Claim No: 282081

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Double G Properties Ltd. v. Woodgrain Furniture Refinishing (JRL) Ltd., 2008 NSSM 14

BETWEEN:

DOUBLE G PROPERTIES LIMITED
and GEORGE ROBB

Claimants
Defendants by Counterclaim

- and -

WOODGRAIN FURNITURE REFINISHING (JRL) LTD.
and JOHN KYTE

Defendants,
Claimants by Counterclaim

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on January 30, 2008 and at Halifax, Nova Scotia on February 14, 2008

Decision rendered on March 6, 2008

APPEARANCES

For the Claimants: Lisanne Jacklin
Counsel

For the Defendants:	Donald Shewfelt Counsel

BY THE COURT:

Introduction

[1] This is a claim by a commercial landlord for rent allegedly owing as a result of a tenant leaving the premises in advance of the expiry of the lease. There are additional claimed items for clean up costs, damage to the premises and for fixtures belonging to the landlord allegedly taken improperly by the tenant.

[2] The tenant denies that there is anything owing and counterclaims on a number of different bases, alleging that the landlord breached a number of provisions in the lease, which forced him to vacate and find alternative premises.

[3] As these reasons will make clear, I have sympathy for both parties as I believe they were innocent victims of a serious error by municipal authorities, which error was never properly acknowledged nor corrected. Nevertheless, since the municipality is not a party to this Claim it is my duty to adjudicate the rights of the parties based upon the facts as I find them.

[4] For ease of reference I will refer to the Claimant Double G Properties Limited as any of “the Claimant,” “the Landlord” or “Double G”, and the Defendant Woodgrain Furniture Refinishing (JRL) Ltd. as one of “the Defendant,” “the Tenant” or “Woodgrain.”

[5] The Claimant George Robb is the principal of the Claimant company, and the Defendant John Kyte is the principal of the Defendant company. They were both named by the Claimant when he commenced the action, without the input of counsel, perhaps out of an abundance of caution. Their presence adds little. There is nothing in the facts that would tend to require either of them to answer personally to the Claim or Counterclaim.

Basic history

[6] The premises in question is a commercial building at 202 Waverly Road in Dartmouth, Nova Scotia, which houses a number of different businesses. During the relevant time the Defendant operated a wood refinishing business in one of the units.

[7] The history of the matter is crucial. The Claimant bought the building in mid-1997. Prior to doing so, through his lawyer he performed a due diligence inquiry and received a letter dated August 5, 1997 from the Halifax Regional Municipality Development Services, confirming that the subject property was zoned “I-1 Light Industrial Zone.” The letter attached the applicable section of the zoning bylaw. Suffice it to say that this zoning would have been sufficient to permit the operation of a wood refinishing business such as that operated by the Defendant.

[8] With this assurance in hand the Claimant bought the property and leased the subject unit to the Defendant who was looking to relocate from elsewhere in the immediate area.

[9] The Claimant and Defendant signed a lease in August 1997 for a 5-year term. That actual lease was not in evidence. On August 28, 2002, a further five-year lease was signed on what was agreed to be the same basic terms, other (I assume) than the amount of rent. That lease was before me and contains provisions that will have to be considered in due course.

[10] It is sufficient for purposes of this decision to say that the Defendant moved into the premises in August 1997 and established his business, not anticipating that zoning would ever become an issue.

[11] The zoning issue first surfaced in early 1999 when another tenant of the Claimant made application to the municipality to erect a large sign and was told that there were restrictions contained in a Development Agreement that applied to the site.

[12] The principal of the Claimant company, George Robb, became aware of the problem and engaged a lawyer, Angus MacIntyre, who went with him to meet with municipal officials. At that meeting the municipality confirmed that the current zoning of the property was not actually I-1 as had been confirmed in the latter two years earlier, but was R-1, Single Family Residential Zone, and that there was a 1982 Development Agreement that had never been filed at the Registry of Deeds, but would now be filed. That agreement specified a number of permitted uses, not including a furniture finishing business.

[13] It also appears from a letter from the municipality to Mr. MacIntyre dated April 7, 1999, that there was some contemplation of an application being

made to make minor amendments to the zoning. However on the evidence it is clear that no such application was ever made.

[14] Nor is there any indication that the municipality was specifically aware at that time of the wood refinishing business being operated by the Defendant, as it was not the Defendant's business but the other tenant's sign that had brought this matter to the municipality's attention.

[15] Mr. MacIntyre did protest in a letter to the municipality that his client had been misled by the 1997 zoning letter and demanded that the municipality re-zone the property. Although it took almost a year to respond, in a letter of April 14, 2000 the municipality essentially refused to do that, although it left the open the possibility that it might expand the permitted uses.

[16] It does not appear that the discussions went any further and the matter was left at that.

[17] A crucial question that I must consider is to what extent, if any, was the principal of the Defendant, John Kyte, aware of the zoning problem, either when it first surfaced in 1999 or when the lease renewal was signed in August 2002.

[18] Mr. Robb stated in his evidence that he made Mr. Kyte aware of the problem right away, although he did not involve him in any of the meetings. He stated that "Kyte and I found out about the zoning problem at the same time." He stated that Kyte knew of the issue and the potential to create a problem for him when they signed the lease renewal in 2002. He admitted that there was nothing in writing indicating that Kyte had been made aware

of or otherwise had any knowledge of the problem. It is worthy of note that neither Kyte nor Woodgrain is copied on any of the correspondence between the Claimant's lawyer and the municipality.

[19] Mr. Kyte flatly denied that he knew anything about the zoning problem in 1999 or 2002, or anytime up to 2006 when the matter came to a head and the municipality started putting pressure on him.

[20] On this point I am more convinced that Mr. Kyte is telling the truth. Mr. Robb seemed vague in his testimony and I had the distinct feeling that he was not being totally candid. Mr. Kyte on the other hand seemed very definite and credible on this issue. While it is possible that he knew or was told something regarding the municipality, I do not believe he knew that his own business might be in violation of the applicable zoning.

[21] The surrounding events add credibility to Mr. Kyte's version. Had Mr. Kyte known fully about the problem in 1999 or at any time prior to the lease renewal, it is hard to believe that he would not have investigated the matter directly with the municipality prior to signing a further five year lease, and prior to making improvements in 2002-3 to address fire safety issues (as discussed below). I am more inclined to the view that Mr. Robb decided to try to deal with the municipality without alarming his tenant, in the hope that the problem would resolve itself. Given the number of years before the municipality actually lowered the boom on the Defendant, it may be said that the strategy - if it was one - almost succeeded.

[22] At some time in late 2002 or early 2003, for totally unrelated reasons the Defendant was visited by municipal fire officials who found some

problematic conditions and ordered him to make certain structural changes to the way fumes were vented from the building. These changes were made at a cost of approximately $4,275.00, which cost factors into the Counterclaim.

[23] It appears though it is not a certainty that the changes to the venting system made the fumes more noticeable to the surrounding homes, and people started to complain to the point that a neighbourhood petition was presented to the municipality. In response, in 2006 municipal officials visited the premises and determined that the Defendant's business was operating illegally because it did not fit within the R-1 zoning. On July 14, 2006 the Defendant was given a written notice by the municipality demanding that it cease operations within 30 days.

[24] The Defendant engaged the law firm of Weldon McInnis to advise and assist with the problem. His legal costs in trying to stave off the closure of his business by the municipality are another component of his Counterclaim.

[25] The municipality proceeded aggressively against both the Claimant and the Defendant in its effort to shut down the offending business. Both Double G and Woodgrain were charged with a bylaw offence and ordered to appear in Provincial Court in October 2006.

[26] Lawyers for both of the parties began to consider ways out of the problem. Mr. MacIntyre on behalf of the Claimant proposed to the Defendant's lawyer that they agree to an early termination of the lease, so long as the

municipality accepted this as a resolution of the issue and agreed to drop the charges.

[27] This would have been a practical, if not entirely just solution. In fact, Mr. Kyte on behalf of Woodgrain gave a written notice to Double G dated December 1, 2006 stating that it would vacate the space on December 31, 2006. Had Woodgrain in fact vacated as of December 31, 2006, the matter might have ended there. Unfortunately, that date came and went without anything happening.

[28] Mr. Kyte did not vacate at that time or any time earlier than he did because he simply could not find anything suitable and was unwilling to shut down his business. He verbally informed Mr. Robb of his intentions on at least a monthly basis. Mr. Robb did not appear in a hurry to see the Defendant leave. However, when the municipality learned that the Defendant was still in operation, on March 9, 2007 it launched civil proceedings for an injunction shutting down the Woodgrain business, returnable in court on March 27, 2007.

[29] On March 27, 2007 the Defendant cooperated with the municipality and consented to an Order enjoining it from operating a furniture finishing business on the subject premises, effective that date. Mr. Kyte explained in his evidence that he did not have the financial resources to continue to fight the municipality and so essentially conceded the point.

[30] In the result, over the next few weeks Mr. Kyte was able to find new premises and resumed his business with some delay and disruption. In the interim period he was able to do some work offsite. He was forced to

store some of his equipment in a storage facility because the new premises was smaller than the subject premises. His Counterclaim includes costs associated with relocation and loss of profits.

[31] During the time that the Defendant was vacating, Mr. Robb was on vacation in Florida and was not aware of what was going on. When he returned the Defendant had moved out.

[32] It was during this process of leaving the premises and relocating that the Defendant allegedly did damage and took fixtures.

[33] The Claimant also claims for lost rent for the month of April, claiming that he ought to have had some notice. It does appear that by this time communications between Kyte and Robb were strained, and neither was keeping the other fully informed of what was going on, which is a shame because they were essentially both victims of circumstances that neither of them had created.

[34] I will return to the specific items of damage claimed by both parties in due course.

Analysis and findings

[35] In my opinion, the lease signed in 1997 was signed under a mistake of fact and was essentially voidable at the instance of either party. I have already found that the Defendant never learned that there was a zoning problem during the currency of that lease, and as such had no reason to void it. Nor did he have any reason to question the 2002 renewal.

[36] Mr. Robb on the other hand learned of the zoning problem in 1999 and could have acted upon that knowledge. I believe that he withheld this knowledge from Mr. Kyte for one or more of a number of reasons. First of all, he was very likely convinced that the municipality was in the wrong and would find a way to correct the problem. He would not wanted to have upset his tenant needlessly; nor would he have wanted to see the flow of rent stopped. I believe that with the passage of time and no aggressive action on the part of the municipality, by 2002 Mr. Robb had become convinced that the problem was either dead or so far on the back burner that there was no significant risk that the bylaw would be enforced. It was in that frame of mind that he renewed the lease in 2002.

[37] Essentially, the Claimant withheld information from the Defendant that might have inclined the Defendant not to renew. He allowed the Defendant to sign under the mistaken belief that the zoning permitted his business. In law this gave the Defendant the right to terminate the lease at any time on the basis of misrepresentation. In the circumstances I find that it was negligent rather than intentional misrepresentation. Essentially the Claimant ought to have known that there was a material fact unknown to the Defendant, which he had a duty to disclose but chose not to.

[38] As such, I would not allow any portion of the Claim that concerns rent because I am satisfied that when the Defendant was put out of business on the 27th of March 2007, the lease was essentially terminated and no notice was required. The fact that it took the Claimant some time to find a new tenant and prepare the space is unfortunate, but cannot be charged to

the Defendant who I find had the right to terminate the lease essentially at will.

[39] The balance of the Claimant's claim is for repairs that he made and cleanup costs after the Defendant moved out. Those claims total $2,027.00.

[40] The space occupied by the Defendant was rough industrial space. Mr. Kyte testified that he left the space in roughly the same condition that he found it. The evidence of Mr. Robb was to the effect that Mr. Kyte removed walls, ceilings and a door, took some industrial carpet and some bevelled glass panels. He also claims that the Defendant left the place in a horrible mess requiring much junk to be hauled away and cleaning to be done. There was also a claim that the Defendant failed to leave the furnace in working condition. Other small items include a claim for burnt out light bulbs.

[41] After having heard the evidence and having seen photographs, I am satisfied that the Defendant took nothing of value belonging to the Claimant. Given the urgency of his leaving and his evident unhappiness with how this had all come about, I have no trouble believing that the Defendant was not especially inclined to leave the place even "broom clean," necessitating some additional attention. The less than broom clean condition was corroborated by an independent witness, Alex Macleod. Some compensation for this would be appropriate, as it is the obligation of the tenant under article 9.03 of the lease to leave the premises "broom clean" no matter the circumstances of the premises being vacated.

[42] The amount claimed for clean up and garbage hauling is $500.00. This was not further broken down in any meaningful way. However, I believe it is a fair amount and would include any burnt out light bulbs or other minor deficiencies left by the tenant. To this extent only does the Claim succeed.

[43] The Counterclaim on the other hand has a sound basis in law, because of the misrepresentation that the Claimant made to the Defendant. Although counsel for the Defendant couched his argument on the basis of a breach of the lease, I see it as a case of misrepresentation. The Claimant made a misrepresentation by omission that caused the Defendant to enter into the lease renewal. He relied to his detriment on that representation, and any damages that logically flow therefrom should be recovered.

[44] The claims made by the Defendant in the Counterclaim are broken down as follows:

2002/3 upgrades	$4,275.00
Lawyers bills	$6,220.68
Moving expenses	$889.77
Storage	$691.27
Loss of income 2006/7	$23,106.96
“disbursements” April-June 2007	$1,590.57
Garbage removal Aug 02 to March 27, 2007	$6,274.83
Total	$43,049.08

[45] I will consider each of them in turn.

2002/3 upgrades

[46] This claim seeks reimbursement for improvements made to the venting systems as ordered by the Fire officials who visited and found the systems inadequate. The Defendant made improvements and upgraded his systems in the mistaken belief that he could continue in business in the premises, at least until the expiry of his lease. It is a fair inference that had he known of the zoning problems, he might not have spent some or all of this money to correct deficiencies, but rather would have focussed on finding another premises.

[47] On the other hand, these expenditures did allow the Defendant to remain in business for almost the balance of the lease. It would not be just in my opinion to hold the Claimant entirely responsible. I believe the fair result is to apportion the expense, attributing $2,000 to the misrepresentation by the Claimant.

Lawyers bills

[48] The Defendant claims reimbursement for money spent dealing with the bylaw charges and injunction proceedings brought by the municipality. It is important to note that the amount claimed is somewhat at odds with the invoices submitted, which appear only to total $4,610.00. This discrepancy was not explained.

[49] The Claimant argues that most of this expense could have been avoided had the Defendant moved out at the end of December 31, 2006, as was

originally intended. The argument is that the Defendant did not mitigate its damages.

[50] The difficulty with the mitigation argument is that without a new space for his business, Mr. Kyte can hardly be said to have been better off avoiding the legal expense while being essentially out of business. Given all of the uncertainties that existed at that time, it was not unreasonable to have done as he did. He was between the proverbial rock and a hard place.

[51] In argument counsel for the Claimant was critical of the Defendant for not following through and fighting the injunction, because in her view the municipality was in the wrong and the putative unlawful use ought to have been allowed as “grandfathered” or perhaps legal non-conforming.

[52] I find it hard to be critical of the way the Defendant handled the situation. The Claimant could have, but did not, take up the fight on his tenant’s behalf, as one might expect in such circumstances. In fact, the Claimant had been dealing with the municipality for seven years by then, with no demonstrable results. The Claimant had a lot to gain since it owned the building. The Defendant on the other hand had to deal with this on an urgent basis, with a lot to lose in the sense that his entire livelihood was threatened.

[53] I find that the legal expense was a direct, foreseeable consequence of the misrepresentation by the Claimant. I assess this item of damage at $4,610.00, which is the amount shown in the bills entered into evidence.

Moving expenses

[54] The problem with the claim for moving expenses is that these would have been incurred no matter what, even had the lease been permitted to run its course for another few months. We cannot make an assumption that the lease would have been renewed yet again, as there are no options to renew contained therein. I would not allow any recovery for moving expenses.

Storage

[55] I regard the storage expense in the same way as the moving expense. It was a function of the Defendant's decision to downsize, and would likely have been incurred in any event.

Loss of income 2006/7

[56] The Defendant produced charts of income supposedly to prove that he suffered a loss of business after learning of the zoning problem in 2006. The biggest problem here is that the documents show no clear trend. Income in previous years fluctuated on a monthly basis. Moreover, Mr. Kyte suffered a heart attack earlier that year and was not working at all for six weeks. Even if I were to find that there was a drop in income in 2006, which I do not, it is more likely attributable to Mr. Kyte's health problems than it is to lease problems. I would not allow any recovery for loss of income.

"**disbursements" April-June 2007'**

[57] The Defendant produced bills for items that he says he bought outfitting his new business. Any new premises would have required some expenditure. I am not satisfied that these disbursements have anything to do with the misrepresentation and find that no such expenses are recoverable.

Garbage removal Aug 02 to March 27, 2007

[58] This claim has nothing directly to do with the zoning issue, and likely would not have been pursued by the Defendant had the Claimant not taken the initiative by suing him. The Defendant claims that for the entire term of the 2002 - 2007 lease he was improperly charged by the Landlord for garbage removal.

[59] The lease is a standard net lease where the tenant pays a proportionate amount for common costs, which under article 1.01(e)(ii) of the lease include “sanitary control [and] refuse removal.”

[60] In practice the Defendant paid for its own garbage removal for more than nine years, in a shared arrangement with some of the other tenants. Mr. Kyte testified that he believed that under the lease the Landlord should have been providing garbage removal as a common expense, but he says his position was dismissed by Mr. Robb.

[61] Mr. Robb testified that his interpretation of the lease was that garbage generated by the overall property, such as leaves in the fall, was his responsibility, but he did not believe the Landlord was responsible for waste generated by the industrial activities of his tenants.

[62] The task in interpreting a contract is summarized in the Canadian Encyclopedic Digest title Contracts at §492:

> The objective sought in interpreting contracts is the discovery of the intention of the parties as determined in accordance with the plain or ordinary and popular meaning of the words used by them. In the absence of ambiguity, the natural or literal meaning of the words set out in the contract should be adopted. Contract interpretation thus becomes an exercise in searching for the objective meaning of language, unless it can be proven that both parties mutually interpreted the contract in a manner that might not have been apparent to an ordinary person. (Footnotes omitted and emphasis added.)

[63] I view the matter this way. On an ordinary language interpretation of the lease, garbage removal would appear to fall unambiguously within common expenses. Absent any evidence of an agreement or understanding to the contrary, that would be the applicable interpretation. However, it appears here that the parties to this lease contract have placed a different interpretation on a provision, which may appear to others to be at odds with the plain meaning. The Claimant clearly intended, and the Defendant accepted without any clear protest, that the provision meant that most of his garbage removal was his own responsibility, and the responsibility of the Claimant was something else and less than that.

[64] In the result I find that the Claimant's interpretation of this clause is the correct one, based upon a mutual understanding and an established practice. As such, it would be inequitable to allow the Defendant to take a contrary position, particularly after having signed the 2002 lease without insisting that the issue be clarified.

Conclusions

[65] In the result, I allow the sum of $6,610.00 on the Counterclaim and $500.00 on the Claim, which when offset against each other leaves the sum of $6,110.00 owing by the Claimant to the Defendant.

[66] In my discretion I do not allow any interest or costs to either party.

Eric K. Slone, Adjudicator