Date: 2007 01 22
Docket: S-0001-CV-2006000087

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF KAM LAKE ENTERPRISES LIMITED, Landlord

against 5128 N.W.T. LIMITED, Tenant

AND IN THE MATTER OF THE *Commercial Tenancies Act*

MEMORANDUM OF JUDGMENT and DIRECTION FOR *VIVA VOCE* HEARING

[1] This is an application by Kam Lake Enterprises Limited ("the Landlord") for a writ of possession and other relief as against 5128 N.W.T. Limited ("the Tenant"). The landlord and tenant relationship between the two partiesarises out of a lease dated April 1, 2005, pursuant to which the Tenant leases and operates a restaurantlocated on the bottom floor of a building owned by the Landlord. The lease is for a three year term with an option to renew for two further three year terms exercisable at the option of the Tenant.

[2] The Landlord alleges that the Tenant has defaulted on its obligations under the lease. As a result of the alleged defaults, the Landlord sent the Tenant a letter terminating the lease and demanding possession of the premises. The Tenant refused to give up possession and continues to operate its restaurant on the premises.

[3] A threshold issue is whether the Landlordhas complied with the requirements of s. 33(1) of the *Commercial Tenancies Act*, R.S.N.W.T. 1988, c. C-10, which provides as follows:

> 33. (1) When a tenant, *on* the determination of his or her lease or right of occupation, whether created by writing or orally, wrongfully refuses or neglects on demand made in writing to go out of possession of the land demised to the tenant or that the tenant has been permitted to occupy, the landlord may apply, on affidavit, to a judge of the Supreme Court, to make the inquiry provided for in this section and in sections 34 to 40.

(Emphasis added)

[4] The inquiry referred to is to determine whether the tenant holds possession against the right of the landlord and whether the tenant, having no right to continue in possession, wrongfully refuses to go out of possession [s. 33(3)].

[5] By letter of March 29, 2006, (the "termination letter"), the Landlord set out a number of events which it claimed amount to breaches of the lease by the Tenant. The termination letter states, "Pursuant to section 37 of the Lease, we hereby serve notice that the Lease is terminated. Your client is required to vacatethe premiseson or before April 27, 2006 at 11:59 p.m.".

[6] The termination letter went on to say that rent for the month of April should be pro-rated and that the notice was being given so as to minimize the effects on the Tenant's business and allow time to relocate. In response, the Tenant sent the Landlord a letter dated April 26, 2006, stating that it was not in violation of the lease and had no intention of vacating the premises.

[7] The Tenant argues that this application by the Landlord for possession is premature or in error because the Landlord failed to follow the statutoryrequirement to make its demand for possession and its notice terminating the tenancy in separate notices. Instead, the Landlord combined both in the one termination letter.

[8] The Landlord argues that because of the wording of s. 33(1), notice of termination and demand for possession can be contained in one document. Alternatively, the Landlord says that even if s. 33(1) requires two separate notices, since the Tenant made it clear that it would not give up possession, there is no prejudice to it by the failure to deliver a second notice demanding possession.

[9] Counsel for both parties agree that resolution of this issue depends on the meaning in s. 33(1) of the word "on" in the phrase "When a tenant, *on* the determination of his or her lease or right of occupation, ... wrongfully refuses or neglects on demand made in writing to go out of possession ...".

[10] Counsel have indicated that there are no cases from the NorthwestTerritories on point. The Tenant relies in part on a statement in Richard Olson's *A Commercial Tenancy Handbook*, Scarborough, Ontario: Thomson Carswell, 2004, at App. D-28 that the demand for possession must be a separate document from the notice

terminating the tenancy. However, that authority explicitly relies on Manitoba cases and also, mistakenly, refers to Yukon legislation. The latter is, however, identical in wording to the portion of s. 33(1) which is at issue.

[11] The Manitoba cases cited by Olson, and relied on by the Tenant, are *Stefanik v. Blazewich*, [1946] 2 W.W.R. 530 (Man. C.A.) and *McBain v. Herbert* (1956), 64 Man. R. 191 (Man. Q.B.).

[12] In *Stefanik*, the Manitoba Court of Appeal was dealing with s. 70 of the *Landlord and Tenant Act*, R.S.M. 1940, c. 112, of which the Court said:

> Sec. 70(1) of the *Landlord and Tenant Act* requires that, as a condition precedent to the right to resort to the provision of the Act relating to overholding tenants, the landlord must serve on the tenant a written demand of possession. The section is very specific that a demand of possession cannot be served until *after* the lease has been terminated. A notice to quit and a demand of possession can, therefore, never be embodied in one document, for there is no right to serve a demand of possession until after the time fixed by the notice to quit has expired and the lease has been terminated thereby.

[13] Although section 70(1) is not producedin the case report, a review of it indicates that the relevant part reads as follows:

> 70. (1) Where a tenant *after* his lease or right of occupation, whether created by writing or by parol, has expired or been determined, either by the landlord or by the tenant, by a notice to quit or notice pursuant to a proviso in any lease or agreement in that behalf, or has been determined by any other act whereby a tenancy or right of occupancy may be determined or put an end to, wrongfully refuses or neglects upon demand made in writing to go out of possession of the land demised to him, or which he has been permitted to occupy, his landlord may apply, upon affidavit, to a judge ...
>
> (Emphasis added)

[14] In *McBain*, the Court was dealing with the 1954 version of the same section, which had the same wording. The Court followed the ruling in *Stefanik* and held that unless the section was strictly complied with, the judge had no jurisdiction to make the requested order.

[15] In this case, counsel for the Tenant submitted that the Manitoba cases reflectthe common law, but referred to no authority for that proposition, nor have I been able to find any.

[16] British Columbia's *Commercial Tenancy Act*, R.S.B.C. 1996 c. 57, contains similar wording in s. 18(1): "In case a tenant, *after* the lease or right of occupation, whether created in writing or verbally, has expired, or been determined, either by the landlord or by the tenant, by a notice to quit or notice under the lease or agreement ... wrongfully refuses, on written demand, to go out of possessionof the leasedland ... the landlord may apply to the Supreme Court ... ". (Emphasis added)

[17] In British Columbia, the reasoning in the *Stefanik* case has been accepted: *Re Anderson and Anderson* (1966), 57 D.L.R. (2d) 561 (B.C.Co.Ct.).

[18] In my view, the difference in the wording between the British Columbia and Manitoba statutes and the Northwest Territoriesstatute is significant. The word "after" in the Manitoba and British Columbia statutes is clear. The word "on" in the Northwest Territories statute is capable of a wider interpretation. In the *Oxford Concise English Dictionary*, Clarendon Press, Oxford, 1995, at page 950, the definitions of "on" include "exactly at; during; contemporaneously with" and "immediately after or before".

[19] Thus, "on" can mean "contemporaneous with" and is not restricted to "after". Earlier versions of s. 33(1) used the word "upon" rather than "on": s. 34(1) *Landlord and Tenant Act*, R.O.N.W.T. 1974, c. L-2; s. 46(1) *Landlord and Tenant Act*, R.O.N.W.T. 1956, c. 56. However, the two have the same meaning according to the *Oxford Concise English Dictionary*.

[20] I conclude that because of the wider meaning of the word "on" in s. 33(1), the demand in writing that the tenant give up possession of the leased premises need not come after notice of termination of the lease, but can come at the same time and in the same document. Accordingly, the notice given to the Tenant in this case does not contravene s. 33(1) by reason of containing both notice of termination and demand for possession.

[21] The next issue is whether the Landlord was entitled to terminate the lease. Although the Landlord takes the position that there have been numerous breaches of the lease by the Tenant, it relies on only two breaches.

[22] The first breach arises from the Tenant's failure to pay for the repair of damage which is said to have resulted from a frozen pipe. The Landlord has filed affidavit evidence suggesting two possible causes of the frozen pipe: accumulation of ice from a dislodged pipe following the Tenant's replacement of a dishwasher on the leased premises and/or dripping water when the restaurant was closed for a period of time, causing the pipe to freeze and crack. The Landlord characterizes the required repairs as plumbing repairs for which the Tenant is liable under paragraph 5 of the lease.

[23] The Tenant, on the other hand, argues that the evidence does not clearlypoint to anything it did as the cause of the damage. It suggests that other tenantsin the building who are users of the water pipes may have been at fault. It also says that the replacement of the dishwasher did not requireany changesto the plumbingin question. The Tenant says it is willing to pay if the damage is shown to be its responsibility, however it has not taken any steps to inspect the damage or obtain advice from a plumber about the cause.

[24] The evidence provided by the Landlord is hearsay. Attached to one of the Landlord's affidavits is the termination letter, which contains information about the damage. That letter is written by the Landlord's then lawyer. In another affidavit, the Landlord talks about what the contractor who did the repairs believes and what he has said and what it is logical to assume. In a further affidavit, the Landlord has attached a letter and a brief note from a plumber about the cause of the damage. There is no sworn evidence from the plumber as to the cause of the damage.

[25] Since the evidence as to the cause of the damage is hearsay and, even taken at its face value, not entirely clear, and since this is a contested issue, the appropriate course is to direct *viva voce* evidence under s. 37(2) of the *Commercial Tenancies Act.* Unless the parties come to some other resolution of this issue, the hearing as it pertains to this issue will be directed at whether the Tenant is responsible for the damage and if it is, whether its failure to pay the repair costs amounts to a breach of the lease.

[26] The second breach alleged by the Landlord is the Tenant's failure to pay for utilities as required under the lease. Two such failures were specified. One is with respect to a shortfall of $91.98 on an invoice and the other is for utilities for January 2006 in the amount of approximately $499.00.

[27] The Tenant's position is that it was never invoiced for $91.98 and is not liable for it. The Tenant says that the Landlord regularly made errors in its paperwork. Although it is unclear to me exactly why the Tenant does not accept the Landlord's

explanation that the $91.98 was part of an invoice, the balance of which was paid by the Tenant, I am also unable to tell from the paperwork exhibited to the Landlord's affidavit that it is actually owing. It would seem to be a simple matter of locating the invoice and determining the unpaid portion. So that issue will also be part of the *viva voce* hearing if the parties are not otherwise able to resolve it.

[28] As to the January 2006 utilities, they were eventually paid approximately 9 months later than they should have been. The Tenant has provided no explanation for this other than the general one that the Landlord's invoices often contained errors and so were carefully scrutinized. No reason is given for why it took 9 months to scrutinize that particular invoice. I am satisfied that the failure to pay on time does amount to a breach of the lease. However, since the Tenant seeks relief from forfeiture in relation to all of the alleged breaches, whether relief from forfeiture should be granted on the basis of this breach alone or in combination with any others proven will await the outcome of the *viva voce* hearing.

[29] I will also leave for determination following the *viva voce* hearing the issue whether the Landlord is entitled to possession of the leased premises notwithstanding acceptance of rent.

[30] Accordingly, I direct a *viva voce* hearing on the issues specifiedabove. Counsel are directed to submit their available dates for the hearing, along with an indication of the time required for the hearing, to the Registry within 20 days of the date this Memorandum of Judgment is filed. Costs of this application will be left to be dealt with at that hearing.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
22 day of January 2007

Counsel for the Landlord: Edward W. Gullberg
Counsel for the Tenant: William M. Rouse

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