Claim No: 415681

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Aarons Sales and Lease v. Rafuse, 2013 NSSM 40

BETWEEN:

AARONS SALES AND LEASE

Claimant

- and -

HEATHER RAFUSE

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on June 25, 2013

Decision rendered on July 2, 2013

APPEARANCES

For the Claimant	Dawn Bishop Account manager
For the Defendant	self-represented

BY THE COURT:

[1] The Claimant carries on a lease to own business supplying merchandise such as furniture, appliances and electronics.

[2] The Defendant signed a number of contracts with the Claimant in September 2012 for the lease of a various items of furniture and electronics.

[3] The state of the account is not really an issue. The Claimant says that there is owing on the account $2,776.38, which is the total buy-out price remaining on the four contracts. The Defendant does not deny that this is the case. Her defence is based on something entirely different. She also counterclaims for the return of certain payments which she has made.

[4] Monthly lease payments were due on the four separate contracts on the 20th of the month. On or before November 20, 2012, payments on two of the contracts were made, but on two of the others were not made until sometime later. Technically, those latter two contracts were in a state of default. Depending on whose position I accept, this may or may not be significant.

[5] According to the Defendant, in or about the middle of November 2012, while her apartment was being fumigated, she moved all of the items to her parents' home to protect them. This was intended to be temporary, lasting perhaps a month. Tragically, on November 22, 2012 her parents home suffered a fire which took the life of both her parents. The personal items that had been leased from the Claimant were also irretrievably damaged in the fire.

[6] Each of the lease agreements contains a type of insurance protection that the Defendant says she should benefit from. I quote the contract language below:

> Risk of Loss and Damage: I am responsible for, and must pay the fair market value of, the Leased Property if and as of the time it is lost, stolen, damaged beyond repair or destroyed ("Loss") from all causes, normal wear and tear excepted. However, I am not responsible for any Loss that results from fire, flood, windstorm or other Act of God if I give notice and satisfactory evidence of such Loss to Lessor within two days of its occurrence. The fair market value will never exceed the Total Cash Price of the Leased Property. If a reasonable person would consider the Leased Property damage beyond normal wear and tear, I must pay the reasonable cost of repair. I agree that the Leased Property is not currently damaged (except ordinary wear and tear, if previously leased).

[7] The representative of the Claimant referred to this benefit as part of the "Service Plus" plan which is outlined in the agreement, and for which a separate payment is payable under the contract. Although it may not matter in the end, my reading of the contract suggests that it is actually a stand-alone provision. There is nothing in the separate one-page document attached to the contracts pertaining to Service-Plus that refers to this coverage for destroyed items. Essentially, the clause I have quoted above is a form of insurance. It is consistent with the fact that until or unless the items are purchased outright, property in the goods belongs to the Claimant seller. It also recognizes that the Claimant would be losing one of its remedies for default, namely repossession of the goods, if the goods are destroyed.

[8] I have no idea whether the Claimant self-insures, or carries coverage with an outside carrier. Such a distinction is not really relevant. The fact is, the contract contemplates some form of protection which protects the consumer in

such a situation. Implicitly, it is something built into the price paid by the consumer.

[9] The Claimant does not question that the goods were destroyed by fire. However, it is unwilling to honour this provision. To its credit, it is not seeking to rely on the fact that the Defendant did not give notice of the loss within two days. It would be harsh and cruel in the extreme to hold someone like the Defendant responsible for notifying the Claimant within 48 hours under circumstances where she had just tragically lost both of her parents. She can fairly be excused for not giving a higher priority to notifying the Claimant that some of its property had been lost in a fire. The evidence does disclose that she did give such notice within a short period of time, and did supply satisfactory evidence of the fire. Moreover, there is no reason to believe that, under the circumstances, the Claimant would have done anything differently had it been notified sooner.

[10] At the hearing, it was explained that the Defendant is not being extended this insurance benefit because:

a. she moved the merchandise to her parents home without obtaining prior authorization from the Claimant. This is a so-called “prohibited act” under the contracts.

b. Also, the Claimant contends that two of the contracts were in default, and that the lease agreement was technically not in force at the time of the fire.

[11] The lease agreements are actually structured as a series of rolling one-month terms. The actual language in the contract is as follows:

> Lease Transaction: I agree to lease the below items ("Leased Property") from… (the Lessor) according to the terms and conditions of this Lease Agreement ("Agreement"). My Initial Lease Term is for one month. On or before the last day of my Initial Lease Term and each Renewal Term, I must either renew this Agreement by making a Renewal Payment or I must return or surrender the Leased Property to Lessor. I must make my Renewal Payment by mailing or delivering a Payment to the Lessor address noted above.

[12] According to the Claimant's argument, once the Defendant failed to make a payment, technically the lease was not renewed and as such, she says, the insurance provision in the lease agreement expired or was not applicable.

Contract interpretation

[13] It must be taken as established that the Defendant was in breach of these provisions of the agreement. According to the Claimant's view, those breaches excused it from performing its obligations under the contract - most pertinently, the insurance provision.

[14] In my view, this view would only be correct if the breaches by the Defendant could be said to have been "fundamental breaches" of contract, serious enough to excuse the Claimant from continuing to perform any of its obligations. Not every contract breach excuses performance by the "innocent" party.

[15] One of the leading case in Canada on fundamental breach of contract is *Syncrude Canada Ltd. v. Hunter Engineering Co.* (1989), 57 D.L.R. (4th) 321 (S.C.C.) . Wilson J. wrote at p. 369:

> The formulation that I prefer is that given by Lord Diplock in *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] A.C. 827 (H.L.) . A fundamental breach occurs "Where the event resulting from the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract" (p. 849). (Emphasis added.) This is a restrictive definition and rightly so, I believe. As Lord Diplock points out, the usual remedy for breach of a "primary" contractual obligation (the thing bargained for) is a concomitant "secondary" obligation to pay damages. The other primary obligations of both parties yet unperformed remain in place. Fundamental breach represents an exception to this rule for it gives to the innocent party an additional remedy, an election to "put an end to all primary obligations of both parties remaining unperformed" (p. 849). It seems to me that this exceptional remedy should be available only in circumstances where the foundation of the contract has been undermined, where the very thing bargained for has not been provided.

[16] Applying this test, the Claimant would only be excused from performing its obligation to provide fire insurance, if the breaches by the Defendant were fundamental. For breaches of a contract that are not fundamental, the remedy of the innocent party is to claim damages for the breach, assuming any had been suffered.

[17] In my view, neither of the two breaches cited by the Claimant constitute fundamental breaches of the contract. In the case of late payment, it is clear that the Claimant’s practice is to keep the contract alive if the account is brought up to date. One cannot say that late payment, or even non-payment, renders the contractual relationship over - not until the goods are repossessed and the consumer loses all opportunity for possession and eventual ownership.

[18] The same logic applies to the unauthorized moving of the goods. The prime purpose of this provision logically is to allow the Claimant to have some control over how the goods are used or kept, and to allow them to know where to

attend to repossess, if it came to that. Had prior authorization been requested, there is no reason to believe that it would have been denied - particularly where avoiding exposure to the fumigation was to protect the property from contamination. While there may have been a technical default here, in my view it was an innocent one by the Defendant that caused no harm. Certainly, it was far from a fundamental breach of contract.

[19] These contracts were drafted by the Claimant. If there is any ambiguity, it must be interpreted liberally, in favour of the consumer - i.e. the Defendant.

[20] In my view, the Defendant is entitled to the benefit of the insurance and should not have been called upon to pay out the contracts.

The counterclaim

[21] The Defendant has paid $631.00 in payments, in order to keep her credit rating from being compromised. She asks that these payments be returned to her. I believe she is entitled to recover this amount. Had she been extended the insurance coverage immediately, she would not have made these payments. She is also entitled to the cost of filing the counterclaim in the amount of $60.60.

[22] In summary, then, the claim is dismissed and judgment on the counterclaim is allowed in the total amount of $691.60.

Eric K. Slone, Adjudicator