SUPREME COURT OF NOVA SCOTIA
Citation: ***AFG Glass Centre v. Roofing Connection,*** 2010 NSSC 108

Date: 20100325
Docket: Hfx No. 317065
Registry: Halifax

Between:

AGC Flat Glass North America Ltd., carrying on business as **AFG Glass Centre**

Applicant

v.

CCP Atlantic Specialty Products Inc., carrying on business as **The Roofing Connection**

Respondent

D E CI S I O N

Judge:	The Honourable Justice Peter Bryson
Heard:	March 17, 2010, in Halifax, Nova Scotia, in Chambers
Counsel:	Matthew Pierce, for the Applicant Andrew Trider, for the Respondent

By the Court:

[1] AFG asks the court to grant summary judgment against CCP under a sublease between the parties. CCP defends, alleging breaches of good faith and a failure to mitigate.

[2] In 1999, AFG entered into a headlease for premises at 121 Ilsley Avenue, in Dartmouth. AFG sublet the premises to CCP for a term commencing May 1, 2003 and concluding on December 30, 2007, one day prior to the expiry of the headlease. The monthly rental was less than AFG was paying under the headlease, so that AFG was losing money each month on the rental "spread" between the headlease and sublease.

[3] CCP said that it advised AFG of its intentions to construct and occupy its own building. CCP spoke to the head landlord which was agreeable to an early termination of the headlease with AFG.

[4] On March 22, 2007, the property manager for the head landlord wrote to AFG and informed AFG that CCP was constructing a new building and "will be vacating the premises at 121 Ilsley Avenue on April 31, 2007. Attached you will find an amendment letter in relation to the early termination of your lease." On the same day, the property manager forwarded a lease amendment to AFG which allowed termination of the headlease on 15 days notice. AFG did not reply and did not contact CCP regarding its intended departure. AFG's explanation for not doing so is that it did not consider early termination of the headlease to be in its interests at that time. CCP did not write to AFG about terminating its sublease. But CCP did vacate the premises.

[5] CCP moved into new premises in May of 2007. But at no time prior to September of 2007 did AFG agree to amend or terminate the headlease or sublease. They finally did so in September, and the headlease was terminated effective October 9, 2007.

[6] CCP says that the head landlord took preliminary steps to prepare CCP's premises for a new tenant. But there is no evidence before the court that CCP's premises were occupied by the head landlord, AFG or a tenant on behalf of either, prior to termination of the head lease on October 9, 2007. Certainly AFG did not accept CCP's departure as a surrender of the sublease.

[7] AFG demanded 2007 rent of $54,992.78 from CCP to October 9, 2007. Eventually CCP paid partial rent of $18,377.49.

[8] AFG seeks summary judgment for the difference.

[9] *Civil Procedure Rule* 13.04 addresses summary judgment:

> **Summary judgment on evidence**
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> **13.04 (1)** A judge who is satisfied that evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial must grant summary judgment.
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> **(2)** The judge may grant judgment for the plaintiff, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
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> **(3)** On a motion for summary judgment on evidence, the pleadings serve only to indicate the laws and facts in issue, and the question of a genuine issue for trial depends on the evidence presented.
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> **(4)** A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
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> **(5)** A judge hearing a motion for summary judgment on evidence may determine a question of law, if the only genuine issue for trial is a question of law.
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> **(6)** The motion may be made after pleadings close.

[10] It has been less than 10 years since a defendant could apply for summary judgment in Nova Scotia. Prior to 2002, only a plaintiff could do so. Accordingly, the formulation of the summary judgment test until then was always from the point of view of the plaintiff. By happenstance, most of the recent cases, including most of the recent Court of Appeal cases, have addressed the situation where a defendant applies for summary judgment. These are the cases often quoted by counsel and courts when reciting the summary judgment test. Examples include: *United Gulf Developments Limited v. Iskandar,* 2004 NSCA 35; *Eikelenboom v. Holstein*

Canada, 2004 NSCA 103; *MacNeil v. Bethune*, 2006 NSCA 21; *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)* 2009 NSCA 38. Many of the cases cite the Supreme Court of Canada decisions in *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 and *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, describing the summary judgment test. However, it is important to recall that when the Court of Appeal first endorsed the Supreme Court's test in *United Gulf, supra*, Roscoe, J.A., said at ¶ 9:

> [9] I agree with Justice Moir that it is not possible to mirror the usual test for a plaintiff on a summary judgment application where a defendant brings the motion. I agree as well, that there is no appreciable difference between the standard of no genuine issue, and no arguable issue. I concur with the Chambers judge that the appropriate test where a defendant brings an application for summary judgment in Nova Scotia is the test as set out in **Guarantee Co. of North America v. Gordon Capital Corp.** . . .

[11] New *Civil Procedure Rule* 13.04(1) allows a judge to consider a motion for summary judgment when a claim or defence "fails to raise a genuine issue for trial." In this context, "issue" really means "genuine issue of material fact," *(United Gulf, supra*; *Gordon Capital, supra*). For a plaintiff to succeed on a summary judgment application under the old *Rule* he had to "clearly" prove his claim and if the defendant were unable to set up a *bona fide* defence, or raise an arguable issue which should be tried, the plaintiff would be entitled to judgment. When trying to raise an arguable issue, it was not sufficient to simply assert one – the defendant had to disclose facts sufficient, if proved, to give rise to an arguable defence (*Montreal Trust Company of Canada v. Quad-Ram Development Group Ltd.* (1994), 136 N.S.R. (2d) 333, (C.A.).

[12] Ontario amended its *Rules* in 1985 to allow defendants to apply for summary judgment. A useful gloss on new *Civil Procedure Rule* 13.04(1) may be that supplied by the Ontario Court of Appeal in *Irving Ungerman Ltd. v. Galanis* [1991] O.J. No. 1478 (C.A.), at ¶ 16:

> Our rule does not contain, after "genuine issue", the additional words "as to any material fact". Such a requirement is implicit. If a fact is not material to an action, in the sense that the result of the proceeding does not turn on its existence or non-existence, then it cannot relate to a "genuine issue for trial". (See Wright, Miller and Kane, *Federal Practice and Procedure*, 2nd ed. (1983), vol. 10A, pp. 93-95.) Similar reasoning applies to the absence from our rule of the words "and the moving party is entitled to a judgement as a matter of law". This is implicit.

[13] Keeping in mind that it is the *plaintiff* who is moving for summary judgment, and who must establish that there is no "genuine issue" for trial, I would characterize the test and applicable legal principles in this way;

(1) The plaintiff must show that, on uncontroverted facts, it is entitled, as a matter of law, to succeed; that is to say, that there is no fact material to the cause of action that is in issue;

(2) The burden then shifts to the defendant to show evidence that the defence has a real prospect of success; that is to say that there is a genuine issue of fact material to the claim or defence, that must be decided before the case can be determined on its merits;

(3) The responding party must put "its best foot forward" or risk losing. This requires more than a simple assertion, but requires evidence, *United Gulf, supra*;

(4) If material facts are not in dispute, the court has an obligation to apply the law to those facts and decide the matter, *Eikelenboom*, supra;

[14] To defeat a summary judgment application, a responding party cannot be coy about its true position. A vague assertion of factual disputes will not do. In *Canada (Attorney General) v. Lameman*, [2008] 1 S.C.R. 372, 2008 SCC 14, the Court said:

> [11] . . . Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried . . . The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts . . .
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> [19] . . . In the Court of Appeal and here, the case for the plaintiffs was put forward, not only on the basis of evidence actually adduced on the summary judgment motion, but on suggestions of evidence that might be adduced, or amendments that might be made, if the matter were to go to trial. A summary judgment motion cannot be defeated by vague references to what may be adduced in the future, if the matter is allowed to proceed. To accept that proposition would be to undermine the rationale of the rule. A motion for summary judgment must be judged on the basis of the pleadings and materials actually before the

> judge, not on suppositions about what might be pleaded or proved in the future. . . .

[15] Based on the evidence before the court, there is no dispute:

(a) Regarding the existence, terms and period of the sublease between the parties.

(b) That the amendment to the headlease proposed by the head landlord's property manager in March of 2007 was not executed until September of 2007.

(c) That the head landlord gave notice of termination of the headlease on or about September 26, 2007, effective October 9, 2007.

The legal effect of terminating the head lease was termination of the sublease, because the estate of the tenant on which the sublease depended, had ceased to exist: *Great Western Ry. Co. v. Smith*, 1876 2 Ch. D. 235 (C.A.); *Roanne Holdings Ltd. v. Victoria Wood Development Corp.* (1975), 58 D.L.R. (3d) 17 (Ont. C.A.). The foregoing *prima facie* establishes that AFG is entitled to rent from CCP under the sublease until October 9, 2007.

[16] In response to the motion, CCP claims that there are "material facts" in dispute relating to ". . . credibility and assessment of evidence as to the knowledge and conduct of the parties during the final months of occupation of the premises by the Respondent." If CCP is correct, the motion must fail because the court will not resolve questions of credibility or disputes about material facts on a summary judgment motion: *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998) 164 D.L.R. (4th) 257 (Ont. C.A.), at ¶ 19, referring to *Aguonie v. Galion Solid Waste Material Inc.* (1998), 156 D.L.R. (4th) 222, (Ont. C.A.), at ¶ 32.

[17] CCP argues that the "material facts" relate to an alleged duty of good faith owed by AFG to CCP. CCP says that the lease payment differential between the headlease and the sublease meant that AFG was actually losing money every month as long as the head lease was in existence. Accordingly, CCP claims that AFG was acting unreasonably and in breach of an obligation of good faith by not accepting the property manager's proposal to amend and terminate the head lease in March, so as to facilitate CCP's departure from the premises in May of 2007.

AFG does not really dispute the facts on which CCP relies for these arguments, but says they don't matter. In effect, AFG says these "facts" are not material.

[18] CCP also argues that AFG failed to mitigate its losses because it could have amended the headlease and accepted an early termination of same, thereby resulting in no loss to itself thereafter.

[19] With respect to the good faith argument, CCP relies upon the decision of this court in *Gateway Realty Ltd. v. Arton Holdings Limited*, (1991) 106 N.S.R. (2d) 180, affirmed (1992) 112 N.S.R. (2d) 180.

[20] For the purposes of this decision it is not necessary to comment on the wide ambit of the duty of good faith described by the court in *Gateway*. However, it is always important to review carefully the context in which obligations of "reasonableness" and "good faith" are asserted. They are not free-standing obligations. Generally they modify substantive obligations to which parties have expressly agreed. So commercial contracts will be given a "reasonable" interpretation; and parties who have a discretion to exercise usually must act "in good faith." But these are not independent obligations in the same way that one may have an obligation to pay rent. Rather, they qualify such obligations so as to give them proper effect.

[21] *Gateway* is clearly distinguishable. In that case, the tenant, Arton, had agreed to exercise "best efforts" to sublet the premises in question so that they would not remain vacant. The court found that Arton breached its obligation to do so and moreover, had a motive for not exercising its best efforts because it owned a competing shopping centre that would thereby benefit from a significant vacancy in its competitor's centre. In this case, there is no contractual obligation requiring AFG to do anything other than to honour the sublease between the parties. It was CCP that wished to have an early termination. CCP acted in accordance with its own commercial interests and contrary to the terms of the sublease by which it was bound.

[22] In *Gateway*, *supra*, Arton had a "discretion" which the Court found should not be exercised arbitrarily or in an unreasonable manner. That is unremarkable. To take one common place example, a purchaser who agrees to buy subject to mortgage financing, has an obligation to make reasonable efforts to obtain that

financing. But there is no such discretion here that is being unreasonably exercised by AFG.

[23] CCP might have expected AFG to act "reasonably" by agreeing to a termination of the headlease, so as to reduce AFG's own losses on the rent spread between the headlease and the sublease. But AFG had no obligation to satisfy that expectation. Clearly, AFG had its own reasons to hold itself to the headlease and to hold CCP to the sublease. It did not breach any legal obligations in doing so.

[24] Alternatively, CCP argues that AFG was not acting reasonably or in good faith by failing to respond to correspondence from the property manager indicating firstly, that CCP was leaving the premises and secondly, that the headlease could be amended to accommodate same. While AFG's silence in these circumstances may not be Carlton Club etiquette, it is not a breach of lease. AFG had no obligation to respond. Its silence cannot found an estoppel. There is no evidence of reasonable reliance by CCP on anything that AFG did or failed to do and this is not pleaded. Moreover, the correspondence came from the head landlord, not CCP. It is the head landlord that might have expected a reply from AFG, not CCP. There is no evidence of communication between CCP and AFG prior to CCP leaving, although CCP's vice-president deposes that she placed calls to AFG but did not speak to anyone or have her calls returned.

[25] There may be cases where a party's failure to respond is unreasonable and breaches an implied term or good faith obligation to communicate with the other side. Such an obligation might arise in an ongoing commercial relationship, which requires the cooperation of the parties for the contract to function as contemplated. But here, the parties' obligations have crystalized and are embodied in an executed document which simply requires them to act in accordance with it. Neither party has an obligation to negotiate the termination of those obligations.

[26] During his submissions, counsel for CCP argued by analogy that it would be unreasonable for AFG to refuse its consent to a sublease by CCP to a new tenant. Subject to the terms of the lease and sublease, that may be so, but that is not what happened here. CCP was not proposing a new tenant. It was seeking an early termination of the lease and sublease.

[27] The terms of the head lease entitled the head landlord to terminate and/or retake possession of and re-let the premises in the event of a default. One such

event of default occurs when the premises become vacant. Accordingly, CCP's departure triggered a default under the head lease, at which time the head landlord could have exercised its various remedies against AFG upon appropriate notice to AFG under the headlease. Then there would be a nice question of an appropriate remedy for AFG against CCP, as a result of CCP creating the default under the headlease. But this issue does not arise because there is no evidence that the head landlord did anything to enforce its rights under the head lease when CCP left.

[28] There is evidence from CCP's vice-president that the head landlord had a potential new tenant to whom CCP provided keys and who later occupied the premises. But there is no evidence that this occupation occurred before October 9, 2007. CCP did not argue that there was termination of the sublease prior to this date. If such were the case, that evidence would have been available and should have been led *(United Gulf, supra*).

Mitigation

[29] Then CCP argues that AFG could have mitigated its loss by accepting the property manager's offer to amend and terminate the headlease. Both parties acknowledge that the leading case remains the Supreme Court of Canada decision in *Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd.*, [1971] S.C.R. 562. At p. 570, Justice Laskin (as he then was) said:

> The developed case law has recognized three mutually exclusive courses that a landlord may take where a tenant is in fundamental breach of the lease or has repudiated it entirely, as was the case here. He may do nothing to alter the relationship of landlord and tenant, but simply insist on performance of the terms and sue for rent or damages on the footing that the lease remains in force. Second, he may elect to terminate the lease, retaining of course the right to sue for rent accrued due, or for damages to the date of termination for previous breaches of convenant. Third, he may advise the tenant that he proposes to re-let the property on the tenant's account and enter into possession on that basis. Counsel for the appellant, in effect, suggests a fourth alternative, namely, that the landlord may elect to terminate the lease but with notice to the defaulting tenant that damages will be claimed on the footing of a present recovery of damages for losing the benefit of the lease over its unexpired term. One element of such damages would be, of course, the present value of the unpaid future rent for the unexpired period of the lease less the actual rental value of the premises for that period. . . .

[30] That case began the assimilation of property and contract law in the case of a lease, which is both a contract and a conveyance of an interest in land. But the Supreme Court preserved an important distinction between these areas of law when it affirmed that a landlord need not mitigate its loss when a tenant repudiates a lease by leaving early.

[31] *Highway Properties* is important for landlords because it allows a contractual termination and damages, whereas property law held that all the landlord's remedies merged in recovery of possession of the premises. Despite adverse comment that it is anomalous to excuse a landlord from the duty to mitigate if it chooses not to terminate, *Highway Properties* remains the law: *607190 Ontario Inc. v. First Consolidated Holdings Corp.* [1992] O.J. No. 2074. And the answer to the critics on this point is that a departing tenant can effectively force mitigation on a landlord by subletting, providing that the landlord cannot reasonably object.

[32] But if a landlord in fact mitigates, the court will take that into account when determining the landlord's loss, if any: *Toronto Housing Co. Ltd. v. Postal Promotions Ltd.* (1982), 140 D.L.R. (3d) 117 (Ont. C.A.); and *Apeco of Canada, Ltd. v. Windmill Place*, [1978] 2 S.C.R. 385. In deciding whether the landlord has a duty to mitigate, it is important to distinguish between repudiation and termination. The latter triggers a duty to mitigate; the former does not (*B.G. Preeco 3 Ltd. v. Universal Explorations Ltd.*, (1987) 42 D.L.R. (4th) 673 (Alta. Q.B.). This matters here because AFG did not terminate the lease upon CCP's repudiation. Thus, the first option in *Highway Properties* is at play.

[33] CCP attempts to distinguish *Highway Properties* by arguing that in this case there is a headlease and the head landlord was prepared to re-let the premises and mitigate its loss. Therefore, CCP argues that this would have benefited CCP which in turn would have been released from its sublease. But the reality is that the headlease was not actually terminated. The sublease remained in place. AFG apparently continued to pay rent under the headlease to the landlord and it relies upon the sublease to require CCP to do so as well.

[34] Even if the mitigation argument were sustainable, it would not avoid a summary judgment on liability. The court would grant judgment, subject to quantification of the loss. *Rule* 13.05(1) provides:

Damages may be determined

> 13.05 (1) A judge hearing a motion for summary judgment on evidence must grant judgment for an amount to be determined, if the only genuine issue for trial is the amount to be paid on the claim.

[35] There are no genuine issues of material fact raised by CCP in its evidence and submissions on the defence to the claim. On the uncontradicted facts, the law favours AFG which is entitled to judgment in the amount claimed. If the parties cannot agree on interest and costs, I will hear them on same.

Bryson, J.