IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Forbes Leasing Ltd. v. MacKenzie Auto Sales Ltd., 2004 NSSC 250

Date: 20041126
Docket: SH 165513
Registry: Halifax

Between:

Forbes Leasing Limited and
2365174 Nova Scotia Limited

Plaintiffs

v.

MacKenzie Auto Sales Limited

Defendant

DECISION

Judge: The Honourable Justice Glen G. McDougall

Heard: November 1, 2, 3 and 4, 2004 in Halifax, Nova Scotia

Written Decision: December 1, 2004

Counsel: Douglas J. Livingstone, for the plaintiffs
Steven G. Zatzman, for the defendant

By the Court: (Orally)

[1] This is an action brought on behalf of the plaintiffs, Forbes Leasing Limited ("Forbes") and 2365174 Nova Scotia Limited ("2365174") for damages for breach of

contract and also damages for intentional interference, or alternatively, negligent interference in its' business relations and operations.

[2] In addition to general and special damages, the plaintiffs also seek punitive, exemplary or aggravated damages, prejudgment interest and costs.

[3] Finally, the plaintiffs seek a declaration that the replacement of the existing new car dealership with a used car business and a collision repair business either: (1) does not constitute a change in use as provided for in the mortgage given to the defendant, MacKenzie Auto Sales Limited ("MacKenzie"), by the plaintiff, Forbes, or, alternatively; (2) that if the Court finds that the proposed change is a change of use then MacKenzie's refusal to give consent to the change is unreasonable.

[4] MacKenzie maintains that its refusal to give consent to the proposed change in use of the mortgaged premises was done to protect its security and, as such, is reasonable. It further denies interfering with the plaintiffs' business operations, either intentionally or negligently, and especially in respect to 2365174's attempts to sell the Dartmouth Hyundai dealership.

[5] The defendant asks that this action be dismissed with costs.

SUMMARY OF THE FACTS:

[6] The plaintiff, Forbes, is the owner of the land and buildings at 308 Windmill Road, Dartmouth, Nova Scotia (the "premises").

[7] The plaintiff, 2365174, is the owner of the Hyundai dealership (Dartmouth Hyundai) which operates from the premises.

[8] Both Forbes and 2365174 are owned by a holding company, Forbes Group Limited (formerly EFESCO Capital Limited). Mr. Patrick Forbes is the president of Forbes Group Limited. He is also the dealer principal for Dartmouth Hyundai.

[9] Mr. Forbes is well known in the automotive retail/leasing business throughout Halifax Regional Municipality. Over the years he has owned and operated a number of new and used automobile dealerships.

[10] Mr. Forbes purchased Dartmouth Hyundai on December 30, 1994. It was purchased from the defendant, MacKenzie.

[11] Prior to the actual closing, MacKenzie entered into an agreement of purchase and sale (the "agreement") with EFESCO Capital Limited (now Forbes Group Limited). This agreement is dated 20 October, 1994. It provided for the sale of the premises as well as the assets and goodwill of the business. Business is defined in clause 1(b) of the agreement:

> "Business" has the meaning ascribed thereto in the first recital to this Agreement;

The first recital in the agreement states:

> **WHEREAS** the Vendor carries on the business of a Hyundai car dealership at 308 Windmill Road, Dartmouth, Nova Scotia and owns the land and buildings at Windmill Road, Dartmouth, Nova Scotia where the business of the Vendor is carried on.

[12] Clause 3(a) of the agreement stipulated that the purchase price for the lands and building was "*...$1,100,000.00 of which the amount of ... $660,000.00 is allocable to*

the plant, buildings, structures, erections, improvements, appurtenances and fixtures situate on or forming part thereof;" Clause 5 of the agreement described the manner in which Forbes Group Limited would pay the purchase price. In particular, clause 5(1)(c)(i) and (ii) deal with payment for the land and premises and state as follows:

> (5) (1) *Payment of Purchase Price.* The Purchase Price for the Purchased Assets shall be paid and satisfied by the Purchase as follows:
>
> (c) by payment for the lands and premises as follows:
>
> (i) Two Hundred Thousand Dollars ($200,000.00) in cash or certified cheque at the Time of Closing;
>
> (ii) (a) by the execution and delivery of a first mortgage over the lands and premises in the amount of Nine Hundred Thousand Dollars ($900,000.00) (subject to adjustments as provided in paragraph 11 hereof) over a five (5) year term, twenty (20) year amortization, at an interest rate of eleven percent (11%) per annum, compounded semi-annually, not in advance, prepayable after three (3) years upon payment of the greater of three (3) months bonus interest or payment of an interest differential to current Royal Bank of Canada five (5) year mortgage rates on the amount prepaid. Said

mortgage shall not be renewable, except as provided for elsewhere herein. Said mortgage shall be guaranteed by any party to whom the Purchaser sells, assigns or conveys the business. Said mortgage shall, at the option of the Vendor, be immediately due and payable in full in the event the Purchaser assigns or sells the lands;

(b) **Provided However**, if sixty-five percent (65%) of the appraised value of the lands and premises for purposes of refinancing after the conclusion of the original five (5) year term does not exceed the payout balance of the said mortgage at the conclusion of the five year term the Vendor agrees to hold a second mortgage on amortization period of fifteen (15) years, for a further term of five (5) years, in an amount equal to the difference between sixty-five percent (65%) of the then appraised value and the payout balance of the said mortgage at the conclusion of the initial five year term, to the effect that the total of the Purchaser's new first mortgage and the mortgage to the Vendor shall not

exceed the said payout balance at the end of the original five (5) year term;

(c) **<u>Further Provided</u>**, that if at the conclusion of the five (5) year term the Purchaser is unable to obtain mortgage financing due to an inability to obtain a satisfactory environmental report respecting soil contamination not caused after the closing date, the Vendor shall renew the said mortgage at the then current rate, within a fifteen (15) year amortization period for a further five (5) year term;

(d) **<u>Further Provided</u>**, that if at the conclusion of the original five (5) year term the Purchaser is unable to obtain mortgage financing due to a title marketability or survey problem related to the right-of-way through the lands, the Vendor shall, at the Vendor's option, either quiet the title at its expense or renew the said mortgage at a then current rate on the same terms, with a fifteen (15) year amortization period for a further five (5) year term;

(e) **<u>Further Provided</u>**, that if, at the expiration of a second five (5) year term of the said Mortgage, if any, the

survey/title or said contamination problems, if any, as referred to in clauses 5(c)(ii)(c) and (d), or any one of them, are or remain unresolved, the Vendor shall at his option and expense, either resolve the problem or renew the mortgage for a further term of five (5) years on the same terms and conditions, save the rate which shall be the then current rate for five year terms and the amortization period which will be ten (10) years;

(f) **Further Provided**, that if, at the expiration of a third five (5) year term of the said Mortgage, if any, the survey/title or said contamination problems, if any, as referred to in clauses 5(c)(ii)(c) and (d), or any one of them, are or remain unresolved, the Vendor shall at his option and expense, either resolve the problem or renew the mortgage for a further term of five (5) years on the same terms and conditions, save the rate which shall be the then current rate for five year terms and the amortization period which will be five (5) years;

[13] The closing of the transaction took place on the 30th day of December, 1994. In accordance with clause 5(c)(ii)(a) of the agreement, Forbes Group Leasing Limited (now Forbes Leasing Limited) gave a mortgage of $900,000.00 to MacKenzie secured by the lands and premises at 308 Windmill Road. The mortgage was for a term of 5 years at an interest rate of 11% per annum, calculated half-yearly, not in advance. The first payment was due on the 1st day of February, 1995 and the last payment on the 1st day of January, 2000.

[14] Clause 21 of the mortgage dealt with renewal and the guarantee of the mortgage by incorporating the applicable terms and conditions of the agreement.

[15] In addition to this particular clause in the mortgage there is one other that is central to the matter in issue. Clause 14 states:

> 14. The Mortgagor covenants and agrees with the Mortgagee that the Mortgagor will not make or permit to be made any alterations or additions to the mortgaged premises **and will not change the current use of the said premises** or permit them to be used for the purpose of any other business, trade or manufacture of any description without the

> written consent of the Mortgagee, **<u>which consent shall not unreasonably be refused</u>**. [emphasis added]

[16] There were no apparent problems between the parties until just before the mortgage came up for renewal in January, 2000. Forbes attempted to re-finance and payout MacKenzie's mortgage but was unable to do so. An environmental assessment done on behalf of Forbes discovered the existence of some contamination on the premises. Re-mediation was undertaken by the property owner. The Department of the Environment was satisfied that most of the contamination had been cleaned up. The property became a managed site. There is some uncertainty as to when the environmental contamination actually occurred. MacKenzie had a Phase 1 environmental assessment done just prior to selling the property and business to Forbes and 2365174. This assessment did not identify any environmental concerns. The information in the report was shared with Mr. Patrick Forbes. He relied on this information despite being encouraged by Mr. MacKenzie to get his own environmental assessment done as part of the normal due diligence process. For his part, Mr. Forbes did not deny this but stated that since he was not required by a mortgage company to have an assessment done he decided not to incur the cost. Since

MacKenzie was prepared to take back a mortgage this could only mean that he was satisfied with the condition of the property. This was good enough for Forbes.

[17] The actual cause of the environmental damage and the timing is not a matter for this court to determine. It is only mentioned as a reason for Forbes' inability to payout the mortgage when the initial 5-year term expired. Certainly if this could have been done then there would have been no need to commence this action.

[18] In any event the parties were able to negotiate a renewal of the mortgage at a rate of interest of 9.25% per annum for 5 years, amortized over 15 years. Neither party was entirely happy with the annual interest rate but nonetheless the mortgage was renewed.

[19] At about the same time this was happening, Mr. Forbes was approached by a prospective purchaser regarding the possible sale of Dartmouth Hyundai. This same individual had previously purchased another Hyundai dealership in Halifax from Mr. Forbes. If successful in working out a deal, he intended to relocate the dealership. He knew from a conversation he had had with the Hyundai (Canada) Zone Manager that they preferred another location on Windmill Road. The prospective purchaser was

satisfied with the existing location but thought he could improve his chances of getting approval to acquire a second dealership in the Halifax Regional Municipality from Hyundai (Canada) if he could satisfy their desire to have the business relocated. Although he was aware of some problem that Mr. Forbes had with the landlord [sic, actually he should have said mortgagee, not landlord] he did not get involved in any discussions between Mr. Forbes and Mr. MacKenzie. He left that to Mr. Forbes. As a matter of fact, he never had any discussions with Mr. MacKenzie nor did Mr. MacKenzie ever try to contact him about the proposed sale of the business by Mr. Forbes. Neither was this prospective purchaser aware of any requirement to guarantee the existing mortgage between Forbes and MacKenzie.

[20] He later sweetened his offer to purchase the business by offering Mr. Forbes an additional $250,000.00 for goodwill hoping Mr. Forbes would then use this to negotiate a release of the conditions that tied him to the 308 Windmill Road location.

[21] Mr. Forbes offered to pay down the mortgage by this amount which would have reduced the principal to approximately 65% of the original mortgage. Mr. MacKenzie would have been satisfied to consent to the relocation of the Hyundai dealership to a new location and to release the guarantee in return for the guarantee of two or more

much smaller businesses (owned wholly or at least partially by the Forbes Group Limited) which Mr. Forbes proposed to move to the site provided the mortgage was paid down to 50% of the existing principal. The additional amount was estimated to be approximately $104,000.00. Mr. Forbes would not accept Mr. MacKenzie's counter-proposal.

[22] There was never any formal written offer presented to Mr. Forbes nor was Hyundai (Canada) asked to approve the transfer of the franchise. Unfortunately the verbal deal fell through due to the inability of Mr. Forbes and Mr. MacKenzie to re-negotiate the terms of the mortgage which had incorporated portions of the agreement.

[23] One other party had approached Mr. Forbes about the possibility of buying the dealership. He, too, had no desire to purchase the property at 308 Windmill Road. He had already owned another property on Windmill Road. If successful in acquiring Dartmouth Hyundai his plan was to relocate the business to this other location.

[24] This second individual required copies of financial information which were provided to him by Mr. Forbes. Since he knew Mr. MacKenzie and since he was not able to get clear answers to the questions he had put to Mr. Forbes, he decided to call

Mr. MacKenzie directly to discuss the situation. Mr. MacKenzie who was vacationing in Florida at the time did not initiate this contact. After speaking with Mr. MacKenzie and after noting from the financial statements that the business was not making much money, the prospective buyer called Mr. Forbes and told him he was no longer interested in pursuing the business.

[25] Shortly thereafter the plaintiffs commenced this action. In the Fall of 2001, the defendant was presented with a proposal to have the mortgage paid out if he agreed to waive any bonus or interest penalties and also if he agreed to forego costs of the action. Mr. MacKenzie, on behalf of the defendant, indicated his acceptance of the proposal. Unfortunately Forbes was unable to arrange the new financing. It is, therefore, left to the Court to decide.

ISSUE 1:

[26] Did the proposed relocation of the Hyundai dealership and replacement by a used car dealership and other related businesses at 308 Windmill Road constitute a change of “the current use of the said premises” as provided for in clause 14 of the mortgage?

[27] There is no definition of current use either in the agreement of purchase and sale or in the mortgage. As indicated earlier "business" was defined in the agreement of purchase and sale at section 1(b) which ascribed to it the meaning in the first recital which states:

> **WHEREAS** the Vendor carries on the business of a Hyundai car dealership at 308 Windmill Road, Dartmouth, Nova Scotia and owns the land and buildings at Windmill Road, Dartmouth, Nova Scotia where the business of the Vendor is carried on.

[28] In the case of **Manulife Bank of Canada** v. **Coulin**, [1996] 3 S.C.R. 415, Justice Iacobucci, while dissenting from the majority decision, stated at p. 418:

> ...Guarantee contracts are basically contracts, like any others, and should be construed according to the ordinary rules of contractual interpretation. The cardinal interpretive rule of contracts is that the court should give effect to the intentions of parties as expressed in their written document. The court will deviate from the plain meaning of the words only if a literal interpretation of the contractual language would lead either to an

> absurd result or to a result which is plainly repugnant to the intention of the parties....

[29] Although the mortgage does not contain a definition of "current use" it is evident from the wording of the document that current use means the business that was being carried on at the time the mortgage was made.

[30] In addition to clause 14, clause 21 of the mortgage indicates that the parties acknowledge the applicability of certain terms and conditions of the agreement of purchase and sale as it relates to the renewal of the mortgage and to the guarantee of its terms and conditions.

[31] What is more, the conduct of the parties clearly demonstrate that the changes proposed by Forbes were seen to be a change in the current use of the premises.

[32] The evidence of Mr. Forbes included an admission that the replacement of the Hyundai dealership by a used-car dealership, an auto-body shop and perhaps a vehicle leasing operation was a change in use.

[33] Three of the witnesses who gave testimony, all of whom were very familiar with the automotive industry, indicated that a new car franchise was completely different from a used-car business.

[34] A comparison of the financial statements of Dartmouth Hyundai with the three businesses Mr. Forbes proposed relocating to 308 Windmill Road also demonstrates a vast difference between the new car sales and service business and that of a used car operation and other related businesses. One of the witnesses indicated that the two types of business were as different as day and night. I agree with this comparative analogy. As such, I am satisfied that clause 14 of the mortgage required MacKenzie's consent before Forbes could change the use of the premises in the manner proposed.

ISSUE 2:

[35] Was the defendant's refusal to consent to the change in current use unreasonable?

[36] Clause 14 of the mortgage states that the mortgagee's consent to a change in the current use of the premises or to permit them to be used for the purpose of any other business, trade or manufacture of any description "shall not unreasonably be refused."

[37] The plaintiffs must establish, on the balance of probabilities, that the defendant's refusal to consent was unreasonable. The parties to the agreement of purchase and sale which led to the mortgage had the benefit of legal advice prior to entering into the agreement. They likewise had legal advice in drafting and executing the mortgage document. This is not a case of one side over-powering another. No one is arguing that they were coerced into signing an unconsionable agreement that should not be enforced.

[38] The original mortgage was for $900,000.00. The mortgagee's security was not only in the land and buildings but was also in the guarantee of 2365174 - the owner of the operating business located on the premises. The value of the premises is tied directly to the operating business. That is the reason why MacKenzie had included clause 5(1)(c)(ii)(a), a requirement that:

> ...Said mortgage shall be guaranteed by any party to whom the Purchaser sells, assigns or conveys the business.

[39] This clause goes on to state:

> ...Said mortgage shall, at the option of the Vendor, be immediately due and payable in full in the event the Purchaser assigns or sells the lands;

[40] Under the circumstances that occurred in the 5 years leading up to the first renewal of the mortgage, it was not unreasonable for MacKenzie to withhold consent to the proposed change in use of the premises. The environmental assessment indicated that the premises had been contaminated. Although it is uncertain as to when this contamination occurred I am satisfied that MacKenzie was not aware of any such contamination when the property and business were sold to the plaintiffs. He, understandably, relied on the report he had received from his own inspector indicating that the property was clean.

[41] In addition to this, Forbes proposed replacing the Hyundai dealership with several smaller businesses which collectively were not near the financial equal of Dartmouth Hyundai.

[42] MacKenzie's financial exposure under the mortgage after receiving payments for 5 years was still in excess of $800,000.00 and, although payments under the mortgage were normally made on time throughout this period, MacKenzie was perfectly within its rights under the mortgage and those clauses in the agreement that dealt with renewal and guarantee to withhold its consent. To consent to Forbes' request under the circumstances that existed at the time of renewal would have been imprudent in my opinion.

[43] The plaintiffs' action also alleged either intentional or negligent interference with its business relations. The plaintiffs are seeking damages for its inability to sell the dealership or to move it to a more viable location. They allege that the defendant directly interfered with the sale of the business to the Steele Auto Group and to a Mr. Steven Scharf.

[44] Both Robert Steele on behalf of The Steele Auto Group/Newfoundland Capital Corp. and Steven Scharf were called to testify.

[45] Mr. Steele never had any contact with Mr. MacKenzie whatsoever regarding his interest in purchasing the business from 2365174. He also made it clear that he

intended to move the dealership to another location. He had no desire to purchase the premises nor was he even aware of the requirement to guarantee the existing mortgage should the business be sold or assigned by 2365174. The reason the sale did not happen was due to Forbes' inability to re-negotiate the terms of the mortgage with MacKenzie. It certainly was not due to any interference, either intentional or negligent, by the defendant.

[46] There was contact, however, between Mr. MacKenzie and Mr. Scharf but this was initiated by Mr. Scharf. There was nothing to prevent Mr. MacKenzie from talking to Mr. Scharf nor was the information provided to him by Mr. MacKenzie intended to undermine the potential sale of the business by 2365174. Mr. Scharf too wanted to relocate the business to another site which he owned on Windmill Road if he was successful in negotiating a deal with Mr. Forbes. He did not want to purchase 308 Windmill Road nor did he want to guarantee the existing mortgage. And not to be forgotten was Mr. Scharf's assertion that the business was not making much money at the time and this was a contributing factor in his decision not to pursue the matter any further. I find that Mr. MacKenzie did nothing to interfere in Mr. Forbes' very preliminary discussions with Mr. Scharf regarding the sale of the business.

[47] The only thing Mr. MacKenzie did was to send a letter to Hyundai (Canada) and to their Atlantic Zone office in Halifax notifying them of his intention to protect his security in the event the business was sold or moved without first complying with the terms and conditions of the mortgage. The plaintiffs tried to characterize this as a threat of legal action and an attempt to influence Hyundai (Canada) whose consent was required in order to sell or transfer the dealership to new owners. The letter was not sent to anyone other than Hyundai. Apparently Hyundai made a copy available to Forbes but no prospective buyers were ever privy to it.

[48] I do not accept the plaintiffs' characterization of this letter as threatening. It was simply a statement of MacKenzie's position regarding any pending or potential sale of the business. It was not a threat to sue. It was simply notification that before any sale or transfer of the business could take place it would have to comply with the terms and conditions in the mortgage between Forbes/2365174 and MacKenzie, failing which MacKenzie would have no choice but to commence legal proceedings to protect its interests. I do not see this as threatening nor is it an interference in the plaintiffs' business relations with others.

[49] I therefore find that there has been no interference, either intentional or negligent, by MacKenzie in the business relations of either 2365174 or Forbes. The actions taken by the defendant were prudent and intended to protect its security under the mortgage. The damages claimed by the plaintiffs cannot be attributed to any improper conduct on the part of the defendant.

[50] This action is therefore dismissed in its entirety with costs to the defendant. If counsel are unable to agree on an amount for costs, arrangements will have to be made for further written and/or oral submissions on this issue.

[51] I will leave it to counsel to prepare the appropriate order dismissing the action.

J.