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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. A. 147 OF 1988

BETWEEN	AMERICANA JAMAICA VENTURE	PLAINTIFF
A N D	POINT HOTELS LIMITED	DEFENDANT

P. J. Patterson Q.C., and with him Clarke Cousins for the Plaintiff.

B. St. Michael Hylton and with him Garth Patterson for the Defendant.

November 1, 2 and 11, 1988

SMITH, J:

The plaintiff is the Lessee of a hotel in Ocho Rios by virtue of a lease dated the 31st December 1981. The defendant is the Lessor.

The defendant is a wholly owned subsidiary of National Hotels and Properties Limited hereinafter referred to as N.H.P. It is abundantly clear that N.H.P. has at all material times acted as the defendant's agent in respect of the hotel and the lease aforementioned.

In letter dated July 22, 1988, and addressed to the plaintiff, N.H.P. stated:

> " In respect of the three years ended January 31, 1984, 1987 and 1988 there is a total of US$177,000 in unpaid rental".

The amount was made up as follows:

Amount due for 1984 - US$62,857; for 1987 - US$153,320; and for 1988 - US$60,825.

It seems to be common ground that the rental for 1984 was US$640,000 and for 1987 and 1988, US$700,130 and US$716,768 respectively.

The letter continued:

> " Clause 3 of the lease requires that all rent due to us be paid free and clear of any deductions. While we are aware that there are certain refurbishment and renovation claims outstanding by you.....these claims do not permit you to withhold rent legally due to us.....

> Accordingly, we are writing to demand payment of the above rent lawfully due to us within thirty (30) days of the date of this letter. The non-payment of this rent is regarded by us as a breach of Clause 3. If you fail to remedy this breach within thirty (30) days of the date of this letter, we will with regret be obliged to exercise the rights available to us under the lease".

Although other breaches were referred to, the only one relevant to these proceedings is the breach of Clause 3 (non-payment of rent).

On the 10th August 1988, N.H.P. again wrote the plaintiff and referred to letter of July 22, 1988 and "our meetings on August 8 and 9, 1988". In this letter N.H.P. conceded that it had overlooked a previous agreement in respect of the amount demanded for 1984 and stated:

> " We regret this oversight and now withdraw our request for this money".

In respect of the US$53,320 for 1987, N.H.P. admitted that it had not credited the plaintiff with US$31,125 and apologised for the error. The letter went on to state that the plaintiff was liable for US$83,020 in all for arrears and N.H.P. promised that if that money was paid within thirty (30) days of the letter they would consider the outstanding breaches of Clause 3 of the lease cited in their letter of the 22nd July, 1988 to be "fully cured".

However it was further claimed by the plaintiff and this has not been denied by the defendant, that no allowance was made for a payment of J$320,000 (or US$58,182) made in 1987 in arriving at the plaintiff's rental liability. Thus the amount of US$83,020 mentioned in the letter of the 10th August, 1988, should have been US$24,838. Another mistake by the defendant.

Addressing "Current rent" this letter states:

> " US$320,000 of minimun rent due and payable by Americana Jamaica Venture on 1st August, 1988 is still unpaid. We proposed and you agreed that Americana Jamaica Venture should pay US$266,108 on this rent to N.H.P. at once".

On the 31st August 1988, the plaintiff wrote N.H.P. stating:

> " .....Enclosed please find the hotel's cheque in the amount of J$366,563.77. This represents the first of four equal monthly installments to settle our rental liability as of August 1, 1988 as requested by Hugh Dyke's letter to Dr. Steve Laufer dated August 10, 1988.
>
> In respect of the US$83,020.00 which represents unpaid rent for the two years ended January 31, 1988 it is our intention to settle that balance with two payments of US$41,510.00,each on September 15, and September 30, 1988 respectively".

To this letter N.H.P. replied promptly (letter dated 5th September 1988) rejecting the plaintiff's proposal in this way:

> " After careful consideration, we are not able to accept your rent payment proposals and we wish to have all outstanding rent for Americana paid to us within 7 days of the date of this letter. Thereafter, we intend to charge you for interest at the prime rate on all outstanding balances....."

Albeit the amount tendered was accepted.

As a climax to this scenario the attorneys of the defendant, on the 30th September 1988 wrote the plaintiff in this vein:

> " On behalf of our clients, Point Hotels Limited, the Landlord, under Lease of the above Hotel to yourselves, dated 31st day of December 1981, we hereby formally notify you that, you are in breach of the provisions of Clause 9(i) of the said Lease, in that, you have failed for a period in excess of thirty (30) days to pay outstanding rental in the amount of $328,351.00 United States Dollars after lawful demand by the Landlord for payment thereof made on the 10th day of August 1988, and accordingly, under the provisions of the said Clause 9(i) , the Landlord will be exercising its right of re-entry and repossession upon the expiration of seven (7) days from the date of this Notice and you are hereby ordered to quit, vacate and deliver the said premises, the subject of the above Lease on or before such date".

Thereupon the plaintiff on the 5th October 1988 filed an Originating Summons, seeking as amended:

(1) A Declaration that the Notice given on behalf of the defendant dated 30th September, 1988, purporting to terminate the Lease dated the 31st day of December, 1981, is lawful, invalid and of no legal effect;

(2) An injunction restraining the defendant, its servants or agents from interferring with the plaintiff's possession or seeking to evict the plaintiff from the premises known as the Americana Hotel, Ocho Rios, pursuant to the ground set out in a Notice dated the 30th day of September, 1988;

(3) An injunction restraining the defendant from taking any steps or action to terminate the Lease dated the 31st day of December 1981, pursuant to the ground set out in Notice dated the 30th day of September 1988.

It should be noted that on the 25th October 1988 a Manager's Cheque in the sum of J$2,096,094 was tendered by the plaintiff and accepted by the defendant. This amount was more than sufficient to satisfy the demand.

Clause 9(i) of the lease is captioned "Termination and Re-entry" and provides inter alia:

> " If the rent hereby reserved or any part thereof shall at any time be unpaid for thirty days after lawful demand by the landlord from the tenant,... .....then.....it shall be lawful for the landlord or any person or persons authorised at any time by the landlord thereafter to re-enter upon the leased premises or any part thereof in the name of the whole and to retake possession thereof....."

The first and vital question therefore is whether or not a "lawful demand" was made.

LAWFUL DEMAND

Mr. Patterson Q.C., for the plaintiff contended that for the demand to be lawful -

(i) It must be made by Point Hotels Limited, the defendant; and

(ii) the sum demanded must not be excessive.

He submitted that the demand was made by N.H.P. and not by Point Hotels Limited, the defendant. There was no indication, he argued, that the demand was being made by N.H.P. acting as duly authorised agents of Point Hotels Limited.

Mr. Hylton for the defendant argues that there is no requirement either that the agent must have been expressly appointed as such or that the notice must have been expressly given on the landlord's behalf. What matters, he contended, is that the parties have been acting on the basis that the party giving notice has the authority to act as agent. In support of his contention he refers to Jackman v. Sealy [1959] 2 W.I.R. 219 and Harmond Properties Limited v. Gajdzis [1968] 3 All E.R. 263.

In the former the appellant was the monthly tenant of certain premises and the respondent the agent of the appellant's landlord. The respondent served a notice to quit on the appellant and signed it as "landlord". It was contended that the notice was bad in that it was signed by the respondent as "landlord" when in fact he was not. This contention was rejected and it was held that the notice was valid as all the dealings in connection with the premises were between the respondent and the appellant who from all the circumstances well knew and believed that the respondent was acting by full authority of the landlord.

I accept this proposition as a correct statement of the law.

In the instant case the uncontroverted evidence is that the plaintiff tendant corresponded with N.H.P. as if they were the agents of the landlord and more importantly paid rental to N.H.P. In the circumstances, it cannot be gainsaid, that they well knew and believed that N.H.P. was acting by full authority of the landlord. I therefore find that the demand was made on behalf of the landlord.

Was the demand excessive?

The facts recounted above clearly show that on the 10th of August the amount of US$83,020 was not owing as arrear for rent up to 31st January 1986. The sum properly due was US$24,838 (i.e. 83,020 less 58,182). Thus the demand for 83,020 for the period referred to was clearly excessive. It should also be remembered that within 30 days of this demand the sum of $366,563.77 approximate US$66,000, was paid by the plaintiff. This could satisfy the rent arrears leaving balance of approximately US$41,000. Since Courts of law always lean against forfeiture, I find that the arrears referred to in letter of the

10th August were paid within 30 days. However the matter does not end there. Mr. Hylton for the defendant argues that the statement - "We proposed and you agreed that AJV should pay US$266,108 of this rent to M.H.P. at once" constitutes a demand for 'current' rent due and payable on 1st August, 1988. Is this a demand? I think not. Previous demands required payment within 30 days of demand as stipulated in the lease. The statement in letter dated 10th August 1988 required payment "at once". In my view this statement was merely a reminder of what was proposed by the defendant and agreed by the plaintiff. It was not intended to be a demand. However even if this was a demand the position would be that on the 10th August 1988 a sum of US$349,128 (83,020 arrears and 266,108 current rent) was demanded. That the defendant intended to demand this amount as an entire sum is evidenced by the Notice of September 30. Thus even if this statement constitutes a demand we cannot escape the contention that it is excessive. In this regard, it should be noted that the Notice dated September 30, 1988 referred to US$328,351 as outstanding rental.

Is a demand for more than what is due valid?

In Fabian v. Winston cited in Volume 31(2) Digest (Re-issue) 814,6758 it was held that the demand of rent must be of the precise sum due. It has been stated that the demand must be made of the precise sum then payable and not one penny more or less - see Woodfall - Landlord and Tenant 27th Edition Volume 1 p. 891.

Lord Tenterden C.J. in Doe deWheeldon v. Paul (1829) 3 C and P 613 at 614 in recognising this principle said:

> "There are two objections (to forfeiture)in this case - First, that the plaintiff has demanded a larger sum than he ought if the non-payment was to work a forfeiture....."

This principle no doubt is based on the approach of the Court towards forfeiture. The Courts lean against forfeiture and normally lean to a strict or literal construction of a clause of forfeiture.

Since a forfeiture clause destroys or defeats the estate, it is subject to the subsidiary rule of construction that it is to be taken most strongly against the person at whose instance it is introduced, that is, the lessor - see Hill and Redman's Law of Landlord and Tenant 16th Edition p. 462 paragraph 385.

In my view, therefore, the demand of the 10th August 1988 referred to in letter of the 30th September 1988 is for an amount in excess of what is due and is thus invalid and of no effect.

On another point, it would seem also that where rent is payable half yearly and more than one half is due, only the rent for the last half should be demanded otherwise the demand will be altogether bad - see Woodfall - Landlord and Tenant 27th Edition Volume 1 page 891 and Scott v. Scott referred to at page 814 # 6757 of English Empire Digest Volume 31(2) (Reissue).

In the instant case the demand made by virtue of letter dated 10th August 1988, is in respect of unpaid rent for years ending 31st January 1987 and 31st January 1988, and rent due and payable on 1st August 1988. It is altogether bad.

Having found that the demand is invalid it is not necessary for me to consider the issue of waiver and the other points raised by Counsel.

Conclusion:

The Declaration sought in terms of paragraph (1) of Originating Summons is granted. Having granted this declaration, I am of the view, that the injunctive reliefs sought are not necessary.

The defendant must pay the plaintiff's costs as agreed or taxed.

Certificate for counsel granted.