IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CIV-2018-004-001750
[2019] NZDC 11195

BETWEEN	WESTCITY NZ PTY LIMITED First Plaintiff
AND	WESTCITY NZ NOMINEES PTY LIMITED Second Plaintiff
AND	SNOW LIMITED First Defendant
AND	RUI XUI SHEN Second Defendant
AND	XIA OBO DAI Third Defendant
AND	HONG YING HOU Fourth Defendant
AND	HANSEN GIA Fifth Defendant

Hearing: 14 June 2019

Appearances: H G Holmes for Plaintiffs
Second Defendant in Person
Third Defendant in Person
Fourth Defendant also in attendance

Judgment: 14 June 2019

RESERVED JUDGMENT OF JUDGE G M HARRISON

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[1] The plaintiffs own in partnership the Westcity Waitakere shopping centre.

[2] The fourth and fifth defendants leased shop FC249 in the mall from the then owner from 2013.

[3] On 25 November 2015 the fourth and fifth defendants assigned their lease to the first defendant. As is usual in such cases, despite the assignment, the fourth and fifth defendants remained liable to the lessor for their obligations under the lease.

[4] In or about July 2017, the plaintiffs acquired the mall from the prior owner. Snow Limited, which traded as "Flames" was then the lessee pursuant to the assignment. Its obligations were personally guaranteed by Ms Shen and Mr Dai. The plaintiffs claim that Snow Limited fell into arrears of rental as from 1 August 2017. They were unable to remedy that position and ultimately the plaintiffs cancelled the lease on 10 July 2018.

[5] It now claims a total of $282,835.80 being rent of $215,963.87 plus accumulated interest, costs described as de-fit costs of removing and reinstating the premises after cancellation, and solicitor client costs.

[6] The amounts claimed are not disputed.

[7] The plaintiff seeks summary judgment against all defendants. It is well established that in such a case the plaintiffs must establish that the defendants have no arguable defence to the claim – *Pemberton v Chappell.*[1]

[8] The fourth and fifth defendants have taken no steps and in particular, have filed no notice of opposition to the claim. Ms Hou attended the hearing and wished to address submissions but I declined to permit her to do so because no formal appearance had ever been entered on behalf of the fourth and fifth defendants, no notice of opposition nor affidavit had been filed, and no opportunity had been afforded to the plaintiffs to respond to any possible defence. Judgment by default is therefore

[1] *Pemberton v Chappell* [1987] 1 NZLR 1.

available in respect of the fourth and fifth defendants, service of the proceedings upon them having been proved.

[9] On the face of it, the plaintiffs are entitled to judgment against Ms Shen and Mr Dai pursuant to their guarantees.

[10] They were legally represented until just prior to the hearing when on 6 June 2019 their solicitors withdrew and Ms Shen and Mr Dai appeared in person.

[11] The notice of opposition previously filed on their behalf alleged essentially three defences. The first was that the plaintiffs had failed to mitigate their loss. The second was that the plaintiffs had breached the defendants' right to quiet enjoyment of their premises by failing to control pest infestation in the mall, and thirdly, that these disputes should be referred to arbitration.

[12] Mr Holmes addressed these alleged defences in his submissions.

[13] At the hearing, Mr Dai raised two matters in defence. His first concern was that the mall had not been managed properly by the plaintiffs because various of the tenants had left and as a consequence, the numbers of people attending the mall had fallen away. He was unable to point to any obligation under the lease for the landlord to ensure a basic "foot traffic" attendance. Mr Holmes referred to clause 1.2 of the lease which provided that the terms of the lease constituted the entire agreement of the parties. Within clause 1.2, the following is stated:

> Without limiting the foregoing, the lessee acknowledges that the lessor has made no representation, warranty or undertaking regarding this lease, including but not limited to any new lease within the centre after the expiry date of this lease, any exclusivity of permitted use within the centre, the lessee's projected gross sales nor projected pedestrian traffic within the centre.

[14] That precludes any defence being advanced on that issue.

[15] The second possible defence raised by Mr Dai was related to an infestation of other food premises within the mall by vermin, although their premises were not affected directly. He claimed that because two such food outlets within the mall were

closed until the infestation problem was remedied, that the patronage of "Flames" was further adversely affected.

[16] Mr Dai could not point to any obligation on the lessor in the lease to control this problem. Indeed, clause 17(a) of the lease provides:

> The lessee will keep the premises free of rodents, insects, reptiles and pests generally. If the lessee does not strictly and promptly comply with this rule, the lessor will be entitled to engage pest exterminators and charge all cost to the lessee and collect the costs in the same manner as rent and arrears.

[17] As noted, it was not the premises in question that were infested, but other premises where it would seem that the owners were in breach of that obligation, but clearly the lessor was under no immediate obligation to keep the premises within the mall free of infestation by vermin unless the lessees of the various premises failed to do so.

[18] Clearly, there is no available defence on that issue.

[19] Although not advanced at the hearing, the notice of opposition alleged that the disputes should be referred to arbitration. I have decided that there are no valid disputes and therefore a reference to arbitration does not come into consideration, but in any event, no application for stay of the proceedings has been made to enable a reference to arbitration. No discernible defence arises in that regard.

[20] The last potential defence raised in the notice of opposition was that the plaintiffs had failed to mitigate their loss. There was no evidence submitted in that regard. The premises were re-let on 26 April 2018 and no evidence was adduced to establish that there had been any undue delay on the part of the plaintiffs in effecting the re-letting of the premises.

[21] In any event, there is significant case authority which establishes that a lessor has no duty to attempt to re-let or otherwise mitigate the loss caused by non-payment of rent whilst the lease remains in force – *Boyer v Warbey*.[2]

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[2] *Boyer v Warbey* [1952] 1 QB 234at 246-247.

Conclusion

[22] For the foregoing reasons, no defence to the plaintiffs' claim has been identified. It is therefore appropriate to enter judgment against the first, second and third defendants on the plaintiffs' claim for summary judgment. As far as the fourth and fifth defendants are concerned they having taken no steps, judgment is entered against them by default.

[23] There will be accordingly be judgment against all five defendants jointly and severally for $263,984.50, plus solicitor client costs incurred by the plaintiffs. Leave is reserved to the plaintiffs to file a memorandum in respect of the amount they seek in that regard. Clause 13.1.3 of the lease provides that the lessee will pay all expenses including legal costs on a solicitor client basis for which the lessor will be liable in consequence of any breach by the lessee of any of the covenants of the lease.

[24] The sealed judgment is to issue following the receipt of the plaintiffs' memorandum as to costs and determination of the proper amount payable.

G M Harrison
District Court Judge