CITATION: 2052770 Ont. Ltd., v. Oriental Chef Buffet Group Inc., 2011ONSC 7520
C**OURT FILE NO.:** 09-CV-00390959-000
DATE: 20111222

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 2052770 Ontario Limited, Plaintiff

AND:

Oriental Chef Buffet Group Inc., and Zhou Qiang Lin, Defendants

BEFORE: Carole J. Brown J.

COUNSEL: *Gil Fischler,* for the Plaintiff

Qian Lin, for the Defendants

HEARD: December 15, 2011

ENDORSEMENT

[1] The Plaintiff, 2052770 Ontario Limited ("205") moves for summary judgment as against the Defendants, Oriental Chef Buffet Group Inc. ("OCBGI") and Zhou Qiang Lin ("Mr. Lin") for default by the Defendants on a 10 year commercial lease and an order dismissing the Defendants' counterclaim.

[2] The owner of the corporate defendant, OCBGI, Qian Lin, appeared on behalf of the corporate defendant, pursuant to Court Order, the defendant, Zhou Qiang Lin, the father of Qian Lin, who was present in the _____, did not have legal representation. His _____Duncan Lin, requested to make _____.

[3] The action arises from a 10 year commercial lease entered into on December 15, 2006 between the Plaintiff, 205, as landlord, the Defendant OCBGI, as tenant and Mr. Lin, as

indemnifier of the Lease Agreement for a term commencing January 1, 2007 to December 31, 2016.

The Terms of the Lease

[4] The lease clearly set forth the rights and obligations of the parties.

[5] The defendants had dismissed their layer prior to the hearing.

[6] Pursuant to the Lease, the premises were to be used for purposes of a "restaurant/family style Chinese Buffet to be operated continuously." Rent was payable on the first of each month, with the annual base rent and monthly installments set forth per year over the 10 years of the Lease. Rent, included base rent and additional rent, as set forth at clauses 4.1 and 7.3 of the Lease. At the material time, 2009, the total monthly rent owing was $29,663.79

[7] Pursuant to the Lease agreement, the landlord was entitled to re-enter the premises *inter alia*

(i) where the tenant fails to pay rent, upon giving 5 days written notice,

(ii) where the tenant fails to occupy or vacates the premises, or the landlord has reasonable cause to believe the tenant intends to vacate or abandon the premises; or

(iii) where the tenant fails to carry on business in the premises pursuant to the lease.

[8] Pursuant to the indemnity agreement, Mr. Lin was obligated to pay all rent, perform all obligations of the tenant and indemnify the landlord for any losses incurred due to the tenant's default, without notice of the tenant's default and without proceeding against the tenant first.

The Events Leading to the Re-entry and Termination of the Lease

[9] The Defendants paid their rent pursuant to the Lease through June 2009. They failed to pay their rent on July 1 as required. The Defendants admit this.

[10] The evidence indicates that the Defendants had entered into a tentative sale of the business and assignment of lease on April 5, 2009, to close May 15, 2009.

[11] The Affidavit evidence of the Plaintiff indicates that in April of 2009, Qian Lin, owner of the corporate Defendant, called the Plaintiff to advise that he had sold OCBGI. The Plaintiff reminded the Defendants that, pursuant to the Lease, an assignment of the Lease had to be approved by the Plaintiff. The Plaintiff met with the prospective purchasers and provided approval in principle to the assignment, on the condition that Mr. Zhou Qiang Lin remains as indemnifier.

[12] The Affidavit evidence of the Plaintiff indicates that the Defendant, Qian Lin, advised the Plaintiff in mid-June that the sale and assignment were not proceeding due to the purchaser's financial circumstances.

[13] The Defendant, Qian Lin, in his submissions, indicated that this was not accurate and that the closing had only been delayed. However, there was no evidence, Affidavit or otherwise, contained in the materials to support the Defendants' contention that the closing was only

delayed, rather than not proceeding. I note that, although the Defendants had legal representation regarding the sale of the business, there was no documentation provided regarding any alleged delay in the purchase or the closing date. I do not accept the Defendants' contention in this regard.

[14] The Plaintiff contacted Qian Lin on July 10 regarding the overdue rent and was advised that the restaurant had been closed since the beginning of July, that he did not intend to reopen, and that he did not have funds to pay the arrears of rent. The Plaintiff's evidence is that they entered the premises on July 11 and found food rotting in the restaurant. The Plaintiff contacted a cleaning company to clean the premises. An invoice for these services dated July 22 was in evidence. On July 11, the Plaintiff re-entered the premises, changed the locks and posted a Re-Entry Notice, dated July 11, 2009, on the door of the restaurant. The Notice stated that "Notwithstanding the change of locks…your rights as tenant continue to be recognized and you may, upon request to the landlord…re-enter the premises and continue to occupy same." The Defendants did not contact the landlord and did not exercise their rights of re-entry or pay the arrears of rent.

[15] The Defendant, Qian Lin, in submissions, denied that the Notice was posted on July 11 or that there was food spoiling in the restaurant, and stated that the Defendants were at the restaurant that day. However, there was no evidence, Affidavit or documentary, to support this contention.

[16] While the Defendants contend that they were unable to pay the July rent due to the delayed closing of the sale of the restaurant, there was again no evidence before the Court to

support this. Nor was there any evidence, Affidavit or otherwise, adduced by the Defendants to indicate whether the sale of the business could have proceeded or what happened to the prospective purchase.

[17] On July 20, the Plaintiff notified OCBGI in writing by registered mail that if the arrears were not paid, the lease would be terminated. The evidence supports this. The evidence further indicates that this registered letter was never picked up by OCBGI.

[18] The Lease was terminated on August 5 and a Notice to Terminate was sent. On August 6, the Defendants contacted the Plaintiff to indicate that the chattels in the restaurant belonged to RBC pursuant to a registered general security agreement and should be left in the restaurant.

[19] The evidence suggests that, at the material time, OCBGI was having financial difficulties. An action for payment of the outstanding account for leasehold improvements to the restaurant was commenced by the contractors as against the corporate Defendant sometime prior to June 2009, as a motion in that action was heard June 18, 2009 and default judgment obtained July 9, 2009 in the amount of $140,159.80 plus costs. As well, RBC, which held the Defendants commercial assets as security for a business loan, gave notice and subsequently sold the assets when the Defendants failed to pay the loan in the amount of approximately $129,000.

[20] The Defendants take the position that the failure to pay the rent, as well as the failure to pay, the construction company was due to the delay in closing and the lockout. However, it is clear that the lawsuit brought by the construction company for payment of amounts owing for leasehold improvements occurred before the lock-out. Further, the Defendant’s obligations under the Lease were clear. Payment of the rent each month is an obligation independent of any

sale or potential sale of the business and the failure to pay rent cannot be explained away by indicating that the sale of the business was pending nor that the sale had fallen through. I do not accept the Defendants submissions, which were unsubstantiated, that the sale had not proceeded due to the lock-out, as there was no evidence to support this contention.

[21] The corporate Defendant further maintains in its Affidavit that "it always maintained its intention to re-open the restaurant." However, the evidence indicates that, at the time of the default, it had been attempting to sell the business. I do not accept the Defendants' Affidavit evidence that it always intended to re-open the restaurant in the face of its own evidence to the contrary.

[22] The corporate Defendant further states, in its Affidavit, that the Plaintiff offered to pay the RBC loan and to pay an additional $70,000 but failed to follow through. Again, there is no evidence to substantiate this.

[23] In oral submissions at the motion, the Defendant further argued that the Plaintiff had offered to take over and/or sell the business for the corporate Defendant with consideration to be the $70,000.00. This contention was, again, not supported by any evidence and was not consistent with the Defendant's Affidavit evidence filed with the Court. Again, I do not accept the Defendant's unsubstantiated submissions.

Summary Judgment and the Jurisdiction under Rule 20

[24] The issue in this motion is whether there are any genuine issues of fact requiring a trial.

[25] The amended Rule 20.04(2) provides for the granting of summary judgment where the Court is satisfied that there is no genuine issue requiring a trial. As recently explained by Justice Frank in *Central Sun Mining Inc. v. Vector Engineering Inc.*, 2011 ONSC 1439 (CanLII):

> …the purpose of Rule 20 of the *Rules of Civil Procedure* is to dispose of actions at an early stage where it is possible to safely predict the result without a trial. The rule should be interpreted broadly so as to ensure its effectiveness in enabling parties to avoid the expense of unnecessary litigation and enabling the courts to reduce delay and increase access to justice.

[26] In determining whether there is a genuine issue requiring a trial, the motions judge must consider the evidence submitted by the parties, and has the power to weigh evidence, evaluate the credibility of the deponent and draw reasonable inferences from the evidence.

As Justice D. Brown held in *Optech Inc. v. Sharma*, 2011 ONSC 680 (CanLII):

> "…if the judge concludes that the nature of the factual dispute, assessed in light of the quality of the written evidentiary record, would enable the judge to make findings of facts with the same degree of certainty, and subject to the same requirements of the law of evidence as could be done at a "regular trial", then it strikes me that the case would be ripe for determination and final disposition on the basis of a summary judgment motion".

[27] On a summary judgment motion, the moving party has the burden of showing that the claim does not raise a genuine issue requiring a trial. Where the moving party meets that burden,

the responding party has an evidentiary burden to set out facts to demonstrate that a genuine issue requiring a trial exists. R. 20 contemplates that a complete evidentiary record will be before the motions judge. Both parties must put their "best foot forward" and produce the evidence which would be produced at trial, and cannot rely on mere allegations or the pleadings.

[28] With respect to the evidentiary onus on the responding party, the Court in *Reid v. Livingstone,* 2004 CanLII 13020, stated:

> "A responding party is not entitled to sit back and rely on the possibility that more favourable facts may develop by trial. If the respondent wishes to avoid summary judgment, it must put its best foot forward and "lead, trump, or risk losing"."

[29] To say that evidence will be forthcoming at trial is not sufficient. This includes substantiating a claim for damages with evidence of the losses: *Continental Insurance Co. v. Almassa International Inc.*, 2002 Carswell Ont. 1727, 39, C.C.L.I (3d) 129.

[30] Under Rule 20, this Court must determine whether a trial is genuinely necessary "because the issues cannot be truthfully, fairly and justly resolved without the forensic machinery of a trial": *Healey v. Lakeridge Health Corp.*, 2010 ONSC 725 (Can LII): 2011 ONSC 55 (Can LII).

[31] I have also taken into consideration the recent decision of the Ontario Court of Appeal in *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764, which has provided guidance with respect to R.20.

[32] It is the position of the moving party/Plaintiff that this is a straightforward case of a breach of a commercial lease, default in payment of rent by the tenant/Defendant, closing of the

Defendants' business which was to have been carried on continuously at the premises pursuant to the terms of the lease and termination by the Plaintiff with notice to the Defendant that damages would be claimed for losing the benefit of the lease over its unexpired term. The Defendants owe the Plaintiff for the lost rent, pursuant to the terms of the Lease and indemnity Agreement. The Plaintiff submits that there are no genuine issues requiring a trial.

[33] The Defendants counterclaim for a set off in the amount of $1,220,000 for loss of leasehold improvements occasioned by the breach of lease, $100,000 for lost profits and $830,000 for loss of the profit of the sale of the business. The Defendants submit that there are genuine issues requiring a trial. As previously indicated, there was no evidence adduced by the Defendants in support of these claims. I do not accept the Defendants submissions that the cause of their financial difficulties was the lock-out or termination of the lease.

[34] The caselaw is clear that once the moving party has established that there is no genuine issue requiring a trial, the responding party must provide evidence to support its position that there are genuine issues for trial. The responding party cannot rest solely on allegations or denials in its pleadings nor on bold, self-serving assertions in its Affidavit in support of the motion. The responding party must put its best evidentiary foot forward and "lead trump or risk losing" and must establish that there are genuine issues which show a real chance of success. The Defendants have failed to do this.

[35] I am satisfied, and find, based on the evidence before me, that there are no genuine issues raised by the claim or counterclaim which would require a trial or the forensic machinery of a

trial with respect to the Plaintiff's claim and the Defendant's counterclaim. A full appreciation of the relevant evidence and issues can be achieved by way of this summary judgment motion.

[36] I accept the Plaintiffs' evidence that the Defendants breached the terms of the Lease, discontinued business operations and, as they admitted, failed to pay rent in July and thereafter, and were accordingly in default. The terms of the Lease clearly set forth the landlords rights and obligations on default of the tenant, including termination of the Lease after 5 days notice which occurred on August 5. The Indemnity Agreement clearly sets forth the landlord's rights as against the indemnifier, Mr. Lin.

[37] I am not satisfied that there are genuine issues for the claim or counterclaim requiring a trial. The issues are clear. The Plaintiff has met its evidentiary burden. The Defendants have failed to provide evidence to establish that there are genuine issues for trial.

Damages

[38] The Plaintiff, for purposes of this Motion, is only pursuing damages for lost rent. After questioning the Plaintiff regarding the calculation of damages, counsel explained the calculation, adequately, and rounded the final rental figures down for easy calculation.

[39] The Plaintiff claims damages of in the amount of $255,347.00, comprising July 2000 rental arrears which it has rounded to $29,000.00, $322,000.00 being rent from August 2009 to December 2009 at the rounded figure of $145,000.00 and from January – June 2010 at the rounded figure of $177,000.00, less rent received from the new tenants until June 2010 in the amount of $71,205.00. These amounts were all stipulated as damages in the Lease Agreement.

[40] The Plaintiff took steps to mitigate its damages, by listing the premises for lease on July 27, 2009 and also for sale on November 27, 2009. The Plaintiff ultimately divided the 8000 sq. ft. premises into three units and was able to lease them to three tenants on March 1, 2010, July 1, 2010, and July 9, 2010.

Order

[41] Accordingly, I grant the Plaintiff's motion for summary judgment in the amount of $255,347.00, which is owed jointly and severally by the Defendants to the Plaintiff and dismiss the Defendants counterclaim.

Costs

[42] I would urge the parties to agree upon costs, failing which I would invite the parties to provide any costs submissions in writing, to be limited to three pages, including the costs outline. The submissions may be forwarded to my attention, through Judges' Administration at 361 University Avenue, within thirty days of the release of this Endorsement.

Carol J. Brown J.

Date: December 22, 2011