CITATION: Ritson Division Retail GP Limited v. Meltwich Food Co., 2024 ONSC 5326
COURT FILE NO.: CV-20-00635296-0000
DATE: 20240926

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Ritson Division Retail GP Limited, Plaintiff

– AND –

2562583 Ontario Inc., o/a Meltwich Food Co., Janarthanan Jeyaparan, and Meltwich Hospitality Group Inc.**,** Defendants

BEFORE: Justice E.M. Morgan

COUNSEL: *Monica Ungar Peters*, for the Defendant, Meltwich Hospitality Group Inc.

Chandralal Handapangoda, for the Defendants, 2562583 Ontario Inc., o/a Meltwich Food Co. and Janarthanan Jeyaparan

HEARD: September 25, 2024

MOTION FOR SUMMARY JUDGMENT

[1] The moving party, Meltwich Hospitality Group Inc. (the "Franchisor"), seeks summary judgment on a crossclaim it has brought against its co-Defendant, 2562583 Ontario Inc. (the "Franchisee"). The Franchisor has already settled with the Plaintiff, Ritson Division Retail GP Limited (the "Landlord").

[2] The Franchisor operates a food system franchise in which franchisees operate restaurants under its trademarked name, Meltwich Food Co. The Franchisor has entered into a Franchise Agreement with the Franchisee and its principal, the Defendant, Janarthanan Jeyaparan, to operate a Meltwich restaurant at C8.2B, 238 Ritson Road North, Oshawa, Ontario (the "Premises"). Mr. Jeyaparan agreed to serve as the Franchisee's guarantor/indemnifier of the Franchise Agreement.

[3] In addition, by an Assignment of Lease agreement, the Franchisee took an assignment of the lease dated July 9, 2015 of the Premises as between the Landlord and the predecessor franchisee, as tenant (the "Lease"). The Franchisor and Mr. Jeyaparan are also guarantors/indemnifiers of that Assignment of Lease.

[4] The Franchisee defaulted on the Lease. An August 2, 2018, the Landlord re-entered the Premises and terminated the Lease. The Franchisee had failed to pay rent in the amount of $15,357.44, did not cure the default within 7 days of having been given a proper Notice of Default. The Franchisee then continued to be delinquent in subsequent rent when it became due, and, finally, it abandoned the Premises and ceased operations of its business.

[5] Thereafter, The Landlord commenced an action against the Franchisee for breach of the Lease, against Mr. Jeyaparan for breach of the Lease and breach of his guarantee/indemnity agreement with respect to the Lease, and against the Franchisor for breach of the Lease and breach of its guarantee/indemnity agreement ("Lease action"). The claim sought damages in the amount of $208,932.62, for the loss of the benefit of the Lease from the date of termination to the expiry date, and lost future rent, with credit for mitigation.

[6] The Franchisor crossclaimed against the Franchisee and Mr. Jeyaparan for contribution and indemnity under the Franchise Agreement and its guarantee/indemnity provision, seeking compensation for expenses incurred in the Lease litigation necessitated by the Franchisee's breaches. In this motion, the Franchisor seeks summary judgment on its crossclaim against the Franchisee.

[7] On March 21, 2024, the Franchisor and Landlord entered into a Mary Carter Settlement Agreement resolving the Lease action as between themselves. The Franchisee has not settled with the Landlord in the Lease action, although the Landlord has taken no further steps against the Franchisee.

[8] What remains to be resolved here is the contribution and indemnity crossclaim brought by the Franchisor against the Franchisee. Under the Mary Carter Agreement, the Franchisor has paid the Landlord $175,000.00, which it now claims back from the Franchisee and Mr. Jeyaparan. In addition, the Franchisor claims as additional damages legal fees and disbursements in the amount of $21,533.,64 incurred in defending the main action.

[9] There is no real controversy regarding the enforceability of Mr. Jeyaparan's guarantee under the Franchise Agreement. He personally guaranteed the Franchisee's performance of its obligations under the Franchise Agreement; breach of the Lease and cessation of the franchise business are breaches of the Franchise Agreement giving rise to a claim by the Franchisor.

[10] Likewise, it is obvious from the documentation that the Franchisee assumed the Lease from the prior franchisee. Moreover, there is nothing in the record to counter the Franchisor's position that it performed its obligations under the Franchise Agreement by providing the Franchisee the right to use its system and trademarks to operate Meltwich Food Co. restaurants. Although the Franchisee was not satisfied with the level of earnings it achieved in its restaurant franchise, there is no evidence in the record to indicate that the Franchisor failed to fulfill its contractual obligations.

[11] Counsel for the Franchisor points out that in section 14.1 of the Franchise Agreement, the Franchisee agreed that if the Franchisor became a party to any claim due to any act or omission of the Franchisee, or due to any violation of the Franchise Agreement, the Franchisee must indemnify the Franchisor against all liabilities and expenses (including legal fees and court costs) thereby incurred by the Franchisor. In addition, Mr. Jeyaparan in his personal guarantee covenanted to be jointly, severally and unconditionally bound by all the provisions under the Franchise Agreement, including the indemnification obligations in section 14.1 of that agreement.

[12] The Franchisor contends that the Franchisee and Mr. Jeyaparan breached section 15.1(e) of the Franchise Agreement as a result of their non-payment of royalties and other amounts owing

to the Franchisor thereunder. While those precise figures may be a matter of dispute between the parties, it is entirely uncontroversial that the Franchisee breached section 15.1(j) of the Franchise Agreement by failing to comply with the terms and conditions of the Lease – i.e. by not paying rent, causing the termination of the Lease, and causing the Franchisor to incur the settlement expense. There is no sustainable defense to that claim by the Franchisor under the Franchise Agreement.

[13] The Franchisee and Mr. Jeyaparan contend that the former franchisee of this restaurant somehow engaged in subterfuge and undermined the profitability of the franchise, and that the Franchisor was in some way involved in this bad conduct. This allegation was never raised during the course of the Franchisee running the business or at the time of the Franchisee's default under the Lease, but rather has arisen subsequently as a response to the present litigation. This allegation forms the basis of the Franchisee's defense to the main claim and its defense to the crossclaim.

[14] One problem with the Franchisee's position is that the record contains no documentary evidence or any particulars to support it. The Franchisor's counsel also points out that under cross-examination, Mr. Jeyaparan indicated that the so-called "subterfuge", or misrepresentation, by the Franchisee was that the Franchisor would not allow him to offer another menu other than the Meltwich menu, and that the Landlord did not allow him to give out flyers in the plaza in which the Premises is located. These are rather ordinary business practices – hardly the hidden and sinister mischief that the Franchisee's description suggests.

[15] Mr. Jeyaparan also testified in cross-examination that the Franchisor participated in this "subterfuge" by failing to advise him that a Meltwich franchise location in Ajax had closed. The subterfuge argument, and a similar misrepresentation argument, form the basis of both the Franchisee's Statement of Defense and its Defense to Crossclaim. In addition, Mr. Jeyaparan testified that the Franchisor and prior franchisee of his own location had told him that, "You will make good money here and, you know, you will be successful here."

[16] With respect, none of this amounts to anything credible or otherwise supportable by any evidence in the record. And none of it is actionable. The entire subterfuge point seems more like a deflection than a defense, and, frankly, makes no commercial sense. There is no reason offered anywhere, and none visible in the record, as to why a business in the position of the Franchisor would want to collude with a landlord or anyone else to cause the failure of the Franchisee. What appears more likely is that the Franchisee is frustrated that its business venture was not profitable, and is looking at all possible targets as a result.

[17] Under the *Arthur Wishart Act, 2000*, SO 2000, c.3, the Franchisor was required to disclose all material facts to a prospective Franchisee before entering into a Franchise Agreement. The Franchisor did so here, as required. There is no claim advanced by the Franchisee that the disclosure was faulty or that the *Arthur Wishart Act* was not adhered to by the Franchisor. The Franchisee had the full protection of a remedial statute, which the Franchisor did not breach.

[18] The Franchisee also contends that it should not be held to any obligations because it never received a full copy of the Lease; it claims to have received only the signing page. Although the Franchisee says that it did not have independent legal advice at the time of entering the Assignment of Lease, a letter in the record dated August 2, 2018 from the Franchisee's lawyer to the Landlord

suggests otherwise. In that correspondence, the lawyer indicates that he was representing the Franchisee at the time of the Assignment of Lease, and advises the Landlord that he has till not received a copy of the original Lease.

[19] As counsel for the Franchisor points out, the Franchisee signed the Assignment of Lease, apparently while having a lawyer on board, and does not claim to have been missing a copy of that document. Whether he obtained a copy of the underlying Lease with the previous tenant at the time may be open to question, but it does not impact on the Franchisee's knowledge and understanding of its obligation to pay rent or on the binding nature of that obligation. The Franchisee took possession of the leased premises at the end of January 2018 and paid rent every month until July 25, 2018, when it defaulted. The Franchisee was never misled on the obligation to pay rent or on the amount of rent due each month, and does not dispute any of that.

[20] Accordingly, I see no merit to the Franchisee's defenses to the crossclaim. There is likewise no defense to Mr. Jeyaparan's liability to indemnify the Franchisor under the guarantee/indemnity provision of the Franchise Agreement.

[21] Counsel for the Franchisee argues that the present motion by the Franchisor is, in effect, a partial summary judgment motion in that the claim by the Landlord against the Franchisee is still alive. He is of the view that the matter will therefore be open to contradictory findings, and that the case law on partial summary judgments does not permit such a situation.

[22] Counsel for the Franchisor, on the other hand, argues that this is a full summary judgment motion in that it will dispense with the crossclaim in its entirety. She is of the view that nothing in this motion prejudices the Franchisee from pursuing whatever defense it deems appropriate as against the Landlord. She submits that my finding that the Franchisor is liable under the Franchise Agreement will not impact on any future court's finding regarding the Franchisee's or Mr. Jeyaparan's liability under the Lease in the main claim.

[23] As courts have indicated on numerous occasions, summary judgment under Rule 20 requires them to engage in; a) weighing the evidence, b) evaluating proportionality and judicial economy, and c) assessing the impact on access to justice: *Starcall Wireless Communications Inc. v. Bell Mobility Inc*., 2017 ONSC 2813. In my view, each of these factors weighs in favour of granting the relief that the Franchisor seeks. Otherwise, the Franchisor will have to wait indefinitely for its remedy since there is no way to compel the Landlord to move ahead against the Franchisor for the balance of the damages it claims.

[24] I also note that the Franchisee has not taken the position that the Franchisor engaged in an imprudent settlement with the Landlord. It simply takes the position that partial summary judgment motions ought not be granted, without embracing any point of principle in support of that position. The fact is that the expenses of the Franchisor in settling the main claim were reasonably incurred; the Franchisor in effect mitigated its damages by settling with the Landlord for less than what the Landlord was seeking in foregone rent. That settlement did not prejudice the balance of the main claim against the Franchisee.

[25] It is also noteworthy that the Franchise Agreement permits the Franchisor to claim any expenses incurred as a result of the Franchisee's breach. This includes legal expenses on a full

indemnity scale, which here come to $21,533.64 attributed to defending and then settling the Landlord's claim.

[26] The Franchisor therefore includes this amount of $21,533.64 in its claim, and combines those legal expenses with the settlement amount of $175,000. Since Mr. Jeyaparan is the guarantor/indemnifier with respect to the Franchisees debts under the Franchise Agreement, this amount is claimed against both the Franchisee and Mr. Jeyaparan.

Disposition

[27] The Franchisee and Mr. Jeyaparan are to pay the Franchisor $196,533.64 in damages.

[28] Counsel for the Franchisor requests $5,000 in costs of the motion. It seems to me, however, that most of the costs of the motion have been largely accounted for in the $21,533.64 it has claimed in fees under the Franchise Agreement. I therefore will reduce the costs in respect of the motion to the all-inclusive amount of $2,000, reflecting counsel's preparation for and appearance at the hearing itself.

[29] In total, including all damages, costs, disbursements, and HST, the Franchisee and Mr. Jeyaparan, jointly and severally, are liable to the Franchisor in the amount of $198,533.64, plus post-judgment interest at the *Courts of Justice Act* rate.

Date: September 26, 2024 **Morgan J.**