IN THE DISTRICT COURT
AT WAITAKERE

I TE KŌTI-Ā-ROHE
KI WAITĀKERE

CIV-2018-090-001383
[2019] NZDC 14681

IN THE MATTER OF	AN APPLICATION FOR SUMMARY JUDGMENT
BETWEEN	WESTCITY NZ PTY LTD First Plaintiff
AND	WESTCITY NZ NOMINEES PTY LTD Second Plaintiff
AND	KEQUAN YU Defendant

Hearing: 25 July 2019

Counsel: H Holmes for Plaintiffs
J Wickes for Defendant

Judgment: 31 July 2019

DECISION OF JUDGE G M HARRISON

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[1] The plaintiffs ("WestCity") apply for summary judgment against the defendant (Mr Yu) pursuant to his guarantee of the obligations of YY & YU International Ltd as lessee of shop premises in the WestCity Waitakere Shopping Centre.

The lease/guarantee

[2] The lease was entered into between WestCity Shopping Ltd and YU & YY International Ltd in respect of shop FC 253 within the shopping centre for a term of five years with a commencement date of 29 June 2017.

[3] The plaintiffs, who I understand to be a trading partnership purchased the shopping centre from WestCity Shopping Centre Ltd.

[4] The lease is undated although it is signed by Yu & YY International Ltd and Mr Yu as guarantor. That company had on 22 May 2017 entered into an agreement to lease the shop with WestCity Shopping Centre Ltd, which was the lessor, with the reversion passing to WestCity in or about July 2017.

[5] By letter of 20 June 2017 WestCity Shopping Centre Ltd confirmed that the agreement to lease was unconditional and that the lease itself would be forwarded for execution.

[6] YY & YU fell into arrears from 24 October 2017 and the lease was cancelled on 8 March 2018.

[7] The obligations of the lessee under the lease are unremarkable and require it to pay rent, operating expenses, local authority rates, and also to remove all partitions, additions, fixtures and fittings installed in the premises within five working days after the cancellation of the lease.

[8] WestCity claims arrears rent of $69,153.23 plus interest on those arrears of $1,418.31, and for further interest from 11 September 2018 to the date of judgment or earlier repayment. It also claims lost rental to 29 June 2018 of $33,660, and the cost of removing the partitions and fixtures (defit) costs of $25,346 and solicitor/client costs of $2,655.50 as at 25 May 2018 and further costs since incurred.

Summary judgment

[9] The principles applicable to the entry of summary judgment are now well understood. They were summarised by the Court of Appeal in *Krukziener v Hanover Finance Ltd*[1] as follows:

[1] [2008] NZCA 187 at [26].

(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.

(b) The Court must be left without any real doubt or uncertainty. The onus is on the plaintiff, but where its evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated.

(c) The Court need not accept uncritically evidence that is in inherently lacking in credibility, as, for example, where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable.

(d) The Court may take a robust and realistic approach where the facts warrant it.

The defences

[10] The notice of opposition filed by former solicitors for Mr Yu raised seven possible defences to the claim.

[11] In her submissions, Ms Wickes relied upon four grounds of defence and abandoned the remainder. They are:-

(i) that the agreement to lease, and the deed of lease are unenforceable;

(ii) there was a further agreement that supersedes the agreement to lease and deed of lease;

(iii) equitable setoff;

(iv) reference to arbitration.

Is the lease unenforceable?

[12] Section 233 of the Property Law Act 2007 provides that if the reversion expectant on the lease ceases to be held by the lessor (whether by transfer, assignment, grant, operation of law or otherwise), the rights to which s 233 apply-

> (a) run with the reversion; and
>
> (b) may be exercised by the person who is from time to time entitled to the income of the land, whether or not the lessee has acknowledged that person as lessor.

[13] Mr Yu's basic contention was that the benefit of a lessee's covenants do not run with the reversion where there is a contrary intention apparent from the lease or other circumstances.

[14] Mr Yu contends that there was a further agreement besides the agreement to lease and deed of lease that supersedes those documents.

[15] Mr Holmes referred to the High Court decision in *Mitre 10 (New Zealand) Ltd v Thistle Dome Holdings Ltd*[2] where the Court held:

> …contrary intention in the context of s 233(2) is not established solely by unilateral statements or conduct on the part of a lessor/vendor. I consider that it is necessary to show that such contrary intention is shared, explicitly or implicitly, by the assignee/purchaser. At the least some endorsement or acknowledgment on the part of the assignee/purchaser is required. It may be that such an endorsement need not take the form of a binding contract but there must be at least some acknowledgment which affirmatively demonstrates that the assignee/purchaser does not demure from what the lessor/vendor proposes.

[16] In making the allegation of the existence of a contrary intention, Mr Yu relies upon an email dated 26 September 2017 by Laura Conquer of Colliers Real Estate, apparently then acting for WestCity. In that email she says, as relevant-

> As discussed would you mind please checking the ATL/DOL for Eatz WestCity to see if both parties have signed them?
>
> If yes can you please return them to us. If not can you please sign and send back and I will review and pass on to the owner.

[2] [2015] NZHC 3289 at [69].

[17] Ms Conquer followed this up by a further email on 11 October and on 20 October Mr Yu replied saying-

> I don't have anything at my side. I remember I have send out long time ago.

[18] Any new documents different from those the subject of the claim have never materialised. WestCity deny ever creating such documents and maintain that it would make no commercial sense for it as the new owner of the premises to re-sign all existing tenants to new leases when they were entitled to the reversion of the existing leases.

[19] I am satisfied that there was no agreement to execute a new lease. It is quite clear that Ms Conquer as the agent of WestCity was endeavouring to get all the paperwork for the various leases in order which led to her enquiry of Mr Yu. His response that he had returned them a "long time ago" confirms in my view reference to the lease as originally signed by him.

[20] There is no arguable defence arising on the enforceability of the deed of lease, nor was there any new agreement to lease. That effectively deals with the first two grounds of defence.

Was there an equitable setoff?

[21] This is raised more as a counterclaim than a defence.

[22] The tenancy in question was part of a food court in the WestCity Shopping Mall. Two eateries were closed down in May 2017 owing to lack of cleanliness and the presence of vermin. There was no problem with the leased premises although Mr Yu claims that customers fell away because of adverse publicity about these other premises.

[23] In the first place, to the extent that the counterclaim involves an allegation that the lessor warranted certain levels of foot traffic, clause 1.2 of the lease provided, as relevant-

> 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.

[24] Furthermore, for an action of the lessor to amount to a breach of the covenant of quiet enjoyment, the actions must amount to substantial interference – *Sauthwark London Borough Council v Mills.*[3] There is no evidence of any action of WestCity amounting to substantial interference. Clause 5.5 of the lease provides-

> The lessee will at the expense of the lessee keep the premises clean and tidy at all times.

Furthermore, clause 8.22 of the fifth Schedule of the lease provides-

> The lessee will ensure the premises, the walls and surrounds in the general area of the front of the premises and the walls, surrounds and floor in the general area of the rear entrance of the premises do not smell, attract flies or other insects, become dirty, stained or littered with boxes, cartons and the like or constitute a firm hazard resulting from the use of the premises for the preparation and retailing of foods. In the event of any breach of this provision the lessor will have the right to arrange, at the cost of the lessee, for such cleaning and making good as it considers necessary.

[25] The primary obligation to keep premises clean and free of flies or insects is therefore cast upon the individual lessees and it is only in the event of a failure to do so that the lessor may step in and carry out the necessary work at the cost of the lessee.

[26] Ms Wickes relied upon *Grant v NZMC Ltd*[4] as establishing that a cross-claim may be set-off against the plaintiff's claim where-

> it would be unjust to allow the plaintiff to have judgment without bringing the cross-claim to account. The link must be such that the two are in effect interdependent: judgment on one cannot fairly be given without regard to the other; the defendant's claim calls into question or impeaches the plaintiff's demand. It is neither necessary, nor decisive, that claim and cross-claim arise out of the same contract (pp 12-13).

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[3] [2001] 1 AC 1.
[4] [1989] 1 NZLR 8.

[27] However, the Court also held that a right to an equitable set-off may be contractually excluded expressly or by clear implication. In the *Grant* case the lease did not contain that exclusion.

[28] In this case however clause 3.2.2 of the lease does exclude the right to an equitable set-off. It provides-

> The lessee will pay all money to be paid to the lessor by either electronic funds transfer or an appropriate order or orders from the lessee's bankers directly payment to the credit of the lessor's account at such bank and branch as is from time to time nominated by the lessor, and otherwise as the lessor may direct, without equitable or legal deduction, counterclaim or set-off.

[29] For those reasons the proposed counterclaim could not succeed even assuming Mr Yu would have the right to bring such a claim when the contractual right to do so is the lessee's.

Arbitration

[30] Mr Yu contends that if there is a valid lease these proceedings should be stayed and referred to arbitration in accordance with clause 13.9.

[31] WestCity submits that this is not a reasonably arguable defence because:

(a) The scope of the arbitration clause does not extend to disputes in relation to the monies claimed, which are either:

(i) covered by clause 3.2.2 of the Deed of Lease, which provides that the lessee agrees to pay all monies due to WestCity under the lease without equitable or legal deduction, counterclaim, or set-off; or

(ii) claimed by WestCity exercising its rights under clause 10 of the Deed of Lease, which the arbitration clause expressly does not prevent;

(iii) clause 10 relates to the rights of the lessor upon default by the lessee of its obligations regarding payment of rent, and that is expressly excluded from the arbitration.

[32] Furthermore, clause 8 of Schedule 1 of the Arbitration Act 1996 provides that an application to stay these proceedings should have been made "not later than when submitting that party's (Mr Yu) first statement on the substance of the dispute. No application for stay has been made. Even if it had, for the reasons given, action by the lessor pursuant to clause 10 of the lease is not subject to a right to arbitration.

Conclusion

[33] No arguable defence has been made out. Mr Yu's obligations pursuant to the guarantee are not challenged per se, and consequently judgment against him must follow.

[34] There will be judgment in favour of the plaintiff for $69,153.23 for unpaid rent, $33,660 for unpaid rent prior to the reletting of the premises; $25,346 being the costs of the defit of the premises. WestCity may submit a memorandum as to all interest now claimed, and costs sought within 10 days. Any response from Mr Yu is to be filed within a further 10 days.

G M Harrison
District Court Judge