

**IN THE DISTRICT COURT
AT AUCKLAND**

**I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKĀURAU**

**CIV 2018-004-000313
[2019] NZDC 3298**

BETWEEN

LING HUANG
Plaintiff

AND

NANYA LIMITED
Defendant

Hearing: 20 February 2019

Appearances: T Alaelua for Plaintiff
J Xiao as director of the Defendant

Judgment: 27 February 2019

RESERVED DECISION OF JUDGE A P CHRISTIANSEN

Decision

[1] At the conclusion of the hearing of this matter the Court informed the parties that the issues in dispute were unsuitable for resolution by summary judgment application and accordingly that application would be dismissed.

[2] The matter will now have to be dealt with by way of ordinary proceeding and for that purpose Registry is to schedule a call of the matter in a Civil List as soon as this can be arranged.

[3] The defendant was unrepresented when this matter was called on 20 February 2019. The defendant should consider engaging legal counsel if the plaintiff's proceeding is to be pursued.

Background

[4] The plaintiff applies for summary judgment upon his proceeding to claim “compensatory/punitive” damages due to the failure of his agreement to purchase the defendant’s drycleaning business.

[5] Each party has a separate account of the circumstances resulting in the purchase failure.

[6] The parties signed a written agreement on 19 October 2017 for the sum of NZD\$100,000. The business operated from leased premises. The parties’ agreement was conditional upon the landlord’s consent being obtained. The defendant was required to obtain that consent and the defendant had commenced rent review negotiations with the landlord on behalf of the plaintiff.

[7] The plaintiff pleads inter alia:

- (a) that on or about 17 November 2017 the defendant entered into a new sale and purchase agreement for the same business to a third party and that on 7 December 2017 the plaintiff discovered the defendant had sold the business to another party who had been granted landlord consent;
- (b) the defendant refused permission for the plaintiff to be in direct contact with the landlord or the landlord’s agent;
- (c) that not long after the agreement had been signed the defendant approached the plaintiff and continually requested the agreement be cancelled for various reasons including that the plaintiff was a male and the business was unsuitable for him, and that the plaintiff was too young to know how to efficiently run the business;
- (d) that he was advised on 1 November that there was a new landlord and that the landlord wished to carry out a rent review; and shortly after that he became aware the defendant had entered into a second agreement for the sale of the same business;

- (e) that he engaged the services of his solicitor to contact the defendant's solicitor to help obtain the landlord's consent he believing the defendant was not assisting him to obtain the landlord's consent.

[8] The plaintiff says on 15 November 2017 the defendant advised him the landlord wished to increase the rent from \$375 per square metre to \$450 per square metre. Ongoing discussion between the parties included he says the plaintiff agreeing to the defendant continuing to negotiate with the landlord on his behalf. Earlier, on 17 November 2017, the parties signed a variation agreement deferring the settlement date to 26 January 2018.

[9] On 7 December 2017 the plaintiff received advice that the landlord had granted consent to the assignment of the lease to another party "weeks prior".

The statement of claim

[10] Causes of action include:

- (a) breach of contract – dishonesty and failing to act in good faith due to:
- concealing the second agreement from the plaintiff
 - refusing to allow the plaintiff or his solicitor to deal directly with the defendant's solicitor regarding seeking landlord's consent
 - continually misleading the plaintiff and providing updates on the negotiation process for obtaining consent
 - advancing the other purchaser's agreement to obtain landlord's consent while under obligation to assist the plaintiff in that regard.
- (b) breach of contract – repudiation:
- failing to seek the landlord's consent to enable fulfilment of an agreement condition

- abandoning its obligations by advancing the purchase agreement on behalf of another
 - assisting that other purchaser while under obligation to the plaintiff
 - showing an unwillingness to perform its obligations to the plaintiff
 - failing to act in a proper manner
- (c) breach of contract by invalidly entering into a second agreement as though that second agreement was not subsequent to the first agreement with the plaintiff, and in doing so abandoning obligations due to the plaintiff

[11] The summary judgment application asserts no arguable defence is available on the plaintiff's claims.

Plaintiff's account of factual background

[12] By his evidence in support of this proceeding the plaintiff acknowledges being advised that the property from which the business operated, was for sale and therefore his agreement to purchase from the defendant would be subject to the consent of a new landlord. The plaintiff recalls a conversation with the defendant on 1 November 2017 advising there was a new landlord and that person was difficult. He said the defendant asked if he would consider cancelling the agreement, but he declined to. He said the defendant then advised she would speak with the landlord. He became suspicious and initiated research and made his own enquiries. He engaged a solicitor to pursue enquiries of the defendant's solicitor but obtained no response.

[13] He recalls on 15 November the defendant advising the new landlord insisted on a rent review before granting consent to the proposed assignment of lease. She, he said, insisted he cancel the agreement. Later, that day it appears, the plaintiff was

advised by the defendant she had received an email from the landlord's solicitor wishing to increase the rent. He said he neither agreed nor disagreed, and requested the defendant to relay a request to the landlord that a valuation be done. He said her reply was that the new landlord was difficult.

[14] The following day he said he asked the defendant to defer settlement until 26 January 2018. The next day he says the defendant advised him the landlord may not be willing to pay for a valuation report. Then he contacted the defendant and asked if he could deal directly with the landlord. He said she declined and insisted she would deal with the landlord.

[15] Only when on 7 December 2017 he contacted the real estate agent acting for the landlord was the plaintiff advised that the landlord had already granted consent to the assignment of lease to a third party a few weeks earlier. Subsequent enquiries confirmed a second agreement had obtained the landlord's consent.

[16] The parties had a conversation later that day when he said he confronted the defendant and that she had apologised. He said she urged him not to take civil action against her and said that she should not have lied to him.

The defendant's account of factual background

[17] Ms Xiao is a director of the defendant and on whose behalf she entered into an agreement for the sale of its business to the plaintiff. When the landlord's property was sold, the agreement for the sale of the defendant's business was reinstated and a new settlement date set for 17 November 2017.

[18] On 30 October 2017 she said the landlord's agent advised her there was a rent review due in February 2018 and that the new owner wanted to negotiate that at the same time as the assignment of the lease. Worried that the landlord would not lease his property to the plaintiff she prepared a backup buyer. On 11 November she was advised that the new landlord wanted to raise the rent 20% from February 2018. She said she passed that message on to the plaintiff. Despite talking to the plaintiff's wife for an hour the following day there was no response as to whether the proposed rent

rise would be accepted. She said the plaintiff asked for a market rent valuation. Ms Xiao said she advised the cost of this would exceed \$1,000; that the plaintiff did not respond then, nor the following day when she texted him about the level of rent rise that would be acceptable. She said that on 7 December 2017 and because the plaintiff had not notified her to accept the rent rise she signed an agreement to sell the property to a third party. When later the plaintiff threatened that she owed him a business of \$130,000 she says she was scared that he wanted to sue her for commercial fraud.

[19] Ms Xiao for the defendant says she believed she did honestly what she should have done; that she kept very close communication with the plaintiff. She denies preventing contact between the plaintiff and the landlord and says it was the landlord who wanted the defendant to contact him through the sales agent. Ms Xiao said the plaintiff rejected the landlord's indication of a 20% rent rise. When she asked the plaintiff what rate he would accept she says he refused to answer.

[20] She refutes claims of dishonesty. She says the plaintiff refused to pay a deposit or to check the defendant's accountancy records.

[21] She believes the plaintiff had no intention to purchase and now wants to challenge her, through the defendant, to achieve a financial outcome.

Summary judgment

[22] This is clearly an inappropriate case for determination upon an application for summary judgment. Also at issue is the degree, if any, of damages that might be quantifiable in the circumstances.

[23] Each party has their own view regarding circumstances, facts and about what was said at certain times.

[24] Issues concern claims of the defendant's disappointment that his prospective purchase failed. The Court urges further consideration be given by the plaintiff regarding how and by what process this dispute continues.

[25] The issues, if they are to succeed at all, will require determination of oral evidence. Presently there is no basis upon which the Court can consider arguable defences do not exist.

Judgment

[26] The application for summary judgment is dismissed.

A P Christiansen
District Court Judge