

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 1044589 ONTARIO INC. carrying on business as NANTUCKET BUSINESS CENTRE, Plaintiff

A N D:

AB AUTORAMA LTD., Defendant

BEFORE: MESBUR J.

COUNSEL: Linda Phillips-Smith, for the Defendant, moving party

William S. Chalmers, for the Plaintiff, responding party

HEARD: August 5, 2008

ENDORSEMENT

[1] This was a motion by way of a special case to determine a question of law on an agreed statement of facts. The question for the opinion of the court is:

Given the Agreed Statement of Facts, including the provisions of the Offer to Lease, has the Defendant established, as pleaded in its Statement of Defence, that the Plaintiff is precluded from maintaining its claim, subrogated or otherwise, in this action for the damages it alleged sustained in a fire on February 9th 2005, at the premises it owned?

[2] The question arises out of an Offer to Lease between the Plaintiff, as Landlord, and the Defendant as Tenant and the parties' respective rights and obligations under the Offer to Lease.

[3] The parties signed the Offer to Lease in December of 1999, intending to enter into a formal lease. They never did so. As a result, under the express provisions of the Offer to Lease, the parties agreed that the Offer to Lease would be the Lease.

[4] The plaintiff leased the defendant a unit in a commercial strip mall to conduct its business of automobile repair shop. For the purpose of this special case, it is agreed that on February 9, 2005 the defendant, or someone for whom they are responsible in law, were working on or repairing one or more automobiles, when a fire started, causing damage to the premises, damages to the contents of the premises, and business interruption and loss of profits.

[5] The issue is whether the terms of the offer to lease permit the landlord to sue the tenant for damages, (and its insurer to sustain a subrogated claim) or whether, when it included insurance as part of the costs of the tenant's proportionate share of the costs of the premises, it effectively assumed the risk of damage by fire, and thus may not sue the tenant for damages arising from the tenant's negligence.

[6] The defendant takes the position that the offer to lease does just that. It relies primarily on what are referred to as the "trilogy" of cases from the Supreme Court of Canada¹ to support its position. It suggests that the essence of those cases was to provide that if a tenant pays its proportionate share of property insurance on the premises the landlord owns, then the risk of damage to the premises falls on the landlord, who cannot then sue the tenant, unless there is clear wording to the contrary.

[7] The plaintiff suggests that the current state of the law preserves the general rule that a tenant is responsible for damage caused by its own negligence and is not immune from a landlord's suit, unless there is clear language in the lease to the contrary. It says there is no such clear language here, and thus the plaintiff's suit may continue against the tenant.

[8] What emerges from all the case law is that the result will turn on the express wording of the lease in question. Here, the landlord points to the fact that in each of the trilogy cases, there was an express provision requiring the landlord to insure the premises against loss by fire. Here, there is no such express provision, and thus the landlord says the trilogy cannot apply. The landlord goes further, and says that the express wording of the offer to lease leads to the same conclusion. I agree.

[9] In my view, the wording of the lease here is more like the lease in *Lee-Mar Developments Ltd. v. Monto Industries Ltd.*². There, as here, the defendant relied on the trilogy, and invited the court to find that although there was no express covenant in the lease that the landlord obtain fire insurance, there was an "inferential covenant" to that effect. The defendant in *Lee-Mar* went further, and suggested that this inferential covenant itself implied "a clear covenant that the fire insurance obtained

¹ *Angew-Surpass Shoe Stores Ltd. v. Cummer-Yonge Investments Ltd.* [1976] 2 S.C.R. 221; *Ross Southward Tire Limited v. Pyrotech Products Ltd.*, [1976] 2 S.C.R. 35, and *S. Smith v. T. Eaton Co.*, [1978] 2 S.C.R. 749

² [2000] O.J. No 1332 (S.C.J.), affirmed [2001] O.J. No. 987

by the landlord is for the benefit of both the landlord and the tenant, resulting in a bar to the subrogated action by the insurer.” That is essentially the position the tenant takes here. The court rejected that argument, looking at the express terms of the lease to hold that those express terms of the lease were contrary to that argument.

[10] The court found that certain aspects of the lease had mandated provisions which placed the risk of loss by fire caused by the tenant's negligence on the tenant. Most of them are present in this case as well. First, there was no covenant obliging the landlord to take out insurance on the property. There is none in this case.

[11] Second, the reference to the landlord's insurance only appeared in the part of the lease under the heading “Lease, Term, Rent, Additional Rent and Taxes.” That is similar to this case, where the only possible reference to the landlord's insurance simply reads as follows:

It is the intention of both parties that the Lease to be prepared shall be an absolutely net Lease, and, therefore, will provide that the Tenant shall pay all costs in respect of the maintenance, repair and replacement of the Premises, Realty Taxes, Insurance, heating, Hydro, Water and Utilities of all kinds, any and all applicable taxes existing now and in the future, as well as the Proportionate Share (defined in the Lease) of Realty Taxes, and all costs incurred in the operation, maintenance, repair, replacement management and insurance of the project in which the Premises are located.”

This clause does not require the landlord to obtain insurance, nor does it specify what type of insurance might be contemplated.

[12] In considering the question of insurance, it is also noteworthy that the only express insurance obligation in the offer to lease is on the tenant. The relevant provision reads:

Tenant shall maintain commercial liability (including fire, premises, liability) insurance in an amount not less than two (2) million dollars, Tenant shall hold the Landlord and his representatives harmless in any and all action against the Landlord. Landlord shall be a named insured under the Tenant's policy ...”

[13] The tenant suggests that this obligation refers only to a general commercial liability policy, to protect against third party claims. The landlord points out, however, that if the parties only intended the tenant to obtain liability insurance, there would be no need to include the words “fire” and “premises”. I agree that this clause lends weight to the landlord's position.

[14] Third, in *Lee-Mar* the court also noted that the lease contained an “entire agreement” clause, and reasoned that this gave weight to the conclusion the landlords advanced. The offer to lease in this case does as well, and I thus conclude there can be no collateral agreements or obligations other than those outlined in the offer to lease itself.

[15] Fourth, the lease in *Lee-Mar* was described as a “completely carefree” net lease to the landlord. The court found this provision supported the landlord’s position. That is also the case here.

[16] Here, the tenant sets much store in the fact that in *Lee-Mar* the lease contained an express provision imposing an obligation on the tenant to repair where the tenant was at fault, and suggests that the lease here contains no such provision. The lease in *Lee-Mar* provided that notwithstanding any other provision of the lease, if any part of the building was damaged or destroyed “through the negligence, carelessness or misuse of the Tenant ... the cost of resulting repairs, replacement or alterations, shall be borne by the Tenant, who shall pay the same to the Landlord forthwith upon presentation of an account of such expenses incurred by the Landlord.” It is true that the lease here does not contain such strong, explicit language. It does, however, in my view, contain a similar clause that is sufficient to bring it squarely into the reasoning of *Lee-Mar*.

[17] The lease contains the following provision:

The tenant shall conduct its business in a good and lawful manner and understands the rules and regulations of the building/property; namely operating his business in a safe and clean manner with regard to the interior as well as the exterior of his unit. In the event the Tenant fails to meet his obligations and maintain a proper and orderly operation as determined by the property manager, then the Landlord’s representatives shall undertake to do the required work(s) and this shall be added to the rent(s)/additional rent and be due and payable immediately.

[18] From this clause I infer the parties intended that the tenant be responsible for the costs which result from its failure to operate the business in a safe manner.

[19] The combination of all these factors in the lease leads me to the inescapable conclusion that the parties intended that the tenant assume the risk for any losses caused by the tenant’s negligence.

[20] In the result, the answer to the question posed is “NO”, and the plaintiff is not precluded from pursuing its claim against the defendant. The plaintiff is entitled to its costs of the motion, fixed, as agreed, at \$3,000 all inclusive.

MESBUR J.