

**IN THE DISTRICT COURT
AT MANUKAU**

**I TE KŌTI-Ā-ROHE
KI MANUKAU**

**CIV 2018-092-002343
[2019] NZDC 3246**

BETWEEN

MVH TRUSTEE LIMITED
Plaintiff

AND

NAVIN DUTT SHARMA & KARISHMA
DEVI SHARMA
Defendants

Hearing: 20 February 2019

Appearances: M Gunawan for the Plaintiff
Defendants in person

Judgment: 27 February 2019

RESERVED DECISION OF JUDGE A P CHRISTIANSEN

Background

[1] The plaintiff owns property [in Papatoetoe — address deleted]. It seeks summary judgment upon its claim that on 29 September 2017 the defendant's company, Autorepairs and Compliance Limited owes unpaid rent for the plaintiff's premises.

[2] The defendants are being sued, they having signed the Agreement to Lease as guarantor of their company's obligations by the lease terms.

[3] On 17 April 2018 the defendants' company was placed into liquidation.

[4] It is pleaded that rent has been unpaid since 15 January 2018. Rent arrears of \$42,104.31 is claimed to be due to 15 May 2018. The plaintiff also claims “further interest from 15 May 2018 at the contractual rate of 12% per annum”.

[5] The plaintiff has produced a copy of the Agreement to Lease. It bears the signatures of the defendants as guarantors of their company’s lease obligations. The lease bears the date of Friday 29 September 2017, that having been handwritten.

[6] It appears to be the effect of the position outlined on behalf of the defendants that a proper lease was not signed on 29 September 2017 and they were permitted to move into the premises without cost but subject to a bond of two months’ rent being paid – which the defendants say was paid. They claimed they were permitted to stay free of rent as an incentive for them not to look for other premises. Mr Sharma deposes that the affidavit of Narendran Krishna dated 12 June 2018 on behalf of the plaintiff confirms the defendants never signed the Deed of Lease.

[7] The affidavit of Mr Krishna, an authorised representative for the plaintiff, deposes, inter alia:

- (i) On 29 September 2017 an Agreement to Lease was entered into and signed by the defendants as guarantors;
- (ii) Possession was taken on 1 November 2017;
- (iii) From 31 October 2017 to around 23 March 2018 a Deed of Lease had been prepared and was signed by the plaintiff; that Mr Krishna “had to chase” the tenant and defendants on a number of occasions to have it signed.

[8] By the defendants’ account what was signed on 29 September was not a full lease. That which was signed on 29 September, as appears by an exhibit attached to the affidavit of Mr Krishna, is an Agreement to Lease. Mr Sharma asserts that the plaintiff “did not prepare the lease properly on the date that the tenant moved in”. Further, “...when the defendants wanted the proper lease then the plaintiff agreed that

they can remain in the premises in the meantime free of rent as an incentive for the defendants not to find other premises and to avoid adverse publicity for the plaintiff”.

[9] In short, it appears to be the defendants’ position that the documents signed by them on 29 September were not binding upon them, but rather such obligation did not arise until a “proper” lease i.e. a Deed of Lease was signed.

[10] When Mr Sharma appeared in Court for this hearing he complained he had not been served with the plaintiff’s documents as required by directions of this Court on 12 November 2018.

[11] In discussion with the parties it became clear that earlier in the litigation issues were experienced in serving documents on the defendants. The plaintiff explains and the Court file confirms that there had been issues previously in serving documents on the defendants and with the authority of the Court service was approved by way of listing on Facebook. Evidence was provided to the Court that all affidavits from the plaintiff were filed on 15 February and subsequently served by Facebook. In the Court’s view the defendants have had sufficient time to prepare their defence.

[12] The Court does not accept for these reasons that the defendants have been disadvantaged. The defendants are well aware, and they have responded directly to matters heralded for consideration at this Court’s hearing.

[13] In essence it is the evidence of Mr Sharma that he is not bound by the terms of the Agreement of Lease because a Deed of Lease was not signed. Also he contends there was an oral agreement permitting occupation for a period free of rental cost.

Considerations

[14] The plaintiff applies for summary judgment. It claims the defendants have no defence and say there is an absence of any real question to be tried.

[15] In the Court's view the evidence provided on behalf of the plaintiff is to be preferred. Claims for the defendants of an agreement regarding a rent-free period lack details regarding when and where such a discussion occurred, or with whom, or what final terms may have been agreed. The Court does not consider the defendants' contention is reliable.

[16] Regarding claims of an unexecuted Deed of Lease the clear evidence is that such was signed by the defendants but ultimately not by the plaintiff because the defendants had vacated the premises.

[17] Also the Agreement to Lease which clearly was binding on the parties, comprehensively records agreed terms including that while the lease and rent was to commence from 15 November 2017, access to the premises had been granted from 1 November 2017 to 15 November 2017, without cost.

[18] It seems improbable, as the defendants claim, that a two-monthly period of occupation was permitted without cost. Further, no such provision was contained in the agreement that both parties signed. The evidence on behalf of the plaintiff rejecting such claims, is preferred by this Court.

[19] The present proceeding concerns a summary judgment application. For that reason care is needed when assessing conflicting evidence. There are clear differences of fact between the parties. It seems to this Court that the evidence of Mr Sharma goes no further than a mere assertion of a defence while the written evidence provides clear proof of an agreement that contradicts the defendants' current claims.

[20] Evidence was given on behalf of the plaintiff by its property manager and its leasing agent. Both confirmed no rent-free period was given other than that for a 14-day period at the commencement of the lease.

[21] The defendants' position that the Deed of Lease was not executed by both parties and was therefore not binding, overlooks clause 4.3 of the Agreement to Lease which notes:

4.3 Notwithstanding that [a Deed of Lease] may not have been executed, the parties shall be bound by the terms, covenants and provisions contained in this agreement and in the lease as if the lease have been duly executed.

[22] It is clear from clause 3 of the Agreement to Lease that rental payments were due monthly in advance and were to include GST.

[23] Misunderstood by the defendants is the fact that an unexecuted Deed does not prevent action being undertaken to recover rental arrears.

[24] Instead the execution of a Deed was, in the circumstances of this case, a formality. Had it been executed then the Deed would have been registerable and may have given rise to a caveatable interest. It may also have been assignable but the lack of such does not provide immunity from payment obligations.

[25] Also the evidence is clear that the defendants were not without assistance at the time of lease negotiations. When the defendants signed the Deed they were, the plaintiff believes, represented by a lawyer. Their signatures have been witnessed. Each of the plaintiff's representatives who had contact or communication with the defendants deposes to there being no discussions at all regarding the rent-free period claim provided by the defendants.

Judgment

[26] In the Court's view there is clear evidence of the defendants' liability for rent arrears.

[27] The Court has reviewed details of the arrears and costs claimed and agrees those total \$42,104.31 to and inclusive of all obligations to 15 May 2018. Judgment will be entered in favour of the plaintiff in that sum claimed.

[28] Any application for costs is to be the subject of written submissions. The defendants will be given seven days to file written submissions served upon them, as authorised by the Court, through Facebook.

[29] The plaintiff's submissions are to include as well, an estimate of scale costs.

A P Christiansen
District Court Judge