IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Behan v. Strickland, 2006 NSSM 44

2006 Claim No. 269139

Date: 20061109

BETWEEN:

Name: **Trevor Behan** **Claimant**

- and -

Name: **Gayleen Strickland & Gayleen's Hair Boutique** **Defendant**

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on March 9, 2007. This decision replaces the previously distributed decision.

Appearances:
Claimant: Trevor Behan
Defendant: June Rudderham

D E C I S I O N

[1] This claim came before the Court on September 12, 2006, and the evidence was heard and completed on that date. The decision was reserved at that time.

[2] The claim relates to a commercial tenancy for premises at civic 1434 St. Margaret's Bay Road, between the Claimant as Landlord and the Defendant as Tenant. There is a written Lease document dated August 1, 2003, which was entered into evidence as Exhibit C2 by the Claimant/Landlord. Similar documents are contained in the exhibit booklet (Exhibit D6) entered by the Defendant/Tenant.

[3] The commercial premises are stated in Article 1.0 to contain 1,470 square feet and to be part of a building situate at 1434 St. Margaret's Bay Road. The Lease document also refers to a Schedule D floor plan of the Demised Premises. There is in fact no Schedule D attached to the written Lease. As well, there is reference to a Schedule B which was to contain the legal

description of the lands at 1434 St. Margaret's Bay Road but that is also not contained in the Lease document itself. Both of these points were acknowledged by the Landlord, Trevor Behan, in his testimony.

[4] I also observe that the Lease document tendered into evidence does not appear to have been actually signed by the Landlord although the Tenant's signature does appear on one of the pages.

[5] The Lease was to have been for a six year term, August 1, 2003, to August 1, 2009. The Tenant moved out on February 6, 2006, and the premises have been re-let as of May 2006. The Landlord is claiming for the rent for the four months in question. The Tenant disputes the claim and says that the actions of the Landlord, which I will refer to below, constitute a fundamental breach of the Lease and the Tenant was entitled at law to terminate the Lease. The Defendant also counterclaims for compensation for loss of income, damage to property, and contribution to the power bill.

[6] I make the preliminary observation that it was quite obvious in the evidence and the documents submitted that the relationship between these two parties was characterized by numerous disagreements, heated exchanges, and acrimony. That was a theme that underscored nearly everything that was brought up in evidence at the hearing.

[7] There was also evidence about the power connection and usage and the disconnect effected by the Claimant in August, 2004. These items pre-dated August 2005 when the primary event occurred which lead to the termination of the Lease - the removal of Ms. Strickland's sign by Mr. Behan.

[8] This removal of the sign took place in early August 2005 when Ms. Strickland was on vacation. Following the removal of the sign, Mr. Behan wrote a letter to Ms. Strickland's solicitor as follows:

August 12, 2005

Without Prejudice

Dear Mrs. Rudderham, it has come to my attention that your client was displaying a sign in the front portion of the above mentioned property without my written permission. Please inform her that to be compliance with our lease agreement, that all outside signs must be authorized by me and written permission must be given before any such signs are erected on the property. As in this case no permission was given to display such a sign and it has now been removed. Any future sign on the property erected without my written permission will also be removed. It is not my intention to cause you client any problems with regard to advertising her business on the property. A new position for the display of commercial signs is now in place on the neighbouring property, if your client wishes to display her banner between these posts she can do so only after she agrees to sign a written legal agreement controlling the shape, size, location and style of the banner she wishes to erect. Please inform me if your client wishes to proceed further with negotiations on this matter. In the meantime there will be no outside signs on the property. Regards, Trevor Behan

(This document was in Mr. Behan's exhibit book let so to the extent there might be privilege, it has been waived)

[9] The comment in Mr. Behan's letter that "*it has come to my attention that your client was displaying a sign...*" is somewhat odd in light of the fact that the sign had been there since 2002 and there cannot be any doubt that Mr. Behan was well aware of this sign. In his evidence he stated that the sign had been there for a "long time" and he acknowledged that he had not previously raised any objections to the sign up until August 2005.

[10] Ms. Strickland testified that at some point Mr. Behan had said she could keep her sign up. She also stated that the sign was something of a landmark in the community.

[11] There is no reference to this type of sign in the written Lease document entered at Exhibit C2. There is a reference in Article 4.14 to "Signage" but, as noted by Ms. Rudderham, that is limited to the signage on the outside of the Building and visible from the outside of the Building, and would not seem to apply to this situation which was a stand alone sign on the land but not in any affixed to the Building. There is a note which is in Exhibit D6, behind Tab

2, which makes a reference to the sign. It was unclear in the evidence whether this was a note made by Ms. Strickland for her own reference or whether it was something that would have been shared with or given to Mr. Behan.

[12] There is then the issue of the parking. Again, the written Lease document appears to contain no reference whatsoever to parking. However, the historical practice was that Ms. Strickland and her customers were entitled to utilize parking at the front, on the side and at the rear of the Building. This rear area, as I understood the evidence, related more to the tanning salon which had an entrance at the rear of the building. The parking on the side of the Building extended on to the adjacent lot which, is also owned by Mr. Behan. In December 2005, Mr. Behan had large boulders and other barriers put in place which had the effect of significantly restricting access to the parking previously enjoyed by the Tenant and her custmers to her beauty salon and tanning salon. At one point, it appears that the whole of the front of the property was blocked off as depicted in the photograph behind Tab 19.

[13] Mr. Behan in his testimony stated that he made sure the boulders were on civic 1436 and that he was protecting his own property at civic 1440. What is unclear about this comment is that as I review the two plans which were submitted with Exhibit C1, it does not appear to me that there is a separate property description for what is referred to as civic 1436. In other words, what is called 1436 arose as a result of a reconfiguration of the legal descriptions of what was lot 3B and lot 4B. This confusion is compounded by the fact that there is no legal description attached to the Lease that I can compare with the plan. Therefore, it seems to me that I have to proceed on the basis that all of this land in question is land owned and controlled by the Landlord, Trevor Behan.

[14] It would seem that the Landlord's position on the issue of the sign and the parking is that whatever the Tenant may have enjoyed, it was at his pleasure since there was nothing in writing on these two points. I cannot accept that proposition. The sign and the parking spaces are matters of significant, if not critical importance to a commercial tenant in a retail business such as a hair and tanning salon. If the customers and clients of these businesses cannot find

the business because there is no sign or cannot easily get parked because there are very few or no parking spots, they will not frequent the business. I note in this regard that there was evidence that many of the customers were elderly individuals and would either drive themselves or be driven to the hair/tanning salon.

[15] I also note that Mr. Behan at no point suggested, and he hardly could, that the Tenant was entitled to no parking in respect of the commercial premises. Yet, that would seem to be the logical extension of his position that since there was nothing in writing, it was at his pleasure. On the other hand, since there is nothing in writing regarding parking it is difficult to determine what is the on-the-ground extent of the rights held by the Tenant. Nevertheless, while the precise extent cannot be stated with certainly in this case, it does appear plain to me that the Tenant's parking was significantly diminished by the Landlord in December 2005.

[16] The significance of the sign issue coupled with the parking issue, brings this case, in my view, into the realm of fundamental breach. Counsel for the Tenant has provided case law including a case out of the British Columbia Court of Appeal called *Shun Cheong Holdings B.C. Ltd. v. Gold Ocean City Supermarket Ltd.* (2002), 216 D.L.R. (4th) 392 (B.C.C.A.), which involved a finding of a fundamental breach with a commercial lease. In that case, the premises in question, a grocery store, were experiencing leaks from the premises above it which were also owned by the Landlord. That finding of fundamental breach was upheld by the B.C. Court of Appeal.

[17] In the *Gold Ocean* case, there was reference to another case from the British Columbia Court of Appeal called *Wesbild Enterprises v. Pacific Stationers Ltd.* (1990), 52 B.C.L.R. (2d) 317 (B.C.C.A.). In *Wesbild*, the court found that a tenant which operated a commercial stationary and office equipment store to which easy access by delivery trucks was crucial was entitled to treat its lease at an end when the landlord made modifications that made vehicular access to the premises very difficult. Those circumstances bear on the facts in this present case where the signage and parking issues are vital to the operation of a business. Here, the purpose of the tenancy, the operation of a hair salon and tanning salon were significantly

undermined by the breach by the Landlord of the term, which I so find, to allow the signage which had been in place at the time of the lease, and to allow for reasonable parking rights. As I have already eluded to, I do not think it is necessary to determine the specific extent of the parking rights as I have already concluded that the curtailment of the parking, was significant in December 2005.

[18] I find therefore that the Tenant was entitled to treat this Lease as at an end.

[19] The letter of August 29, 2005, from Ms. Rudderham to Trevor Behan advises that her client would be vacating the premises on or before the end of February, 2006, and post-dated cheques were enclosed to cover the rent up to the end of February 2006. It appeared from the evidence that, at least to some extent, the parties treated this as the termination date. It would follow from that, that the Tenant would be obliged to pay the rent up to the end of February.

[20] The evidence, including Exhibit C3, indicates that the rent for the hair salon was paid for February but the tanning salon rent of $977.50 was not paid for February.

[21] Against that, it is my view that the Tenant is entitled to some amount for the sign rental which she incurred from August 2005 - February 2006, six months according to the evidence and submissions. The evidence showed that this amount was $161.00 a month which for the six months totals $966.00.

[22] There is also the counterclaim for the loss of income from the tanning salon in August, 2004, when Mr. Behan had the power disconnected without any notice to the Ms. Strickland. I believe she is entitled to compensation of $200.00 in regards to that incident.

[23] The net difference therefore is $188.50 which would be owing by the Landlord to the Tenant.

[24] As the success has been substantially equally divided, I will exercise my discretion and not allow any costs.

DISPOSITION

[25] It is hereby ordered that Trevor Behan pay to Gaylene Strickland the sum of $188.50

DATED at Halifax, Nova Scotia, this 9th day of November, 2006.

Michael J. O'Hara
Adjudicator

Original Court File
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