

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE  
PORT OF SPAIN**

**Claim No: CV2018-00053**

**Between**

**EL DORADO CONSUMERS  
CO-OPERATIVE SOCIETY LIMITED**

Claimant

**And**

**CLX HEALTH AND FITNESS CENTRE LIMITED**

Defendant

Before the Honourable Mr Justice Ronnie Boodoosingh

**Appearances:**

Mr C. Persadsingh for the Claimant

Mrs S. Holdip-Francis for the Defendant

**Date: 8 June 2020**

**JUDGMENT**

1. The Claimant is a Co-operative Society. The defendant is a company operating a gymnasium. The claimant rented part of their premises at El Dorado to the defendant. They terminated the lease and sought vacant possession. The premises had a car park. Other businesses were located there. By agreement, the defendant vacated the premises.
  
2. The claim, as it stands now, is for the court to decide if rent payments are owed and whether service charge fees are due. The defendant filed a counterclaim. The defendant said that service charges were not paid but this was due to problems with the provision of the services and that there was some form of reassurance that the service charges did not have to be paid pending rectification of the issues. The claimant has denied any significant problems existed and also denied that such assurances were given or agreed to.
  
3. The parties agreed there was a lease. It was for three years. It was renewable. The terms were specified including terms for increase in rent.
  
4. Key terms of the agreement were as follows:
  - a. Rent was payable by the first working day of each month.
  - b. The rent was twenty five thousand dollars (\$25,000.00) per month for the period 1 July 2011 to 31 December 2011 payable from 1 July 2011 and continuing on the first day of every subsequent month.
  - c. The rent would be thirty thousand dollars (\$30,000.00) per month for the period 1 January 2012 to 30 June 2014.

- d. Rent was to be increased by 10% in Term 2 and 15% in Term 3.
  - e. Electricity charges were of a fixed amount subject to variation if charges increased.
  - f. A service charge was payable by the first working day of each month:
    - Term One - \$7,000.00
    - Term Two – increased by 10% (\$7,700.00)
    - Term Three - increased by 10% (\$8,470.00)
5. All charges inclusive of rent were subject to Government tax. The service charges were for services listed in the Second Schedule of the said Lease. These were maintenance of the premises and building; maintenance of the car park; rental of the garbage compactor; external security; generator fuelling; generator maintenance; management of the premises.
6. In the pleaded case, the defendant accepted it stopped paying the service fees in January 2015. The premises were occupied up to and including December 2018, but rent was not paid for that month. Interest was payable on default of payment of rent or service charges at 2 percent per day from the due date until payment: Clause 7 (b).
7. The key issues in this claim were:
- i. Whether the Claimant provided the services under the Second Schedule to which the service charges relate.
  - ii. Whether the defendant failed to pay rent.

- iii. Whether the Defendant's counterclaim is maintainable in law and/or in fact.
  - iv. What damages would be payable.
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- 8. The Claimant gave evidence through its executive officers, Swamy Morgan, the Secretary; and Ramesh Ramcharan, Treasurer. The Defendant gave evidence through its Chief Executive Officer, **Lee Beatrice**. Mr Morgan gave evidence of the lease and the terms. He indicated the defendant stopped paying rent and service charges. Letters were written to the defendant which were put into evidence. He gave evidence that the services listed in the Lease were provided. He said they were hands-on in providing the services to their tenants and whatever issues arose, they sought to resolve.
  - 9. In cross-examination he maintained his evidence on what services were provided. Much of the cross-examination of this witness appeared to focus on the reasonableness of the service charge fee based on how often these services were accessed and the cost of these services. But the amount of the fee was not an issue in this trial.
  - 10. Mr Ramcharan gave evidence that his functions as Treasurer included looking after the Society's finances and accounting. He gave evidence of the state of the defendant's account.
  - 11. He gave evidence of the non-payment of rent, the service fees and the electricity charges and the dates from which these payments were not

made. His evidence was supported by relevant documents from the society. He stated the defendant left in January 2019.

12. The cross-examination followed along similar lines as Mr Morgan. He essentially kept to the version of the claimant's case.
13. In Mr Lee Beatrice's Witness Statement for the defendant there were some matters of particular note. At paragraph 7 he stated a decision was made by the defendant for the suspension of service charge payments in January 2015. He did not say if this was agreed to by the parties. He said this was pending investigations into complaints he made. He agreed that the defendant had agreed to the terms of the lease. He accepted that some of the complaints that he made, for example air conditioning services and electrical services, were not included in the service charge fee. There is also evidence of a letter where the concerns he raised were addressed by the claimant, even though they were not covered by the service charge matter.
14. He accepted that various services were provided such as garbage collection, car park services, attendants, cleaning of the compound, generator being available, and so on. There was some quibbling in cross-examination about how well these services were provided, but in general, there was acceptance that the services were in fact provided.
15. The claimant's case was grounded in breach of contract in the failure of the defendant to pay the service charge fee and later on the rent.

16. On the evidence, I concluded that the claimant provided the services outlined in the tenancy agreement. I preferred the evidence of the claimant's witnesses in this regard.
17. There was some attempt at the trial for the defendant to shift to the position about how well the services were provided in respect of the service charge fee. But that was not the issue for the court to decide. In any event there was no evidence of any substantial or sustained complaints about the provision of these services during the time from 2011 onwards.
18. I concluded the defendant failed to pay the service charges from January 2015 and the rent for December 2018. This was in breach of agreement. It is also clear that the defendant continued to occupy the premises during the period for which the charges and rent was not paid. The failure to pay the service charge was a fundamental term of the contract.
19. The next issue concerned the award of damages which is the amount of money that is outstanding to the Claimant for either rent or service charges. This includes the contractually agreed interest for late payment. In addition to such award the Court can make a nominal award for the fact of the breach.
20. The defendant could not sit on its responsibility to pay the service charge and claim that it was not satisfied with the services. The defendant occupied the premises and availed itself of the services.

21. The defendant's witness admitted in cross examination that the company occupied the premises for December 2018 but did not pay rent.
22. Even if the defendant was of the view that the service charge was too high or not in keeping with the services provided it could not simply decide not to pay it.
23. The defendant's counterclaim sounded in unjust enrichment. However the evidence led by the defendant did not make that out. This was a commercial arrangement between the parties. The defendant contracted for rent and for services. The premises were provided to the defendant. The services were generally provided to the defendant. There was no issue of the claimant being enriched, that it was at the defendant's expense, or that this was unjustly done. As in any agreement of this nature, issues would arise. However, the evidence I accepted was that efforts were made to deal with these.
24. The defendant's pleaded case was deficient on this as was the evidence in support.
25. As concerns the issue of the service charge, Mr Ramesh Ramcharan's evidence as Treasurer is quite helpful as he gave a breakdown at paragraph 18 of his Witness Statement in this regard. Including Value Added Tax, which dropped from 15% to 12.5% in January, 2016, the following monies are outstanding for service charges:

- i. Service Charge at \$8,855.00/month for the period January, 2015 to January, 2016: \$ 115,115.00
  
- ii. Service Charge at \$8,662.50/month for the period February, 2016 to December, 2018: \$ 303,187.50
  
- iii. Total Service Charges Outstanding: **\$ 418,302.50**

26. As the claim relates to the issue of outstanding rent, it was an agreed fact [which came out in cross examination] that rent for the month of December, 2018 is due and owing by the Defendant. This will be in the sum of **\$37,125.00**. As indicated at the start of trial, the Claimant is not pursuing the unpaid rent in the sum \$9,600.00 for the short paid month of April, 2017 as further checks revealed that the AC Units which the defendant purchased were left at the property upon the delivery of vacant possession and so the claimant has the benefit of same. However, the claimant ought to be compensated for the month of December, 2018 for a full month's rent which similarly carries the daily interest rate of 2% per day pursuant to Clause 7(b) of the Lease.

27. There are two other heads of loss that the claimant has asked the Court to consider. These are monies owing for electricity and compensation for leaving the demised premises in a damaged condition upon delivering vacant possession.

28. As accepted by the claimant, these two particular aspects of loss were not pleaded. The reason for this was that at the time of filing the Claim



Form and Statement of Case these losses had not yet occurred. However, after pleadings had closed, the defendant left the premises. The claimant said this caused damage to the property and the defendant failed to pay the electricity bills for November and December 2018.

29. Counsel for the defendant did not raise any evidential objections on these issues raised in the evidence. The claimant submitted that the court can award the sums claimed under the rubric of “any further and/or other relief as the Court deems just”.
30. The claimant advanced that the defendant failed or refused to pay the electricity bill for November and December 2018 in the sum of \$10,125.00, being \$5,062.50 per each month. Copies of the bills were attached.
31. Further, the claimant stated that in January 2019, the defendant left the rented premises, and in so doing caused damage to the walls and flooring of same. The damage included broken tiles and damaged gypsum walls throughout the demised premises. This damage also affected the paint on the walls as the gym mirrors were removed. The walls of the property are now perforated with holes, according to the defendant’s evidence.
32. As a result of the damage, the claimant was now required to expend monies to restore the demised premises to the state it previously was.

Quotes were obtained from Poinsettia Homes Real Estate in the sum of \$55,820.16 and \$45,500.00, as well as for paint.

33. Unfortunately, however, the claimant did not seek to amend their pleadings to take account of these matters. One important purpose of pleadings is to give notice to the other side of one's case. Further, it is to define the facts upon which the issues in the case are identified. It is unfair to the other party to make such a claim in the evidence at trial without first putting the other side on notice by the pleaded case that such claims would be made. The claimant may well have succeeded in an application to have the statement of case amended but this was not pursued.

34. It would be inappropriate for the court under "further or other relief" to grant such additional relief to the claimant. This broad heading is really to give the court power to make orders which are consistent with other orders made in the case and to assist with giving effect to the other reliefs pleaded, proved and awarded.

35. In conclusion, the claimant generally kept to its responsibilities and provided the agreed services to the defendant.

36. The defendant breached the lease agreement by failing to pay the service charge for the period of January 2015 to December 2018 and rent for the month of December 2018.

37. The defendant's initial defence that the services were not provided has been abandoned and its second position which it adopted at trial that it was dissatisfied with the degree and extent of the services was not maintainable on its pleaded case.

38. The Defendant's Counterclaim is also unmaintainable.

39. I therefore make the following orders:

- I. There is judgment for the claimant against the defendant.
- II. The defendant is to pay to the claimant outstanding service charges in the sum of \$418,302.50 with interest on this sum at the rate of 3% per annum from the date of the filing of the claim form to the date of judgment.
- III. The defendant is to pay to the claimant outstanding rent in the sum of \$37,125.00. Interest on this sum to run from February 2019 to the date of judgment at the rate of 3% per annum.
- IV. The claimant may retain and apply the security deposit of \$30,000.00 towards the above payments.
- V. The defendant's counterclaim is dismissed.

- VI. The Defendant is to pay to the claimant costs on the prescribed scale for the claimant's claim based on the judgment sum and interest payable. In respect of the counterclaim I make no order as to costs.
- VII. There is a stay of execution of twenty-eight (28) days.

40. On the interest I awarded, I note the lease agreement provided for interest at 2% per day until payment. I did not consider that was an appropriate rate to be used for the purposes of this judgment. While this was a commercial arrangement between two corporate entities in my view that rate would have led to an excessive award of interest given the time that has passed. As a consequence I applied a more realistic rate in the circumstances.

Ronnie Boodoosingh

Judge