

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CC 10/2012

[2013]SCSC

ROYAL IMPORTS & EXPORTS (PTY) LIMITED
Plaintiff

Versus

SUNDARARAJULU VENKATESAN NAIDU
Defendant

Heard: 18 July 2013

Counsel: Bernard Georges for the plaintiff
Serge Rouillon for the defendant

Delivered: 30 September 2013

JUDGMENT

Egonda-Ntende CJ

1. The plaintiff sub-let to the defendant in 2007 Mangal Supermarket to the defendant annually and the last sub-lease was to expire on 30 May 2011. The plaintiff purported to terminate this sub lease on account of the defendant sub letting the property to another person without the consent of the plaintiff, in breach of their agreement with effect from 2 January 2011. The defendant failed to hand over the business as directed or even after the end of the lease. He closed she shop on 5 June 2011. The plaintiff took over the shop on 14 June 2011.
2. The plaintiff contends that the defendant, in breach of their agreement failed to pay to the plaintiff a sum of R11,000 per month from December 2010 to May 2011 totalling R66,000.00. In addition in breach of their agreement the defendant failed to pay to the head lessor, Mr Pillay, rent in the sum of R69,000.00. The plaintiff claims the said sums

of money from the defendant. In addition the plaintiff claims additional sums of money from the defendant on account of loss of profit for the period 2.01.11 to 14.06.11 at the rate of R50,000 per month totalling R275,000.00; R300,000.00 on account of special damages for anxiety, stress caused to the plaintiff by the defendant's breach, defaults and omissions; and R2,000.00 on account failure to submit end of year accounts to Seychelles Revenue Commission. The plaintiff claims a total sum of R712,000.00 and costs from the defendant.

3. The defendant admits that there was a sub lease agreement between him and the plaintiff but denies that it defaulted or breached any of its provisions. He therefore denies the plaintiff's claim wholly. Furthermore he asserts that the original sub lease was illegal for violation of the express provisions of the head lease. The plaintiff cannot therefore lay any claim under that sub lease on account of its illegality. Furthermore the defendant contends that the plaintiff cannot claim rent and profits at the same time since it admits that there was an existing lease at the time.
4. The defendant counter claimed from the plaintiff a total sum of R143,517.00 on account of multiple heads of claim. Firstly the plaintiff had used a store belonging to the leased premises for which the defendant claims R5,000 per month for 24 months less arrears of rent for 5 months which comes up to R65,000.00 due to the defendant from the plaintiff.
5. By oral agreement, on account of the plaintiff, the defendant paid air tickets and GOP charges and costs for 3 persons; Govindaram Raguraman, Masilamani Kalimuthu and Ramasamy Swaminathan which accounts for the balance of the claim against the plaintiff by the defendant.
6. The plaintiff denied the counter claim. It stated that it did not occupy any store belonging to the leased premises and had separately leased out a store from the owner of the premises. It denied the existence of any oral agreement to pay for air tickets and GOP charges as claimed. It contended that these were employees of the defendant and it was the defendant's obligation to meet those charges. It prayed for the dismissal of the counter claim.

7. The defendant raised the issue of illegality of the sub lease agreement between himself and the plaintiff. The plaintiff denied the illegality and contended that the head lessor had consented to the sub lease in question. The defendant did not lead any evidence on this aspect of his case. At the same time he chose to rely on the sub lease agreement in respect of his counter claim for 24 months of use and occupation of the store, part of the sub leased premises by the plaintiff. In the circumstances I can only take it that this aspect of the case for the defendant was abandoned.

The Main Claim

8. The plaintiff called 2 witnesses to testify and the defendant testified in person without calling an additional witness. From the testimony of the parties it is common cause that there was a sub-lease agreement between the plaintiff and the defendant dated 14 April 2010 for one year. Under this agreement the defendant was obliged to pay to the head lessor a sum of R16,000.00 per month and an additional sum of R11,000.00 directly to the plaintiff.
9. Save for the sum of R55,000.00 which the defendant admits is due to the plaintiff on account of unpaid business lease fee the defendant testified that he had paid the rental due to the head lessor Mr Pillay. He stated that he had done so by bank standing instructions for monthly transfers from the Mangal Supermarket bank account. He contradicted this version by saying he paid cash into Mr Pillay's account. The defendant failed to offer any supporting documentary proof for these payments.
10. In accordance with article 1315 of the civil code of Seychelles, as submitted by Mr Georges the defendant was under a burden to prove that he had complied with the foregoing obligations. It is clear that he has failed to discharge this burden. I accept the evidence of the plaintiff that R69,000.00 was outstanding to the head lessor as equally R66,000.00 was outstanding to the plaintiff of which defendant admits R55,000.00 only. I have no hesitation in entering judgment for the plaintiff in the said sums of money.
11. The plaintiff claimed R275,000.00 for loss of profits over a five and half months period during which the defendant retained the business premises after expiry of the notice

terminating the sub lease agreement. Mr Rajsunduram testified that this was at the rate of R50,000.00 per month. There is no evidence produced to show that these are the profits that the plaintiff would have earned had it been running the business for that period. This claim is unproven.

12. The other significant claim of the plaintiff is special damages for anxiety, stress caused to the plaintiff by the defendant's breach, defaults and omissions in the sum of R300,000.00 only. What are special damages? This question was discussed by Bowen L.J. In *Ratcliffe v Evans* [1892] 2Q.B. 523 at page 528 in the following words,

'Lest we should be led astray in such a matter by mere words, it is desirable to recollect that the term "special damage," which is found for centuries in the books, is not always used with reference to similar subject-matter, nor in the same context. At times (both in the law of tort and contract) it is employed to denote that damage arising out of the special circumstances of the case which, if properly pleaded, may be superadded to the general damage which the law implies in every breach of contract and every infringement of an absolute right: see *Ashby v White*. (1) In all such cases the law presumes that some damage will flow in the ordinary course of things from the mere invasion of the plaintiff's rights and calls it general damages. Special damage in such a context means the particular damage (beyond the general damage), which results from the particular circumstances of the case, and of the plaintiff's claim to be compensated, for which he ought to give warning in his pleadings in order that there may be no surprise at the trial.'

13. Special damages are damages claimed by a party, representing out of pocket expenses or other outgoings incurred by a party on account of injury or loss suffered by reason of the default of a defendant. These damages would be measurable in the particular currency which they have been incurred or lost. Ordinarily these would refer to some pre trial expenses arising after the cause of action arose such as medical bills, cost of repairs to property or lost earnings or other expenses. These damages are not speculative or subjective. They are not general damages which are determined by the court.
14. Much as the claim for R300,000 for anxiety and stress is labelled special damages it clearly does not fall under claims that would be understood in law as a claim for special

damages. Damages for anxiety and stress are not capable of exact calculation. This item of claim cannot qualify as special damages, a specie of damages usually claimed under the common law, in respect of claims under contract or tort, rather than under the Civil Code of Seychelles.

15. It may well have qualified as a claim for moral damages as non-patrimonial loss or injury or non-pecuniary loss suffered by the plaintiff but it would have no chance of success given that this claim is by a limited liability company which has no 'stress' or 'anxiety' as it is not a human being but a fictional creature of law. The claim for special damages of R300,000.00 is dismissed as it is entirely without merit.
16. The last claim of the plaintiff is R2,000.00 for failure to submit annual accounts to the Revenue Commission by the defendant. This claim has not been proven. No evidence has been adduced to show that this sum was incurred. In his testimony PW1, Mr Rajasunduram claimed that the only amount due under this head was R1,357.00 which is what he paid as a penalty. However no receipt was produced to support this statement. Neither was any explanation provided why a receipt for the same was not produced. I would not allow this claim.

The Counter Claim

17. The defendant had claimed that the plaintiff occupied the store, part of the leased premises for 24 months. This was denied by the plaintiff. The defendant had to prove not only that the plaintiff had occupied the store but that doing so was worth R5,000.00 per month for use and habitation of the same or for denying the defendant occupation. He has proved neither. There was no evidence adduced that showed that the plaintiff had taken over the occupation of this store from the defendant at any one time during the currency of the sub- lease. If in fact by the time they entered into the last the agreement for one year it had gone on for the last 12 months I am surprised that this was not discussed and included in the agreement. This claim remains unproven.
18. The defendant alleged several oral agreements for payment of GOP fees and air tickets expenses for 3 persons between 2009 and 2010. He stated that these expenses were

incurred by him in agreement with the plaintiff that the plaintiff would refund the same. The plaintiff denied such agreement and stated in evidence [PW1] that the said three persons were employed by the defendant and were in fact living with him. They were not employees or staff of the plaintiff. The defendant failed to provide any particulars of the alleged agreements including with which of the plaintiff's officers he did discuss with or made the oral agreements with and when this was done.

19. The burden of proof to prove these oral agreements rested upon the defendant. He has failed to discharge the said burden.

20. I find that the defendant has failed to prove the existence of the several oral agreements between it and the plaintiff in relation to purchase of GOP and air tickets for the persons it claimed it had incurred the said expenses. Neither has it proved that the plaintiff occupied 'the store' of the lease premises to its detriment for 2 years as claimed. The counter claim is entirely without merit.

21. In the result judgment is entered for the plaintiff in the sum of R135,000.00 only with costs and interest at the legal rate from the date of this judgment till payment in full.

Signed, dated and delivered at Ile du Port this 30th day of September 2013

FMS Egonda-Ntende
Chief Justice