

IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: Best of Being Studio and Spa Inc. (Re), 2009 NSSC 316

Date: October 30, 2009

Docket: B 33712

Registry: Halifax

District of Nova Scotia
Division No. 1 - Halifax
Court No. 33712
Estate No. 51-1218509

**In the Matter of the Bankruptcy of
Best of Being Studio and Spa Inc.**

LIBRARY HEADING

Registrar: Richard W. Cregan, Q.C.

Heard: September 22, 2009

Written Decision: October 30, 2009

Subject: Whether there was an agreement between a trustee in bankruptcy and the landlord of premises occupied by the bankrupt at the time of assignment whereby the trustee would occupy the premises for the period of time required to dispose of the assets free of occupation rent.

Issue: It is clear law that there is a presumption that a trustee should in these circumstances be required to pay the landlord occupation rent. This presumption can be rebutted. The trustee claimed it had an understanding that the occupation would be rent free, but on the evidence it was found that no such understanding had

been reached with the landlord.

Result: The trustee was required to pay occupation rent.

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**In the Matter of the Bankruptcy of
Best of Being Studio and Spa Inc.**

D E C I S I O N

Registrar: Richard W. Cregan, Q.C.

Heard: September 22, 2009

Counsel: Kent McNally representing Banc Properties Limited
Tim Hill representing the Trustee, Robert Hunt of
Green Hunt Wedlake Inc.

- [1] The bankrupt, Best of Being Studio & Spa Inc., (BOB), prior to its assignment in bankruptcy on June 11, 2009, had occupied premises owned by Banc Properties Limited (Banc) and leased to Dr. Alison McCallum Inc. My understanding is that Dr. Alison McCallum is the principal of both BOB and the professional corporation and that the premises were in turn sublet to BOB.
- [2] At the time of the assignment the rent, except for a small amount of earlier arrears, had been paid to June 30, 2009. It was convenient for the Trustee, Green Hunt Wedlake Inc., to continue in possession of the premises not just to June 30th but throughout most of July as a place to keep BOB's physical assets and show them to prospective purchasers. The Trustee vacated the premises on July 29, 2009.
- [3] What is in issue is whether the Trustee should pay rent for July in the amount of \$8,415, plus HST.
- [4] In the discussions the Trustee was represented by Robert C. Hunt and Banc,

by Besim Halef. These gentlemen met on June 15th. This meeting was followed with a letter from Mr. Hunt to Mr. Halef the next day. Included with this letter were keys to the premises, the Trustee having changed the locks, and the Notice of the Stay of Proceedings related to BOB. I quote this letter in its entirety except for the introductory paragraph.

I also wish to confirm the following aspects of our conversation:

- ▶ Our firm was appointed Trustee of BOB on June 11, 2009. I provided you with a copy of the notice of appointment from the office of the Superintendent of Bankruptcy when we met yesterday as well as the Statement of Affairs of BOB;
- ▶ Dr. Alison McCallum Inc. is the tenant in a lease with Banc Properties, and it is not bankrupt. Rent for the month of June has been fully paid; there is rent arrears of approximately \$2,851 for the months of February to May;
- ▶ The Statement of Affairs indicates that BOB owns all of the contents in the premises. Dr. McCallum informed me that BOB paid for and owns all of the assets currently situated in the premises; you asked that I provide some confirmation that this is actually the case, which I will have to obtain;
- ▶ I indicated there is the possibility of a win-win resolution here. Rather than the Trustee remove BOB's assets now, I believe it is in both of our interests to see if a buyer and new tenant can be sourced before the assets are removed.

We intend to advertise BOB's business and assets for sale by tender, at our cost, and in doing so, this might present potential new tenants for you to consider. I expect the tenders will close in mid to late July to enable interested parties to view the assets, negotiate a lease with you, and submit a tender.

Any sale will be subject to the approval of the Estate inspectors who won't be appointed until the first meeting of creditors which takes place on June 29, 2009.

► You indicated that you are authorizing me to continue to use the premises until further notice, without being charged rent, while we conduct this sale process. We will not be operating the business in the interim.

You indicated that you might ask us to vacate the premises if you have another tenant. I request that you agree now to allow us to continue to keep BOB's assets in the premise while we complete the sale process as noted above before provide requesting we vacate the space. That way, we can allow the sale process to attract as many possible buyers/tenants.

► You did request to be informed when we are showing the premises to potential buyers;

I trust this summarizes our conversation. If you believe this reflects our agreement, will you please sign below indicating accordingly? If it does not reflect our agreement, will you please let me know where we differ so that we can have a clear understanding of our agreement.

[5] The position of Banc is that the Trustee owes occupation rent for July. It never accepted or confirmed the understandings in Mr. Hunt's letter. It alleges that it is well established in common law that a trustee is liable for occupation rent where it continues occupation of premises following that of the bankrupt.

[6] The position of the Trustee is that the letter expresses an agreement reached by Mr. Hunt and Mr. Halef on June 15th which clearly indicates rent is not to be charged while the Trustee is in the process of selling the assets located on the premises.

[7] The applicable law respecting the obligations of a court appointed receiver, liquidator and bankruptcy trustee to pay occupation rent was well reviewed by Rogers J. in *Bank of Montreal v. Steel City Sales Ltd.* (1983), 57 N.S.R.

(2d) 396. I quote paragraphs 18, 19, and 25:

18 The general principle with regard to occupation rent is summarized in Williams, *Canadian Law of Landlord and Tenant*, 4th ed. (1973), at pp. 228-29:

If a person is in occupation without a lease, although the relationship of landlord and tenant will not exist, the law will imply a contract for payment to the landlord of a reasonable amount for the use and occupation of his land: *Young v. Bank of N.S.* (1915), 34 O.L.R. 176, 23 D.L.R. 854 (C.A.); *Zalev v. Harris* (1924), 27 O.W.N. 197 (C.A.) ... The action for use and occupation is founded on an implied agreement to pay for the use of the property, and the defendant must have held or occupied the premises as tenant to the plaintiff; or by his permission or sufferance: *Camden v. Batterbury* (1985), 141 E.R. 324, affirmed 141 E.R. 1055.

19 This principle was endorsed in *N.S. Trust Co. v. Auto Parts Co.*, [1936] 2 D.L.R. 441 (N.S.S.C.) where Carroll J. said at p.447:

There is however a presumption that when there is occupation by one person of premises belonging to another, by permission express or implied, that a reasonable compensation for their use has been agreed upon between the parties, *per* Lord Denman, C.J., in *Gibson v. Kirk* (1841), 1 Q.B. 850, 113 E.R. 1357.

The presumption however of a contract to pay a reasonable sum which arises for use and occupation may be rebutted by proof of circumstances which shows that such occupation was to be without compensation. *Howard v. Shaw* (1841), 8M. & W. 118, 151 E.R. 973, *per* Parke, B.; and Bramwell, B., in *Crouch v. Tregonning* (1872), L.R. 7 Ex. 88.

25 Similarly, trustees in bankruptcy have been held liable to occupation rent. In *Re Auto Experts Ltd.; Ex parte Tanner* (1921), 1C.B.R. 418, affirmed 49 O.L.R. 256, 3 C.B.R. 591, 59 D.L.R. 294

(C.A.), Orde J. said at p. 423:

The liability to pay occupation rent becomes a personal obligation of the trustee like any other item of expense, for which he is, of course, entitled to indemnify himself out of the estate. It is not a debt of the insolvent and the landlord is not called upon to prove for it. If he is entitled to accelerated rent any dividend in respect thereof is credited to the occupation of the trustee. But the trustee can no more escape the obligation of paying rent for the period during which he occupies the premises than he can escape the payment of his accounts for advertising or the wages of a man in possession.

[8] Put simply, a receiver, liquidator, trustee in bankruptcy and anyone else with like responsibilities, when they make use of the property of others to carry out their respective functions, are presumed to be responsible for paying reasonable compensation to the owner of the property. This presumption can be rebutted.

[9] The question then is whether the presumption which flows from these authorities that the Trustee should pay reasonable rent for the time it occupied Banc's property was rebutted by the dealings between Mr. Hunt and Mr. Halif.

[10] The Trustee says that it has evidence of an understanding in Mr. Hunt's letter, namely that the occupation would continue throughout the relevant

period free of charge. Banc says that it never agreed to the terms in the letter and the presumption is not rebutted.

[11] One must look carefully at the actual wording Mr. Hunt used in his letter:

“You indicated that you are authorizing me to continue to use the premises until further notice, without being charged rent, while we conduct the sale process.”

This sentence taken by itself, if affirmed by Banc and if consideration can be shown, might constitute such a rebuttal. However, in the following paragraph and in particular this sentence:

“I request that you agree now to allow us to continue to keep BOB’s assets in the premises while we complete the sale process as noted above”

we have the language not of an agreement, but of continuing negotiation.

[12] This uncertainty continues even more strongly in the last paragraph of the letter. It is not the language which indicates the parties have a clear agreement. The first sentence,

“I trust this summarizes our conversation.”

leaves open that possibility it does not. It is almost a question. It is looking for acceptance on Mr. Halef’s part, the suggestion being that they had not reached a clear agreement. The next sentence assumes an agreement and

raises the question of whether the letter reflects it. This invites the possible need to reword or rectify an agreement already reached but not satisfactorily reduced to written language. However, the phrase,

“so that we can have a clear understanding of our agreement”

suggests that something more needs to be settled and the parties are therefore not *ad idem*. I therefore fail to see that the presumption stated above has been rebutted.

- [13] Mr. Hill, however, submits in the alternative, that, if there is not an agreement that rent would not be required, Banc nevertheless is estopped from collecting rent because of its representation in these dealings that it would not seek rent.
- [14] To raise an effective estoppel there must be clear evidence that one has made a representation with the intention it would be relied upon by the other and in fact was relied upon to the other's detriment. Mr. Halef is quite insistent that he made no representation that the occupation would be rent free. The overall tenor of Mr. Hunt's letter as mentioned above is that of possible uncertainty in the understandings the two may have had. It invites continued

discussion or negotiations. It does not evidence the necessary elements required of a representation which would give rise to an estoppel. Also the thrust of Mr. Hunt's *viva voce* evidence indicates an uncertainty on his part as to just where he stood with Mr. Halif on the issues covered in the letter. Accordingly, I do not see that an argument based on estoppel has been made.

[15] The Trustee obtained the benefit of these premises for the month of July 2009. Banc is entitled to be paid a fair rent. There is no reason to suggest that the fair rent should be anything other than one month's rent under the lease with Dr. Alison McCallum Inc. which I understand is \$8,475, plus HST.

[16] Banc is entitled to costs.

R.

Halifax, Nova Scotia
October 30, 2009