

COURT FILE NO.: 02/7412

DATE: 20040819

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:)
)
JOROBIN INVESTMENTS LIMITED) William D. Dunlop, and Justin
) Robinson, counsel on behalf
) of the Applicant
)
Applicant)
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- and -)
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)
)
PETER LUKOSIUS, CAROL LUKOSIUS,) Charles P. Criminisi, counsel
991895 ONTARIO INC. and SAM'S) on behalf of the Respondents,
AUTO CENTRE) Peter and Carol Lukosius
)
) Richard Wellenreiter, counsel
) on behalf of the Respondents,
) 991895 Ontario Inc. and Sam's
) Auto Centre
)
Respondents)
)
)
) HEARD: Written Submissions

WHITTEN J.

[1] The original judgment in this matter was released September 2, 2003. On June 4, 2004, it was ordered that as between Sam's Auto Centre and the landlords, the Lukosius', there would be no order as to costs, i.e., that either entity pay the costs of the other. As for the issue of costs between

the applicant and the two respondents, the Lukosius' (the landlord), resolved with the applicant that the costs be fixed to a certain amount and that the liability for those costs be assigned to the landlord.

[2] Specifically, the Minutes of Settlement executed October 30, 2003 provides that the landlord will pay to the applicant Jorobin, (1)\$50,000.00 for costs and damages; (2) payment shall be by way of rent reduction in the amount of \$1,250.00 per month for 30 months; and (3) the claim for costs and damages that the applicant has against the landlord and Sam's Auto Centre are assigned to the landlord.

[3] No doubt, the landlord realizing the inevitability of an award for costs, as a result of the original September 2, 2003 judgment, sought to contain the exposure by this resolution.

[4] The landlord now looks to Sam's for contribution.

[5] The issues that now arise are twofold. Firstly, is the \$50,000.00 settlement an appropriate level of costs? Secondly, to what extent should Sam's be responsible for the amount ordered appropriate?

[6] Initially, there is some confusion generated with respect to the \$50,000.00 cost figure in that the Minutes of Settlement refers to the sum as being for both costs and damages. The latter was never really litigated before the court. That lacking and the fact that the figure of \$50,000.00 represents a figure just shy of the detailed costs, suggest that the reference to "*damages*" was really a reference to close the matter off, to leave no stone unturned as it were.

[7] The question then becomes is \$50,000.00 an appropriate level of costs in the matter at hand. The applicant, as referred to in the original judgment, was successful because of a lease, which was found to be unambiguous, in a commercial context in which "*usage*" had been an historical and significant aspect of the relationship between the landlord and Jorobin. As was stated in paragraph 39 of the judgment, "*The parties are quite familiar with how the use of a unit is significant to the occupant, and the existence of restrictive covenants. The parties are neither neophytes in their relationship nor how to define that relationship in a lease.*". The applicant made an offer which

would have allowed for a status quo pending a final determination. All in all, the original judgment spoke of the defendants being quite reckless in their position. Costs were an inevitability and given how the actions of the defendants were characterized, so would be the full indemnity scale.

[8] As was referred to above, the Bill of Costs submitted was backed up by detailed docket entries. The hourly rates upon which the amount is based are entirely in keeping with the experience level of the solicitors and the "Costs Grid". It was a prolonged proceeding in which the respective positions were vigorously championed. Fifty thousand dollars is a reasonable amount for costs in this matter, a fact which is reflected by the settlement between the landlord and the applicant.

[9] That settlement was an intelligent step by the landlord. By resolving the question of costs, the landlord contained the amount, avoided any further costs in either an assessment or court assessment, and probably most importantly, allowed for payment of costs over time instead of "forthwith". The landlords are not incorporated. By this resolution they reduced the taxable income from the rental property and consequently, in a way, gained tax relief for costs that would be difficult to offset otherwise.

[10] Having found the settlement a reasonable representation of costs, to what extent should Sam's Auto Centre contribute, if at all. Sam's argues that in a way, there was entrapment (not in the criminal sense of the word). Sam's advances that the landlords and their real estate agent knew what the nature of Sam's business was to be. Given the wording of the lease between the landlords and Jorobin, the applicant, and the history of the relations between those two entities, the potential for conflict between the proposed use of Sam's and Jorobin was blatant. Furthermore, the potentiality was complained of by Jorobin to the landlord. Regrettably, the landlord did not advise Sam's of the complaints before he acted to his detriment and moved in. The position of Sam's in this regard is quite compelling. Basically, "*the landlord got Sam's into this mess*". Having said that, Sam's tenacity in holding on to the occupancy, after all the cards were on the table compounded the problem. The landlord was forced into taking an indefensible position. Sam's and the landlords became, in a way, prisoners of their own recklessness. Therefore, it is appropriate that Sam's contribute to the costs. Given the

behaviour of Sam's and the landlord as described above and in the original judgment, it is appropriate that the landlord bear sixty percent (60%) of the costs and Sam's forty percent (40%). That would mean that Sam would be responsible for \$20,000.00 of the costs. That responsibility should be discharged over time as per the original Minutes of Settlement. To hold otherwise would be too unduly burden Sam's and would, in a way, create something of a financial windfall for the landlords in that they would have "up front" money for what is effectively a debt over time. Therefore, Sam's should pay to the landlord, commencing September 1, 2004, the sum of \$400.00 per month for 50 months.

WHITTEN J.

Released: August 19, 2004

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B E T W E E N:

JOROBIN INVESTMENTS LIMITED

Applicant

- and -

PETER LUKOSIUS, CAROL LUKOSIUS,
991895 ONTARIO INC. and SAM'S AUTO
CENTRE

Respondents

SUPPLEMENTARY REASONS - COSTS

WHITTEN J.

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Released: August 19, 2004