Claim No: 351675

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: M-C Holistic Healing Centre Ltd. v. Goldstein, 2012 NSSM 7

BETWEEN:

M-C HOLISTIC HEALING CENTRE LIMITED

Claimant

- and -

BRIAN GOLDSTEIN and CANADIAN COLLEGE OF MASSAGE & HYDROTHERAPY

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on September 29, 2011 and at Dartmouth, Nova Scotia on October 6, 2011

Decision rendered on February 10, 2012

PPEARANCES

For the Claimant Thomas Singleton, Counsel
Leora Lawson, articling student

For the Defendants Joseph Herschorn, Counsel

BY THE COURT:

[1] This is a claim by a commercial landlord against its former tenant for damages allegedly left behind by the tenant after the expiry of the term, as well as consequential damages for loss of rental income.

[2] The Defendant Canadian College of Massage & Hydrotherapy (hereafter "CCMH") is a business name registered by Canadian College of Massage & Hydrotherapy Inc., which was at one time known as Canadian College of Natural Medicine Limited. The claim was initially brought against both the CCMH and its Toronto-based principal (or one of them) Brian Goldstein. At the outset of the trial, the Claimant through its counsel abandoned any claim to hold Mr. Goldstein personally liable, and the case proceeded against CCMH only.

[3] The Claimant MC Holistic Healing Centre Limited (sometimes "MC") is the owner of a commercial building at 1306 Bedford Highway in Halifax, Nova Scotia. In June of 2000, MC leased the second floor of this building to Canadian College of Natural Medicine Ltd. The term of that lease was for ten years commencing the 1st of September 2000 and ending the 31st day of August 2010. That lease was in many ways a usual commercial lease containing many provisions, some of which it will be necessary to refer to later on in this decision.

[4] Although the full extent was not explained to me, it is clear that the relationship between the Landlord and the Tenant at that time was not arm's length, and some or all of the same people who were involved in the ownership group were also involved in the Canadian College of Natural Medicine Limited. However, that eventually changed.

[5] In or about 2002, a Dr. Brian Goldstein purchased the Tenant and changed its name to that which it bears today, namely, Canadian College of Massage and Hydrotherapy, i.e. CCMH. At that time there were certain documents created which renewed and updated the lease. There is a great deal of significance to the fact that the current ownership group was not in the premises for the first two years of the lease. There is no one currently employed by CCMH who could testify to the precise condition of the premises at the time the initial lease was entered into, and that most notably includes Jennifer Stuart, who is the current Executive Director of CCMH and who has been associated with it for approximately ten years.

[6] In August of 2002 there was a further lease agreement entered into for additional space on the first floor of the building, which is referred to as "the first floor new addition." Although I have not carefully checked the language in that additional lease against the language of the initial one, no argument was made before me that there is any material difference between the two, and thus when I refer to the language of the lease I will refer to the language of the initial 2000 lease that was argued to me.

[7] The particular paragraphs in the lease that were argued include the following:

> 17 (a) The tenant shall keep the leased space clean and shall pay for its own cleaning.
>
> (b) the Tenant shall pay all of the Tenant's own electrical power and telephone bills. The Tenant shall pay for its own light bulbs change and normal plumbing and flooring and door, window and electric and other normal repairing.
>
> (c) the Tenant shall pay for its own insurance.

> 31. The Landlord may allocate an area for the location of a suitable container to hold the tenant's garbage awaiting regular garbage collection. The Tenant shall not allow any ashes, refuse, garbage, paper or other loose or objectionable material to accumulate in or about the leased premises and will at all times keep the said premises in clean and wholesome condition, and shall, immediately before the termination of the term hereby granted, wash the floors, windows and woodwork of the leased premises. The Tenant further covenants that the Tenant will not on the termination of the said term leave upon the said premises rubbish or waste material and will leave the said premises in a clean and tidy condition.
>
> 32. The Tenant covenants that he will keep well painted at all times the interior of the leased premises in accordance with the reasonable requests of the Landlord. The Landlord shall keep painted those parts of the exterior of the leased premises requiring painting. The Tenant shall not make any structural change in respect of the leased premises without the prior written consent of the Landlord.

[8] As mentioned, the original ten-year lease term was scheduled to expire on the 31st of August 2010. There was no renewal anticipated, and indeed CCMH had secured new space in the West End Mall in Halifax, which space was being prepared for the eventual opening of CCMH there. For reasons which are not germane, there was a delay in finishing the space at the West End Mall and CCMH had to figure out a way to be able to operate during the fall of 2010. As such a negotiation occurred to extend the lease with the Landlord for a 4-month period, enabling CCMH to delay its occupancy at West End Mall until the 1st of January 2011. I accept the evidence of the Landlord’s witness, Diana Li, that this was not something that her group welcomed, but they were prepared to accommodate it. The reason this was not a welcome development was that there was a new tenant being readied to take over the space once CCMH was out. The new Tenant was to be the Canadian College of Acupuncture and Traditional Chinese Medicine (the “Acupuncture College”), which is another company not entirely at arm's length from the parties, as its principal Joe Starr,

was at one time involved with the Canadian College of Massage and Hydrotherapy or its predecessor. Also, Diana Li is a principal of the Landlord MC Holistic and also an owner or at least a part owner of the Acupuncture College.

[9] Notwithstanding all these relationships, there was considerable care taken to document the lease extension, by way of a two-page document. I believe it is fair to say that the document was authored by someone for whom English is not their first language, which gives rise to some minor grammatical anomalies. Nevertheless I believe it is perfectly possible to discern the intention.

[10] The argument is made by the Landlord, to considerable persuasive effect, that this extension agreement varied the obligations that would otherwise have been upon the Tenant had it vacated upon the original expiry period. Some of the provisions required CCMH to leave behind fixtures that it wouuld otherwise have been entitled to take. More important for this case, was paragraph 9 of the Extended Lease Agreement:

> 9. Repair or replacement of any and all damage to the walls (including damage to drywall and paint), doors, floors (including broken tiles and torn and worn carpeting), ceiling tiles, windows and doors, including damage occurring during the move out of the facility to the satisfaction of the Landlord MCHHC Limited. Will agree to fix the window and drywall in the Executive Director's office at MCHHC's expense.

[11] There is no reasonable interpretation of this provision other than to find that the Tenant undertook certain obligations for repair and replacement that it would not have faced had it vacated at the end of August 2010.

[12] In particular, whereas it might have been able to argue reasonable wear and tear, it explicitly bound itself to repair or replace damage to the walls,

including damage to drywall and paint, doors and floors, including broken tiles and torn or worn carpeting. It also undertook to repair or replace ceiling tiles, windows and doors and any other damage that might have occurred during the move.

[13] The real issue in this case is who bears the responsibility to pay for the fairly long list of repairs and replacements that the Landlord was obliged to do at the end of the term in order to turn the place over in good condition to the new Tenant. Reduced to its simplest form, the Tenant has argued that the premises was left in reasonable condition, and that any damage or deficiencies can be explained away by normal wear and tear.

[14] It appears that CCMH did some perfunctory cleanup, but few real repairs and no replacement. Ms. Stuart accompanied Ms. Li and Mr. Starr on an inspection on December 30, which was only two days before the Acupuncture College was supposed to take occupancy. Mr. Starr was very clear that there was no way he would move into these premises. They were, in his words, “a disaster.” The photographs taken on that day lend some support for that characterization. In any event, the Landlord was faced with a problem for which CCMH was not prepared to take any responsibility. MC immediately set about getting quotes on work and began the process of readying the space to the satisfaction of the Acupuncture College.

[15] It is not only the cost of these repairs that is at issue, but also the rent that was lost to the Landlord as a result of the fact that the Acupuncture College was unwilling to take occupancy until roughly the end of February 2011, when the building was in much better condition. The two-month loss of rent claim alone

virtually takes up the entire $25,000 jurisdiction of this court. The cost of the repairs done would almost double that amount.

[16] A great deal of the trial was occupied by going through photographs taken on December 30 showing damaged floors and other elements of the building that clearly needed repair or replacement. The Defendant also questioned a number of the repairs. The bottom line is that the Tenant did not accept that it was its responsibility to pay for the approximately $11,000.00 in floor replacement and about $3,000.00 in painting. Nor does it accept any responsibility for the fact that the new Tenant delayed its move in.

[17] CCMH objects to being held responsible for what it characterized as a "full restoration" of the building. It argued that the building as vacated at the end of December was in good functional condition and could have been taken over by the new Tenant without particularly missing a beat.

[18] I have no hesitation in saying that had the four-month extension agreement never come into existence, the Claimant Landlord would have had a much more difficult time holding the Defendant Tenant responsible for many of the repairs or upgrades that it performed. However, in my opinion, the extension agreement made quite clear that the Tenant was undertaking a much higher degree of restoration upon leaving the premises than it otherwise would have had. This was part of the cost to it of being allowed to stay for four months in premises that was earmarked for a different Tenant. Again, while some of the repairs undertaken may be arguable, the floor replacement and painting of the premises is not at all arguable. I am satisfied that these were required. Also, there were many other minor items of damage and further cleaning that required attention.

[19] Had the Tenant properly planned for all of this and taken responsibility for it toward the end of December, perhaps over the holidays, it is quite possible that the delay in occupancy for the Acupuncture College would never have arisen. My sense of the evidence was that Ms. Stuart and perhaps others associated with CCMH were more focussed on dealing with issues at the West End Mall, and less focussed than they ought to have been toward fulfilling the obligations that they had undertaken to the Claimant in this matter. Having left the premises without fulfilling its responsibility, CCMH has limited grounds to complain about the cost that the Landlord incurred and the delay that resulted. It is not reasonable to expect a commercial tenant such as the Acupuncture College to take possession of and begin holding classes in a premises that is about to receive new floors and a paint job on the walls, along with numerous other small repairs. This is a large and relatively expensive commercial premises. Two months may seem like a long time, but I am hard pressed to find that there was any unreasonable delay on the part of the Landlord. At this point, the exercise was one of mitigating its loss.

[20] Given that the claim is almost double the jurisdiction of this court, but reduced to stay within the jurisdiction of the court, there is not much value in trying to whittle down some of the repair items. For what it is worth, one of the items that the Landlord tried to charge was an overriding administration fee for the time that it spent dealing with all of the needed repairs, amounting to several thousand dollars. The Tenant took the position that there was no obligation express or implied, to pay an administration fee. I tend to agree, and should not be seen to have endorsed that administration fee. Nevertheless, on the evidence the loss of rent was approximately $12,000.00 per month, and the repairs that were required were in the neighbourhood of $20,000.00, all of which

adds up to far more than $25,000.00 which is the amount sought by the Claimant.

[21] I note that the Defendant was critical of some of the invoices, and suggested that perhaps not all of them were paid by the Claimant because some of them were directed to the Acupuncture College. I accept the evidence of Ms. Li and Mr. Starr that it was MC that paid these invoices, and that some of the contractors were simply in the mistaken belief that they should be made payable by the Acupuncture College because its sign was on the premises by that time. These invoices may not be perfect evidence, but they are adequate for my purposes.

[22] As for the amount of my order, I am mindful that in the original claim form, the amount sought was $24,845.83. It does appear that the claim was drafted before the Claimant had counsel, and counsel expanded the claim to include the loss of rent as well as the hard costs of repair. Counsel observed that the damages actually incurred were well within the jurisdiction of a Supreme Court action, but the Tenant was content with claiming the $25,000 allowable in this court.

[23] I am satisfied that the Defendant had ample notice of all of the Landlord's claims, and a full opportunity to respond, and there is no prejudice to allowing the claim to be pursued to the limit of this court's jurisdiction.

[24] I also note that the Defendant counterclaimed for damages on various grounds. None of these grounds was actively pursued at the trial and, moreover, the evidence would not have supported any recovery on this counterclaim. The counterclaim stands dismissed.

[25] To summarize, I find that the Claimant has made out a claim for the two months of lost rent and most, if not all of the repairs, all of which total well in excess of the jurisdiction of this court, and as such there will be a judgment for the Claimant in the amount of $25,000 plus costs of $182.94. There was no claim advanced for prejudgment interest and in my discretion I would not have awarded any.

Eric K. Slone, Adjudicator