EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS]

IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CIV-2017-004-002663
[2018] NZDC 17840

BETWEEN	V & V INVESTMENTS LIMITED Plaintiff
AND	KAHLUA LIMITED First Defendant
AND	MASS RIZVI SHABEER MAHAMOOR Second Defendant

Hearing: 23 August 2018

Appearances: J A Wickes for the Plaintiff
2nd Defendant in Person and for 1st Defendant

Judgment: 4 September 2018

RESERVED JUDGMENT OF JUDGE AA SINCLAIR
[On Plaintiff's Summary Judgment Application]

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[1] This is an application by the plaintiff for summary judgment claiming rent and outgoings, contractual interest and costs under a Deed of Lease dated 19 July 2016 (the Lease).

Factual Background

[2] The plaintiff as landlord, leased to the first defendant the premises at [address deleted], Mt Eden, Auckland for a term of 12 years commencing 1 July 2016 at an initial rent of $30,000 (plus GST) per annum. The second defendant and his business partner Mr Tithira Jayamal Udumalagala Gamage, are named as guarantors under the Lease. Pursuant to the terms of the guarantee, the guarantors guaranteed payment of the rent and the performance by the tenant of the covenants in the Lease. The plaintiff

gave the first defendant a two-month rent holiday so that the first rental payment of $2,500 plus GST was due on 1 September 2016.

[3] The first defendant took on the Lease with the intention of setting up a café in the premises. The second defendant and Mr Gamage filed affidavits in which they described difficulties they encountered in completing construction work which meant that they faced lengthy delays in opening the café. When it did finally open in June 2017 business was quiet, and they struggled to pay staff wages and for supplies.

[4] The plaintiff made demand for payment of the rent by letter dated 31 July 2017, Property Law Act default notice dated 21 August 2017, and a statutory demand served on the first defendant on 6 September 2017. No rent was ever paid under the Lease.

[5] Efforts were made by the second defendant to sell the business without success and the first defendant moved out of the premises on 14 September 2017. On 22 September 2017, the parties signed an agreement terminating the Lease and returning the premises to the landlord (the Termination Agreement).

Defendants' position

[6] The defendants do not dispute the rent and outgoings claimed. Rather, they oppose the application for summary judgment on the following grounds:

(a) The first defendant spent money on building a "professional" kitchen of which the plaintiff obtained the benefit when the first defendant vacated the premises.

(b) An alleged verbal agreement between the first defendant and the plaintiff's director to leave the first defendant's works at the premises in lieu of payment of arrears of rent and outgoings.

(c) The second defendant further opposes the application on the basis that Mr Gamage as the other guarantor, is also liable and further, he has lost a considerable sum of money in building the café and the plaintiff has had the benefit of that investment.

Summary Judgment

[7] The principles relevant to an application for summary judgment are well settled and were summarised by the Court of Appeal in *Krukzeiner v Hanover Finance Limited*[1] as follows:

(a) The question on a summary judgment application is whether the defendant has no defence to the claim that is, that there is no real question to be tried. The Court must be left without any real doubt or uncertainty.

(b) The onus is on the plaintiff, but where the evidence is sufficient to show there is no defence, the defendant has to respond if the application is to be defeated.

(c) The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But on the other hand, it need not accept uncritically evidence that is inherently lacking in credibility. The Court may take a robust and realistic approach where the facts warrant it.

Defences Raised

(a) Expenditure on Kitchen

Evidence

[8] The second defendant, Mr Mahamoor, deposed that the first defendant had installed a kitchen on the premises and had spent a total of $75,628.42 on the renovation work including architectural fees, building consent, plumbing and electrical services, security system, vinyl, range hood and ducting, builder, and silver chef rental. Invoices were provided for only 6 of the items being architectural fees, range hood, ventilation system, plumber, Auckland City Council and consultancy fees

[1] *Krukzeiner v Hanover Finance Limited* (2008) 19PRNZ 162 at [26].

relating to the design of the ducting system. The Silver Chef Rental related to equipment hire. When the café closed, the equipment was returned and the first defendant received an invoice for $15,622.00.

[9] The plaintiff said that when the first defendant moved out of the premises on 14 September 2017 the company left an extractor and a sink. He did not ask or agree to these items remaining. The plaintiff observed that the first defendant left these items in the premises because it would have cost money to remove them. As well, the first defendant had also left a quantity of rubbish on the premises and unconsented electrical and plumbing work. It was his evidence that there was no discussion or agreement as to waiving the rent arrears.

[10] Mr Mahamoor stated in a reply affidavit dated 23 March 2018, that in addition to the sink and extractor fan, the first defendant had laid vinyl on the floor, extended a wall and added a door, built a grease trap and installed ventilation and security systems. As well, plumbing, electrical and construction work was undertaken. It was on this basis, it had been possible for the plaintiff to re-let the premises quickly.

[11] The plaintiff in his further affidavit dated 17 April 2018 stated that this was not correct. It was his evidence that he had fully renovated the premises prior to the first defendant's tenancy. He commented that he had been able to re-let the premises quickly because the location is good. He went on to say that it took the new tenant over 3½ months (from 26 September 2017 when its lease started to 4 January 2018) to fitout the premises for its restaurant operation. The tenant's business had opened on 5 January 2018.

Discussion

[12] Clause 20.1 of the Lease specifically provides that if the landlord authorises any alterations or additions which are made before the commencement date or during the term of the Lease, the tenant will, at the tenant's own expense if required by the landlord, no later than the end or earlier termination of the term, reinstate the premises.

[13] Ownership of the alterations or additions that are not removed by the end or earlier termination of the Lease may, at the landlord's election, pass to the landlord without compensation payable to the tenant. If the tenant fails to reinstate, then any costs incurred by the landlord in reinstating the premises within 6 months of the end or earlier termination of the Lease, shall be recoverable from the tenant.

[14] While the first defendant may have incurred cost in the renovation work, there is no obligation or requirement on the plaintiff under the terms of the Lease to pay any compensation to the first defendant for all or any of the amounts claimed.

(b) Agreement to waive rent

Evidence

[15] Mr Mahamoor deposed that he told the plaintiff that the first defendant had spent more than $60,000 on renovation work in order to obtain consent to operate as a café. It was his evidence that the plaintiff agreed that the first defendant would leave the premises, and, taking into account the work done by the first defendant, the plaintiff would write off the outstanding rent and outgoings.

[16] The plaintiff denies that there was any agreement to waive rent in return for receiving the benefit of the tenant's renovations.

[17] The Termination Agreement signed by the parties does not make any reference to rental obligations or to any agreement to waive the rent and outgoings owed under the Lease.

Discussion

[18] There are no contemporaneous documents which support there being an agreement between the plaintiff and first defendant not to claim the full amount of the outstanding rent and outgoings. Mr Mahamoor and/or Mr Gamage gave evidence that there was such an agreement but did not give any details including when and where it was negotiated.

[19] It is apparent from the evidence that the first defendant was in financial difficulty and could not sustain the café business. The company therefore had little option but to vacate the premises when it did.

[20] It is questionable whether the renovation work said to have been carried out by the first defendant was of any particular value to the plaintiff having regard to the nature of this work, and the fact that the incoming tenant then undertook its own renovations before opening its restaurant business.

[21] Furthermore, and significantly, for the first defendant to have removed its fixtures, it would have had to pay to reinstate the premises in circumstances where it was Mr Mahamoor's evidence that the company did not have funds to be able to pay the rent.

[22] Taking all these matters into account, I find the assertion that the plaintiff would have walked away from the Lease without receiving any rent for the whole term of the tenancy, lacks any credibility and I am satisfied that there was no such agreement between the plaintiff and defendants.

[23] At the hearing, Mr Mahamoor took the position that in the absence of any agreement, the defendants should be entitled to some deduction in the amount of the rent claimed for at least some of the renovation work. He submitted that he was the sole income earner in his household and had two young children. He had lost "a huge amount of money and time" building the café. He submitted that the plaintiff had benefited from his hard work and this should be taken into account when considering the plaintiff's claim.

[24] While there is no doubt that the defendants have lost a large amount of money in relation to this venture, that does not provide a ground of itself for a setoff or reduction in the amounts claimed by the plaintiff in the context of the Lease and having particular regard to clause 20.1 discussed above.

(c) Other Guarantor

[25] Mr Mahamoor contends that Mr Gamage should also have been joined as a defendant in the proceeding. In his affidavit of 14 March 2018, the plaintiff noted that he had been told by Mr Mahamoor that Mr Gamage was only his assistant and had no money and that Mr Mahamoor took full responsibility for paying the arrears. It was on this basis that he had issued proceedings against Mr Mahamoor only

[26] The liability of the guarantors is joint and several. However, there was no obligation on the plaintiff to have joined Mr Gamage as a defendant in this proceeding. Mr Mahamoor is able to pursue Mr Gamage separately for a contribution if he wishes to take this action.

Judgment

[27] After careful consideration of the evidence and submissions I am satisfied for the reasons discussed above, that the defendants do not have any defence to the plaintiff's claim, and it is appropriate to enter summary judgment.

[28] Accordingly, the plaintiff is entitled to judgment against the first defendant as tenant, and the second defendant as guarantor for the following amounts:

(a) Outstanding rent and outgoings in the sum of $35,600.61.

(b) Legal costs in the sum of $1,108.55;

(c) Interest accrued on the rent and outgoings during the period of the Lease at the rate specified in the Lease of 14% per annum to 31 August 2017 in the sum of $2,635.55; and

(d) Interest on $35,600.61 from 1 September 2017 to the date of judgment at the rate of 14% per annum.

Costs

[29] The plaintiff is entitled to costs. In the event that the parties cannot agree, the plaintiff is to file and serve a memorandum within 10 working days of the date of this judgment; and the defendants are to file and serve their memorandum in reply within a further 7 working days.

AA Sinclair
District Court Judge