

SUPERIOR COURT
(Civil Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

Nº: 500-17-103978-188

DATE: April 27, 2021

IN THE PRESENCE OF THE HONOURABLE PAUL MAYER J.S.C.

NA NY TY INC.

Plaintiff

-v.-

9213-3578 QUEBEC INC.

Defendant

JUGDMENT

1. INTRODUCTION

[1] The Court is being asked to determine what is a tenant's proportionate share of real estate taxes.

[2] It is seized with a motion by Na Ny Ty Inc. (the "Landlord") to cancel a commercial lease because of non-payment of the appropriate fraction of real estate taxes and a claim for the unpaid amount.

[3] 9213-3578 Quebec Inc. (the "Tenant") seeks to dismiss the claim. It explains that there was a debate between the parties several years ago about what was the correct percentage of real estate taxes payable that the parties resolved with a transaction.

2. LEGAL ISSUES

[4] Accordingly, the Court proposes to examine the following issues:

1. Is the Tenant in default?
2. If so, what are the amounts owing?; and
3. Should the lease be resiliated?

3. IS THE TENANT IN DEFAULT?

3.1 The context

3.1.1 The parties

[5] In 2012, the Landlord purchased the property situated in the Plateau Mont-Royal neighborhood from its principal shareholder, Mrs. Thi Lang Lê (“Mrs. Lê”).

[6] Mrs. Lê was the owner of the property when she signed a lease agreement with the Tenant in October 2009.

[7] The Tenant was incorporated for the purposes of operating a restaurant and specialty food store, Artigiani Pizzeria Cucina, that specializes in fresh pasta and pizzas baked in a wood burning oven.

[8] One of the three partners in the venture, Mr. Vincent Puerto (“Mr. Puerto”) found the location and negotiated the terms and conditions of the lease.

3.1.2 The lease

[9] The premises are some 1900 square feet on the ground floor and the basement portion of a building situated on St.Denis Street (the “Premises”). This is a mixed commercial and residential property. There are four residential tenants situated on the floors above the restaurant.

[10] On September 11, 2009, Mrs. Lê and the Tenant met at her lawyer, Me Rudi Daelman’s office to sign a lease agreement (the “Lease”)¹ and a sale agreement for the purchase of the furniture and equipment in the premises.

[11] The initial term of the Lease was for a period of 63 months, from September 1, 2009 to November 30, 2014. The Tenant has three options to renew the term of the lease of five years each. The first and second options were duly exercised by the Tenant.²

[12] Given the Landlord’s contention that the Tenant was not paying the correct amount of real estate taxes, it notified the Tenant that it considered the exercise of the

¹ P-2.

² P-20.

latest lease renewal invalid. In its motion, it asks the Tribunal to confirm the cancellation of the lease renewal and that the Tenant be evicted.

3.1.3 The base rent and the proportionate share of real estate taxes

[13] The Lease provides that the Tenant is to pay a base rent of \$4,289.25 per month during the first two years, and \$4,515 per month for the following three years. The current base rent is \$5,189.99 per month.

[14] Section 3.02 of the Lease stipulates that the Tenant is to also pay its proportionate share (“quote-part”) of the operating expenses listed in Sections a) to f) set out in Schedule 1 hereof.

[15] Section 3.07 of the Lease provides that, on October 1, 2009, the Tenant was to prepay municipal real estate and school taxes for the year ending on December 31, 2009, the whole as set out in Schedule 1 hereof.

3.1.4 Payment over the years

[16] During the first five or six years of the term, the Tenant paid pretty much the same additional rental except for some slight increases, including an adjustment to add sales taxes.

[17] Mr. Puerto and Mrs. Lê had an easy going relationship. The Tenant paid its rent by postdated cheques remitted annually as requested by Mrs. Lê from time to time.

[18] It should be noted that the Lease does not contain a clause which requires the Landlord to provide the Tenant with an annual estimate of the sum to be paid. Nor does it contain a clause whereby the Landlord is to provide the Tenant, on an annual basis, after each lease year with a statement establishing accurately in reasonable detail a breakdown of real estate taxes.

[19] Instead, from 2009 to 2015, the parties acted informally, agreeing to adjustments orally on the basis of a good faith understanding without exchanging any documentation.

[20] Mr. Puerto, an informed businessman, urged Mrs. Lê over the years to take the time necessary to undertake a proper and fulsome review of real estate taxes without success.

3.1.5 A disagreement arises

[21] Then, in December 2014, some six years into the term of the Lease, Mrs. Lê submitted to Mr. Puerto a one-page document she said had been prepared by her accountant that showed that the municipal real estate taxes to be paid between 2009 and 2014 had been substantially underestimated. According to her calculation, the Tenant owed the Landlord in the vicinity of \$12,860.00 of arrears. She invited him to contact her accountant if he had questions.

[22] In light of this information, the Tenant agreed in 2015 to increase its monthly share of taxes to catch up until a proper analysis of the information be undertaken and an overall adjustment for past years be settled.

[23] Subsequently, Mr. Puerto and Mrs. Lê met to review the matter. Mrs. Lê submitted a new one-page document setting out the Tenant's share of municipal taxes from 2009 to 2014. This one showed that the Tenant owed \$8,546.14 of arrears. Mr. Puerto made it clear that he considered that the method of calculation proposed by Mrs. Lê was unacceptable. It illustrated an increase of 110% over a period of 6 years.

[24] In 2016, Mrs. Lê asked Mr. Puerto to sit down with her accountant, Mr. Gary Frohlich, and to come to an agreement on the real estate taxes. She suggested that the way to figure out what was the appropriate share of taxes, was to use the taxes that had been identified in Section 3.07 of the Lease. This should be the basis to establish the percentage of taxes payable by the Tenant.

[25] Mr. Puerto accepted to proceed as suggested. He, Mr. Frohlich and his assistant, Mrs. Etleva Mama, exchanged information. This enabled Mr. Puerto to create a graph that established that, according to his calculations, the Tenant should pay 44% of all real estate taxes. As such, on May 4, he wrote to Mr. Frohlich and sent him a document that explained that he considered the Tenant had overpaid \$1,634.77 over the years. He asked that they compare his numbers with theirs and that they get back to him as soon as possible.³

[26] On May 16, Mrs. Mama responded that she agreed with Mr. Puerto's method of calculation. She forwarded her own calculations and pointed out that he had omitted to adjust for school taxes. According to her, the Tenant owed the sum of \$1,782.87.⁴

[27] Mr. Puerto responded that he did not have the school taxes but he noted that the Tenant had been overcharged for same. He discovered that, in 2009, the Landlord had included 100% of the school taxes in Section 3.07 of the Lease instead of the Tenant's proportionate share. He confirmed that now that he had the numbers, he would calculate the whole and get back to her.

3.1.6 The issue is settled

[28] Having done so, he concluded the Tenant had overpaid the sum of \$823.52. According to Mrs. Mama's numbers, the Tenant was owed \$622.28. Mr. Puerto accepted this lower amount as a final settlement.

[29] Mrs. Lê was informed by Mrs. Mama that an agreement had been reached to adjust all taxes from October 2009 to December 31, 2016. The Tenant's share of real estate taxes for the year 2016 would henceforth be \$628.82 per month.

[30] On October 6, Mrs. Lê wrote to Mr. Puerto to inform him she had a cheque for him for the overpayment of \$622.28. She asked him to provide her with the postdated cheques that had been agreed for the 2016 real estate taxes.⁵

³ P-4.

⁴ D-2.

3.1.7 Until it's not settled...

[31] In early 2017, Mrs. Lê met with a notary, Me Thi Ngnan Ha Lê, who was drafting a lease for her for other premises. She noted that a different method of calculating real estate taxes should be applied when dealing with commercial tenants, who in her view should assume 100% of the non-residential portion of the real estate taxes instead of 44% of the whole tax bill. This method of calculation would require the Tenant to assume approximately 49.9% of the municipal real estate tax bill.

[32] On January 31, she informed her accountant that she thought a mistake had been made. She asked him to check to make sure she was not losing money.⁶

[33] She also informed Mr. Puerto that she thought a mistake has been made.⁷ He responded on February 3 that, according to Section 3.07 of the Lease, the Tenant's proportionate share is 44% as calculated by her lawyer and accountant.

[34] Mrs. Lê replied that, once she returned from holiday, they would sit down and try to resolve it.

[35] On April 23, Mrs. Lê's lawyer, Me Rudi H. Daelman, who had drafted the Lease, wrote to her accountant, Mr. Frohlich. He indicated that somebody seemed to have made a mistake in the calculation of real estate taxes payable by the Tenant and this disadvantaged the Landlord.

[36] On May 2, Mrs. Lê wrote to the accountant to tell him that 44% was not the correct percentage of real estate taxes payable by the Tenant. He responded that he could not convince Mr. Puerto otherwise. She asked him whether he had explained this to Mr. Puerto. He replied that it was not his responsibility to do so.

[37] On May 4, Me Daelman wrote to Mrs. Lê. He indicated that he thought that the accountant was trying to distance himself from this issue as he had probably realized he made a calculation error.

3.1.8 Litigation ensues

[38] On May 24, a demand letter was sent to the Tenant in which it was alleged that the wrong proportionate share of taxes was being paid. It was asked to pay 100% of non-residential portion of the municipal real estate non-residential taxes and 40% of the school tax bill, namely \$1,238.67 per month (instead of the \$628.82 per month agreed upon the previous October). It was informed that all taxes since 2009 would be recalculated and that the Landlord would get back in respect to this shortly.

[39] On June 22, another demand letter was sent to the Tenant. It sought the payment of \$36,678.81 to adjust real estate tax payments since January 1, 2010. It was asked to regularize his situation by the end of the month.

⁵ D-3.

⁶ P-6.

⁷ P-7.

[40] This was followed two weeks later, on July 5, with a letter informing the Tenant that it was in default of its lease obligations because of its failure to pay the abovementioned sum.

[41] By letter dated December 20, the Tenant was given a last chance to settle up. It was notified that if \$17,425.66 was not paid for arrears for the year 2014, 2016 and 2017, within 5 days, judicial proceedings would be filed.

[42] On July 3, 2018, the Landlord filed its motion to resiliate the Lease and to recover the unpaid real estate taxes.

[43] On October 10, the Tenant submitted its defence.

[44] This matter was heard on April 14, 15 and 16, 2021.

3.2 Analysis and decision

[45] The Court considers that this claim is to be dismissed for several reasons set out herein.

3.2.1 The Lease is imprecise

[46] To begin, the Lease is not sufficiently clear to impose such an obligation on the Tenant.

[47] When a landlord wishes to impute an expense to a tenant, he needs to be as precise as possible in the lease, especially when he is the one drafting it. Operating expenses and real estate taxes clauses need to be drafted carefully. This is best left to experts. This will ensure that the tenant is bound by it. An obligation to pay an amount needs to be determinate or determinable.⁸

[48] In the case at hand, the Lease does not specify clearly and unequivocally what is the Tenant's proportionate share of real estate taxes or how that share is to be determined.

[49] Section 3.02 of the Lease is drafted very poorly. In fact, it's a mess. It sets out that the Tenant will pay its share (quote-part) of the costs and expenses set out in subparagraphs a) to f) without any definition that explains what is the fraction payable by the Tenant.

[50] When one examines those expenses closely, we can see that paragraphs a), b) and c) are costs that are to be assumed wholly by the Tenant as they relate to its business, that is the Tenant's insurance, the costs related to the upkeep of its premises and equipment, snow clearing, garbage removal, and the costs related to the Tenant's operations in the Premises. Yet, they are situated in a section of the Lease that sets out shared expenses.

⁸ **art.1373 C.c.Q.** : The object of an obligation is the prestation that the debtor is bound to render to the creditor and which consists in doing or not doing something.
The debtor is bound to render a prestation that is possible and determinate or determinable and that is neither forbidden by law nor contrary to public order.

[51] As for sub-paragraph d), the Tenant agrees to pay its undefined proportionate share of all real estate taxes.

[52] Sub-paragraphs e) and f) are like phantoms. The Tenant agrees to pay its proportionate share of the Landlord's costs to contest real estate taxes and the amortized portion of capital expenditures. The evidence shows that the Tenant has never been asked to pay its share of such expenses. As such, the parties have shown that such expenses are not passed on to the Tenant.

[53] Mr. Puerto testified that when he signed the Lease prepared by Me Daelman on behalf of the Landlord, he was told by Mrs. Lê's attorney that his proportionate share of real estate taxes was to be calculated on the basis of the square feet of his premises in relation to the number of square feet of the building. He was not shown the municipal tax or the school tax bills. He trusted that the Landlord was in good faith and the numbers set out in Section 3.07 were accurate.

[54] He had no way of knowing, for example, that he was being taken for a bit of a ride. It turns out the sum of \$949.78 set out in Section 3.07 by Me Daelman was 100% of the school tax bill. It was not, as stipulated in Section 3.02, his proportionate share of same.

[55] For her part, Mrs. Lê explains that, before signing the Lease, she went to City Hall to help determine what portion of the tax bill of her property was related to the non-residential premises occupied by the Tenant. She was informed that out of her total \$8,707.67 tax bill, \$4,349.31 was applicable to the commercial premises, namely some 49.9% of the total bill.

[56] She states she gave this information to her lawyer. As such, he included the sum of \$4,349.31 in Section 3.07 of the Lease as the annual amount payable by the Tenant in 2009.

[57] The Court concludes that the end result of all of this is that there was not a meeting of the minds on the percentage of the tax bill payable by the Tenant and the Landlord.

[58] The Lease lacks clarity on the issue given its opaque and defective drafting.

[59] As stated, the Lease does set out a formula to be used to establish the Tenant's proportionate share. This uncertainty creates a confusing situation. Both parties are convinced that the Lease clearly sets out their interpretation. Yet, there is no fixed and precise way to determine one or the other interpretation.

[60] One can only conclude that the Lease is imprecise on this point. The calculations made by the Landlord may or may not be reasonable. They are nevertheless arbitrary and unenforceable.

3.2.2 Given the doubt as to the interpretation of the Lease, it is to be interpreted in favour of the Tenant

[61] The least that can be said about Sections 3.02 and 3.07 of the Lease is that they were not drafted meticulously. There was clearly no search by Me Daelman for precise words or a striving to avoid ambiguity of interpretation.

[62] For his part, Mr. Puerto was convinced that the Tenant was to pay its share of the taxes on the basis of the rentable area of the Premises in relation to the rentable area of the building. Upon signing of the Lease, no other explanation is given to him. He is not shown a copy of the tax bills. He was confident that the standard way of proceeding would apply.

[63] As stated, Sections 3.02 and 3.07 are nebulous and confusing. They contain no clear indication of what fraction of the tax bills is payable by the Tenant. This lack of precision causes uncertainty and doubt for all concerned and led to the present litigation. This imprecision does not allow the parties to clearly understand what exactly is the contractual obligation assumed by the Tenant.

[64] In such an event, article 1432 of the Civil Code of Quebec stipulates that the ambiguity is to be interpreted in favour of the Tenant who contracted the obligation and against the Landlord who stipulated it.⁹

[65] To conclude, it is not for the Court to redraft an indeterminate and vague clause in a manner advantageous for the Landlord.

3.2.3 There was a transaction

[66] The Court considers that, when the parties reconciled the tax bills of 2009 to 2016 inclusively, they reached a transaction that settled the past and established the formula to be used in the future. As of January 1, 2017, any ambiguity had been resolved.

[67] Before 2016, the Tenant paid the sums requested yearly by the Landlord. The Landlord was clearly negligent and rather unprofessional in its handling of operating expenses. No written estimates of real estate taxes were submitted at the beginning of each lease year. No statements and supporting documents were provided at the end of each year to permit the Tenant to verify it despite the Tenant's request for same.

[68] In 2016, the Tenant was provided with the real estate taxes and school tax bills for the first time. Mrs. Lê was unable to articulate what was the Tenant's share of real estate taxes. She urged Mr. Puerto to sit down with her accountant to figure it out.

[69] Having the tax bills in hand for the first time, Mr. Puerto and the accountant settled the matter. They agreed that on the basis of 44% of the tax bills, an overpayment of \$622.28 was owing to the Tenant after a careful examination of what had been paid over the past eight years.

[70] Mr. Puerto recalls that the accountant told her she had spoken to Mrs. Lê and that she was in agreement with the settlement and that she would remit him a cheque

⁹ **1432 C.C.Q.** : In case of doubt, a contract is interpreted in favour of the person who contracted the obligation and against the person who stipulated it. In all cases, it is interpreted in favour of the adhering party or the consumer.

for the overpayment. As well, in accordance with their calculations, it was agreed that, for the year 2016, the Tenant should pay \$628.82 per month.

[71] This agreement was confirmed by Mrs. Lê herself when she wrote Mr. Puerto on October 6, 2017 to inform him she had a cheque for him and asking he submit post-dated cheques.

[72] Mr. Puerto received and cashed the cheque and remitted the requested post-dated cheques.

[73] Several months of peace followed until Mrs. Lê consulted notary Lê. She then came to the Tenant's restaurant in early 2017 to inform Mr. Puerto that he was paying the wrong amount of real estate taxes.

[74] The Court considers that a transaction was reached by the parties in October 2016 that settled all payments of real estate taxes until December 31, 2016. It also established that the Tenant would pay 44% of real estate taxes in the future.

[75] The Landlord considers that the accountants made an error. They would have miscalculated the Tenant's share of taxes.

[76] The Court has serious doubts as to whether the accountants made an error.

[77] Mr. Frohlich testified that the situation was properly exposed to Mrs. Lê. Asked if she agreed with the settlement of arrears of taxes, he answered: "*She made the cheque*".

[78] In any event, if there was an error, it is an inexcusable one on the part of Mrs. Lê who signed the cheque without taking the time to properly understand the situation.

[79] For all the reasons mentioned above, the Court will dismiss the claim of the Landlord.

4. WHAT IS THE AMOUNT OWING?

[80] Having determined that the case is to be dismissed, there is no need to calculate what amount is owing.

5. SHOULD THE LEASE BE RESILIATED?

[81] The Court considers that, even if it had come to the conclusion that some 5% of the taxes had been underpaid, it would not have resiliated the Lease.

[82] To seek such a recourse in these circumstances is an abuse of the Landlord's rights stipulated in the Lease.

[83] In the case at hand, we have a Tenant who has invested heavily to fixture the premises and who has, for the past 11 years, paid its rent regularly on the first day of each month. It has been a loyal and faithful Tenant, respecting all of its obligations in the Lease. It has been patient with the Landlord who, year after year, failed to adjust sums owing on an annual basis. After having in good faith cooperated with the

Landlord's accountant to settle outstanding adjustments in 2016, it had a legitimate expectation that the matter was settled.

[84] Asking the Court to resiliate the Lease over a misunderstanding such as this one could be characterized as excessive or unreasonable.¹⁰

FOR THESE REASONS, THE COURT:

[85] **DIMISSES** the *Demande introductive d'instance re-re-modifiée en annulation du renouvellement de bail commercial, en annulation de renouvellement, en expulsion et en dommages et intérêts*;

[86] **THE WHOLE**, with costs.

PAUL MAYER, J.S.C.

Me David Summerside
Attorney for Plaintiff

Me Carmine Mercadante
Attorney for Defendant

Dates of hearing: April 14 to 16, 2021

¹⁰ **art. 7. C.C.Q.** : No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner, and therefore contrary to the requirements of good faith.

ANNEX
Schedule 1

3.02 Loyer additionnel

Au cours de chaque année du bail ou durant l'une des périodes de son renouvellement éventuellement, le locataire doit, selon le cas, payer au locateur, à titre de loyer additionnel, sa quote-part des frais, coûts et dépenses qui suivent :

- a) sous réserves du paragraphe 4.02, les coûts d'assurance pour la protection du commerce du locataire et de l'immeuble du locateur, de ses équipements et accessoires;
- b) les coûts de fonctionnement, d'opération, d'entretien et de nettoyage, des systèmes et équipements, y compris le déblaiement de la neige et l'enlèvement des ordures, qui sont défrayés éventuellement par le locateur au bénéfice du locataire;
- c) les coûts relatifs à la location de tout équipement, enseigne et autre matériel reliés à l'exploitation et à l'opération du commerce du locataire, qui sont défrayés éventuellement par le locateur au bénéfice du locataire;
- d) les taxes foncières et/ou les taxes sur les immeubles non-résidentiels, municipales, scolaires, d'améliorations locales, spéciales et toutes autres charges, contributions, licences, surtaxes ou autres impositions qui peuvent être établies ou réclamées en relation avec l'immeuble;
- e) les dépenses juridiques, administratives et générales ainsi que les dépenses d'évaluation encourues par le locateur pour obtenir ou tenter d'obtenir une diminution du montant des taxes foncières;
- f) l'amortissement ou la dépréciation en capital des équipements, biens meubles et installations fixes qui ont besoin d'être remplacés périodiquement ou de façon substantielle.

Toutefois, le loyer additionnel n'inclut pas le coût des services et autres frais qui peuvent être facturés directement au locataire par toute personne autre que le locateur et qui sont directement sous la responsabilité du locataire en vertu de la Loi ou du présent bail.

* * *

3.07 Premiers paiements des loyers additionnels

Le locataire remettra au locateur et ce, au plus tard le 1^{er} octobre 2009, la somme de mille quatre cent quarante neuf dollars et soixante dix sept cents (1.449,77\$) pour les taxes sur les immeubles non-résidentiels entre le 1^{er} septembre et le 31 décembre 2009, conformément au paragraphe 3.02 d) des présentes; le calcul utilisé était le suivant: 4.349,31\$ divisé par 12 et multiplié par 4 mois;

De plus, le locataire remettre au locateur et ce, au plus tard le 1^{er} octobre 2009, la somme de trois cent seize dollars et cinquante-neuf cents (316,59\$) pour la taxes scolaire entre le 1^{er} septembre et le 31 décembre 2009, conformément au paragraphe 3.02 d) des présentes; le calcul utilisé était le suivant : 949,78\$ divisé par 12 et multiplié par 4 mois;

