Attorney General)*, 1997 CanLII 401 (SCC), [1997] 1 S.C.R. 69, the court cited with approval the dicta of LaForest J. (as he then was), in *White, Fluhman and Eddy v. Central Trust Co. and Smith Estate* (1984), 54 N.B.R. (2d) 293 at 310-311:

> What the statement quoted means is that in determining what was contemplated by the parties, the words used in a document need not be looked at in a vacuum. The specific context in which a document was executed may well assist in understanding the words used. It is perfectly proper, and indeed may be necessary, to look at the surrounding circumstances in order to ascertain what the parties were really contracting about.

409 From these authorities can be gleaned certain principles which should guide the court in interpreting an agreement. The document should be looked at as a whole, with each contractual term considered in the context of the entire document. See: G.H.L. Fridman, *The Law of Contract in Canada*, 3rd ed. (Toronto: Carswell, 1994) at 469. The court should make every effort to construe the document on its face, without regard to extrinsic evidence.

410 Where an agreement is clear and unambiguous on its face, the parol evidence rule operates to prohibit admission of evidence to alter or vary the written terms of the contract. However, the court may admit evidence of the surrounding circumstances, including evidence of the commercial purpose of the contract, the genesis of the transaction, the background, the context, and the market in

> which the parties were operating. In this regard, evidence to be admitted must be objective in the sense of what reasonable persons in the position of the parties would have had in mind, rather than subjective evidence of the parties' actual intentions.

Analysis

[23] The resolution of this matter turns on the meaning to be given to Section 8.02 of the lease entered into by the appellant with the respondents Raidan and Yehya, and later assigned to Mr. Allahham. That section provides as follows:

> 8.02 It is hereby expressly agreed by the Landlord and the Tenant as follows:
>
> a) If and whenever the Rent hereby reserved, or any part thereof, shall be unpaid for five days after any of the days on which the same ought to have been paid, although no formal demand shall have been made therefore, or
>
> b) in the case of the breach or nonperformance of any of the covenants, agreements, rules and regulations herein contained on the part of the Tenant to be kept, observed or performed, …
>
> then, and in any such case and without prejudice to the Landlord's general remedies under the law;
>
> (e) the then current month's rent and the next ensuing six months' Rent shall immediately become due and payable.

> f) it shall be lawful for the Landlord at any time thereafter to enter into and upon the Demised Premises or any part thereof in the name of the whole by force, and repossess the Demised Premises and hold the Tenant's property in the Demised Premises as security for any such default and the Landlord may relet or terminate this Lease anything herein contained to the contrary notwithstanding.

[24] Section 2.03 of the Lease required rent of $2000 to be paid by the tenant to the landlord on the first day of each month. The Adjudicator found that no rent was paid for March of 2010.

[25] Section 8.02 appears clear and unambiguous on its face. No extrinsic evidence was adduced which could lead the Adjudicator to vary the plain and unambiguous meaning of this section. If rent is not paid then the landlord has a right of re-entry, and the payment provided for in 8.02 (e) of the lease becomes due and payable by the tenant.

[26] When, on March 11, Mr. Toulany re-entered the property and took control, the tenant was already in default in the requirement to pay the rent. Under the lease this default gave rise to a right of re-entry by the landlord and put in effect the payment clause set out in Section 8.02 (e). The Adjudicator therefore erred in law in finding that the landlord, Mr. Toulany, wrongfully terminated the lease.

[27] The Adjudicator found that even if the landlord had a right of re-entry under the lease, he had waived this right. In support of his conclusion the Adjudicator pointed to a settlement reached in February, 2010 between Mr. Toulany and Mr. Allahham in which Mr. Toulany agreed to pay $600.00 for his unauthorized propane use.

[28] The defence of waiver operates when a party to an agreement affirms the contract in the face of the knowledge of breach by the other party. It requires the party to act in a manner that is inconsistent with that party's strict legal rights when it first had the opportunity to do so. In this case that would have been relevant if Mr. Toulany accepted rent following the failure by Mr. Allahham to pay the rent due for March. That did not occur.

[29] The settlement of the propane claim is irrelevant to the issue of waiver. Mr. Toulany was not waiving any breaches by Mr. Allahham. He was paying for his unauthorized personal use of propane that was paid for by Mr. Allahham. The defence of waiver has no application to these facts. In concluding that waiver did apply, the Adjudicator erred in law.

[30] If follows that the award of damages to Mr. Allahham arising from the wrongful termination of the lease must be vacated.

[31] I find no basis upon which to interfere with the Adjudicator's findings of fact, and in particular:

1. that the December 2009 rent was paid;

2. that the February 2010 rent was paid;

3. that the Appellant owed Raidan and Yehya $500.00 for propane used by him but paid for by them;

4. that Mr. Allahham did not cause damage to the premises or allow it to deteriorate and was not responsible for post re-entry renovation costs.

Conclusion

[32] I conclude that the Adjudicator erred in law in deciding that:

1. The tenants were not in default of the lease on March 10, 2010.

2. The tenants were entitled to Notice of Default and an opportunity to rectify that default, prior to the landlord having the right to re-enter the leased premises.

3. The landlord did not have the right to re-enter the premises on March 11, 2010.

4. The landlord's conduct implied a waiver of his right to re-enter the premises.

5. The landlord was not entitled to damages for the tenant's default under the terms of the lease.

6. The tenant Mr. Allahham was entitled to damages for arising from an alleged unlawful re-entry to the premises by the landlord.

[33] I find no error of law in the Adjudicator's decision requiring the appellant to pay the sum of $500 to the respondents Raidan and Yehya.

[34] In consequence of these conclusions I direct the following:

1. Salim Allahham will pay Nabil Toulany the sum of $14,000 together with interest thereon at the rate of 5% per annum from March 2010 to the present, in accordance with Section 9.01 of the lease and as provided for by Section 8.02 (e) of the lease.

2. Mr. Allahham shall pay to Mr. Toulany his disbursements of $893.41, plus court filing fees.

3. The order that Nabil Toulany pay $27,182.94 to Salim Allahham is vacated.

4. The decision requiring Nabil Toulany to pay $682.94 to the respondents Raidan Raidan and Ferial Yehya is affirmed.

J.