

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Mei v. Urchin Property Management Inc., 2012 NSSM 52

Claim No: SCCH 398600

BETWEEN:

Name Liu Zhu Mei and 3232258 Nova Scotia Limited **Claimants**

Name Urchin Property Management Incorporated and Urchin Holdings Limited **Defendants**

DECISION

Editorial Notice

This decision has been edited to correct several typographical and grammatical errors. The findings and results have not changed. Addresses and phone numbers for the parties have also been removed.

Date of Hearing: August 9, 2012;

Date of Decision: September 24, 2012.

Liu Zhu (“Wisdom”) Mei appeared on his own behalf and the Corporate Claimant.

Douglas J. Livingstone appeared for the Defendants.

This matter involves the Landlords and Tenant of a commercial property, 55 Portland Street, Dartmouth Nova Scotia. The Claimant in this matter, Liu Zhu (“Wisdom”) Mei, commenced the claim in his personal name. It was clear from the documents presented in evidence that he contracted at all times under his company name, 322358 Nova Scotia Limited. Accordingly the style of cause in this matter is amended by naming as a Co-Claimant, 322358 Nova Scotia Limited. (hereafter referred to as “the Corporate Claimant”). The Claimant sold his restaurant

equipment to one Rose Burgess, the Defendants' choice for a new tenant who took possession of the equipment. Before the Claimants could receive the full purchase price, Ms. Burgess filed for bankruptcy. The Claimants are seeking \$13,015.08 to represent the lost funds.

From November 2008 until June 2010 Mr. Mei operated, through the Corporate Claimant, a business entitled Queen's Choice Beans Coffee House at 55 Portland Street. The building was owned by Urchin Property Holdings Limited and managed by Urchin Property Management Limited. The Claimants did not contract with either Urchin company directly, rather the relationship arose through Assignments of Lease. Specifically, the initial lease for the property was between Urchin Holdings Limited and Chantelle Reid and dated May 20, 2005. This lease ran for a five-year term commencing June 1, 2005 to June 30, 2010. Two subsequent Assignments of Lease followed, the first dated August 1, 2007 between Chantelle Reid and BCSG Enterprises Limited. This assignment of lease commences August 1, 2007 enabling BCSG Enterprises to operate a new business under a trade name. This assignment like its head lease only addresses demised premises, 55 Portland Street. The second assignment was dated November 14, 2008 where BCSG Enterprises assigns its leasehold interest to 3232258 Nova Scotia Limited. These Assignments were consented to by Urchin Holdings Limited. The result of these assignments renders Urchin Holdings Limited as Landlord and the Corporate Claimant as tenant of the premises.

The terms of this lease are common terms found in most commercial leases. It includes the following paragraphs:

- "The Landlord covenants and agrees with the Tenant herein that if the Tenant is not then in default of payment of installments of rent or and performance or observance of any of the covenants and agreements in this Lease on its part to be observed or performed, the Landlord will upon the tenants *written request*, received by the Landlord not later than ninety (90) days before termination of the term, renew this Lease for further term of (5) years upon the same covenants and agreements is contained in this Lease with the exception of the provisions for rent, and of this covenant to renew."
- "That the tenant shall to, nor will during the said term assign, transfer or set over to otherwise by any act or deed procure the said premises or any of them to be assigned, transferred, set over, or sublet onto any person or persons whomsoever without the consent in writing of the first had and obtained, provided that such consent shall not be unreasonably withheld;"

The Claimant tendered into evidence a blank, unsigned lease between Urchin Holdings Limited BCSG Enterprises seeking to extend the date of the tenancy to July 2012. It is clear however, that this document was never signed as all of the correspondence and the assignments of leases cited the initial lease executed in 2005 between Urchin Holdings and Ms. Reid. Accordingly, I exclude from evidence the blank lease marked as exhibit C1.

It is worth noting that none of these documents relate to the sale, possession or ownership of any of the businesses which operated from this building. Furthermore, they do not address the ownership or transfer of any of the equipment owned by any of the businesses. That alone is sufficient reason to dismiss the Claim. However, I have provided further reasons below to provide clarification for my decision.

Liu Zhu (“Wisdom”) Mei testified that he intended to sell his coffee shop in 2010. He was approached by two potential buyers, Mr. Jimmy Hong and Rose Burgess. In his opinion, Mr. Hong had the better offer as he intended to pay cash for the business. Ms. Burgess’ offer involved payments in installments. Mr. Mei sought to receive the consent of Urchin Holdings to enable Mr. Hong to assume the lease of the property. It was Mr. Mei’s intent to sell equipment and the business to Mr. Hong.

Mr. Mei testified that he purchased the business from BCSG Enterprises Limited and assumed the lease with Urchin Holdings. Using paragraph 2 of the initial lease as authority, he sought to extend the term of the lease for a period of five years. These discussions took place sometime in 2009. This must not have occurred, as the correspondence in evidence shows that negotiations took place in 2010 for an extension but on a month-to-month basis. It is Mr. Mei’s opinion, that the terms of this paragraph give him a priority to renew the lease and subsequently transfer it to a new buyer.

Under cross examination by Mr. Livingstone, Mr. Mei acknowledged that he intended to change the term of the lease to a month-to-month lease. In a letter dated February 3, 2010, received from Ursula Prosegger, on behalf of the Defendants, she confirms a discussion to change the lease term to month-to-month effective July 1, 2010. There are several proposed modifications to the financial terms of the lease as well.

Mr. Mei tendered into evidence an agreement between the Corporate Claimant and Ms. Burgess dated May 31, 2010. The agreement confirmed the sale of the equipment for \$15,000 subject to the successful signing of the lease by Ms. Burgess (the appendix listing the equipment is missing). The second paragraph shows the payment schedule: the first payment of \$3000, confirming it was paid and subsequent payments of \$2000 on the 15th of each month, with a “penalty” of 0.1% per day. The third paragraph provides “Any term change is subject to agreement of both sides in writing”. That is the extent of the agreement. It is a one-page document, clearly not prepared with the advice of legal counsel. Mr. Mei confirmed that he did not receive legal advice.

In an e-mail dated May 26, 2010 from Mr. Mei to Ms. Prosegger, he confirms that Mr. Hong and a Mr. Huang are still interested in the in the business, but they were previously unable to put together a viable business plan. Attached to the e-mail, is a document entitled business plan.

In a subsequent chain of e-mails, ending with an e-mail dated June 10, 2010, Mr. Mei suggests difficulty believing that Ms. Burgess could raise sufficient funds for the transaction. In a letter to Ms. Prosegger dated June 15, 2010, Mr. Mei indicates that Ms. Burgess is seeking to know the terms of the lease which was required in order for her to complete the agreement for the purchase of the equipment.

Finally in a letter to Mr. Mei, Ms. Prosegger confirmed the lease will not be renewed after

June 30, 2010.

Mr. Livingstone presented a copy of Ms. Burgess' business plan (Exhibit 10) and sought to have Mr. Mei comment on its reasonableness. I stopped this questioning as I do not feel that relevant in this matter. I shall have more to say on this plan in reviewing the evidence of the Defendants.

Based on Mr. Mei's evidence, it was his understanding that the paragraphs of the lease cited above provided him with a right and priority to extend the term of the lease and then subsequently assign it. He testified that he was not happy with the defendant's choice of tenant. Given that she was the new tenant, Mr. Mei felt he had no choice but to sell the equipment to Ms. Burgess and feels that the defendant should be held liable for this.

Ursula Prosegger is the President of Urchin Property Management. She testified that she and Mr. Mei had several discussions concerning the renewal of the lease and its terms. Mr. Mei did not want to renew the lease but rather change it to a month-to-month term. When she sent the February 2010 letter to Mr. Mei proposing the amended rent and month-to-month term, she received no response from him. Several months later things became "very confused".

Mr. Mei showed up at her office frequently and called her several times. At one time, he showed up with several prospective new tenants, presumably Mr. Hong and Mr. Huang. She testified that she had only met with these gentlemen for five minutes and received an e-mail from one of them at one point. By contrast, she met with Ms. Burgess directly when she approached Ms. Prosegger about renting the premises. In her mind the lease does not give him a right pick a new tenant. She described her impression of Ms. Burgess' business plan as impressive and "thought had been put into it". It consisted of a review of projected sales and costs which Ms. Prosegger felt appeared to support her ability to pay the rent. She found that Mr. Mei's referrals' documents deficient with no indication of financial risk.

Ironically, for all its impressive appearance and organization, it had its deficiencies. For example, the income projections for the business were not consistent throughout the analysis. In the end, the business plan proved futile as Ms. Burgess would make an assignment in bankruptcy eighteen months later.

Neither Mr. Hong, Mr. Huang, nor Ms. Burgess gave evidence.

In reviewing the evidence, it is clear that the contract between the parties concerned the rental of the premises at 55 Portland Street. The tenancy was due to expire on June 30, 2010. Mr. Mei had proposed an extension of the lease on a month-to-month basis, which the Defendants were prepared to consider. The terms of the lease agreement provide for an agreement to extend the lease, "upon the same covenants and agreements as contained in this Lease with the exception of the provisions for rent, and of this covenant to renew". This clause does not create a cause of action for a defaulting purchaser of business assets. It is not a contract for the purchase and sale of his business or its assets. That transaction occurred between the Corporate Claimant and Ms.

Burgess. I find as a fact that the purchase and sale of the equipment was not part of the subject matter of the contract between Urchin Holdings and the Corporate Claimant.

The extension of the term of the lease ought to have been pursued in Supreme Court. It is an interest in land which is beyond the jurisdiction of the Small Claims Court.

In summary, I make the following findings of fact:

- The Agreement between the Defendants, the Corporate Claimants and all of the tenants in between affected only the interest in 55 Portland Street. They did not have any bearing on the businesses nor their assets.
- The February 3, 2010 letter was the last written correspondence dealing with an extension of the tenancy.
- The terms of the initial lease and the sub-leases do not create a priority to renew the tenancy. Rather, I interpret the clauses to provide Mr. Mei and the Corporate Claimant with the right to occupy it, subject to their agreement on new rental provisions and the application of the renewal clause. A default in this provision in any event does not create a cause of action against a defaulting purchaser for an unsuccessful sale of a business.

I do not believe that Mr. Mei has shown that either Urchin company can be found liable in contract or tort for the loss experienced by him. They clearly did not know about her financial situation or else it is reasonable to assume they would not have approved the rental to Ms. Burgess.

In addition, I note that Mr. Mei was not without alternatives. For example, he could have removed the equipment and sold it elsewhere or he could have accepted security in default of payment of the installments and subsequently realized on it. While not a factor in my decision, I note that Mr. Mei would have benefitted from legal counsel during his negotiations.

As stated previously, the claim is dismissed.

Dated at Halifax, NS,
on September 24, 2012;

Gregg W. Knudsen, Adjudicator

Original: Court File
Copy: Claimant(s)
Copy: Defendant(s)