

**CITATION:** DBCD Spadina Ltd et al v. Norma Walton et al, 2015 ONSC 5608

**COURT FILE NO.:** CV-13-10280-00CL

**DATE:** 20150910

**SUPERIOR COURT OF JUSTICE – ONTARIO  
COMMERCIAL LIST**

**BETWEEN** DBDC SPADINA LTD. and THOSE CORPORATIONS  
LISTED ON SCHEDULE A HERETO,

Applicants

**AND:**

NORMA WALTON, RONAULD WALTON, THE ROSE & THISTLE GROUP  
LTD. and EGLINTON CASTLE INC,

Respondents

**AND**

THOSE CORPORATIONS LISTED ON SCHEDULE B HERETO, TO BE  
BOUND BY THE RESULT

**BEFORE:** Newbould J.

**COUNSEL:** *Mark S. Dunn*, for the Manager

*Morris Cooper*, for 2299366 Ontario Inc. o/a Strada 241

**HEARD:** September 8, 2015

**ENDORSEMENT**

[1] Schonfeld Inc., the Manager of the Schedule B Companies moves for approval of its disallowance of the claim of 2299366 Ontario Inc. o/a Strada 241 (“Strada”). Under the claims process order of June 18, 2014, if a dispute between a claimant and the Manager is not settled

within a time period or in a manner satisfactory to the Manager, the Manager may bring the dispute before the Court for determination and the determination by the Court shall be final and binding on the parties for all purposes.

[2] The claims process order did not provide any direction regarding which party has the onus when a dispute is brought before the Court for determination. In my view, the onus should be on claimant as it is in an appeal from a disallowance of a claim by a trustee in bankruptcy. The Manager is an officer of the Court with the same level of responsibility to the parties as a trustee in bankruptcy. I agree with Walker J. in *Coastal Capital Savings Credit Union v. Symphony Development Corp.* 75 C.B.R. (5<sup>th</sup>) 221 who stated:

20 ... the Court's review of the receiver's determinations must be conducted on a principled basis; the review must not trample upon the integrity of the claims process. The review or appeal process should not detract from the requirement that parties who choose to engage in the claims process in the first instance must take it seriously. Further, the review process should be one that maintains the onus on any party who disputes the receiver's decision.

21 I agree with the receiver's submissions that to permit a *de novo* examination of each of the contested claims is not appropriate. It is unprincipled, and it renders pointless the claims process undertaken to date.

[3] On an appeal from a disallowance of a claim, the court should only intervene in the case of an error of law or a palpable and overriding error of fact. See Houlden, Morawetz and Sarra, *2015 Annotated Bankruptcy and Insolvency Act*, (Thomson Reuters Canada Limited) at §G109(1).

### **Strada Claim**

[4] Strada operated a restaurant on the first floor of one of the Schedule "B" Properties, 241 Spadina Avenue pursuant to a Lease Agreement dated September 8, 2011 (the "Lease") entered into with the owner of the Spadina Property, Twin Dragons Corporation ("Twin Dragons").

[5] The Strada claim relates to alleged breaches of the Lease by Twin Dragons. More specifically, Strada alleges that Twin Dragons failed to complete certain work specified in the

Lease in a timely manner and that, as a result, the opening of the Restaurant was delayed and Strada suffered various losses.

[6] The Strada claim was filed with the Manager on July 10, 2014. It claimed to have an unsecured claim of \$550,000 resulting from a breach of contract by Twin Dragons. It did not include any detailed description of Strada's alleged loss. The Manager disallowed the claim on three grounds. The first was that Strada commenced its action against Twin Dragons more than two years after the breach and therefore was statute-barred under the *Limitations Act 2002*. The second was that some months after the breach, Strada had executed an estoppel certificate to Strada's lender that stated that Strada had no claim against Twin Dragons. The third was that Strada had failed to provide sufficient particulars of its damages.

### **Limitation period**

[7] The building in which the restaurant was to operate was a historical building on Spadina Ave. that had been stripped of materials to the raw beams and studs and further work was required. Under schedule C to the Lease, Twin Dragons was responsible for a number of things, including providing electrical power to service the premises not later than November 11, 2011.

[8] Strada commenced its action against Twin Dragons by notice of action on December 13, 2014 and its statement of claim was dated January 14, 2014. In the statement of claim Strada claimed damages of \$350,000 for breach of the Lease. Strada pleaded that Twin Dragons was obliged under the Lease to provide electrical power to the premises by November 1, 2011 and that unknown to Strada, but known to Twin Dragons, there was never any realistic possibility of having power available by that date specified in the Lease and the power supply was a custom made unit which had never even been ordered. Strada pleaded that Twin Dragons "made this representation" to Strada deliberately with the deceptive intention of persuading Strada to sign the Lease. No claim for misrepresentation was pleaded.

[9] On this motion, Strada filed an affidavit of Michael Rubino, the president of Strada. Whether such an affidavit was permissible is a question mark, but it was not objected to by the Manager.

[10] In his affidavit, Mr. Rubino stated that he was aware that power would not be available by November 1, 2011 no later than September 29, 2011. It is clear from this affidavit that the primary cause of the loss to Strada was the failure of Twin Dragons to have power available by November 1, 2011. Strada was therefore aware of the breach underlying its claim as soon as it occurred on November 1, 2011, more than two years before the notice of action was issued.

[11] On August 7, 2012 Twin Dragons and Strada signed a Lease Amending Agreement. This agreement provided benefits to Strada, including extending the commencement date of the lease to May 1, 2012. In the statement of claim in paragraph 1.a Strada claimed damages for breach of the Lease and the Lease Amending Agreement. However nowhere in the statement of claim was there any pleading of the Lease Amending Agreement or a claim that it had been breached. I do not accept the argument of Mr. Cooper that the reference to the Lease Amending Agreement in paragraph 1.a of the statement of claim means that the limitation period began to run only from the date of the Lease Amending Agreement.

[12] The Lease Amending Agreement provided in paragraph 14 that it was without prejudice to the rights of Strada under the existing Lease. Mr. Cooper contended that this provision was in effect a tolling agreement. I do not agree. It was the opposite. It preserved the right of Strada to sue Twin Dragons for breach of the Lease and made no mention at all that there was a tolling agreement to extend any limitation period.

[13] I conclude that the Strada claim was statute-barred and that the disallowance by the Manager of the claim on that basis was proper.

[14] In the circumstances, there is perhaps no need to consider the two other grounds relied on by the Manager to disallow the claim, but I shall do so briefly.

### **Estoppel Certificate**

[15] On April 16, 2012, Rose & Thistle wrote to Mr. Rubino and asked Strada to execute an estoppel certificate in connection with the proposed refinancing of the Spadina Property. Mr.

Rubino responded that he was not prepared to execute an estoppel certificate because, in his view, Twin Dragons was in default of its obligations under the lease:

... Under these circumstances, it is not reasonable to expect the Tenant to sign a document saying the Lease is in good standing when it is not.

[16] The differences between Strada and Twin Dragons appear to have been resolved by the Lease Amending Agreement entered into on August 7, 2012. Among other things, the Lease Amending Agreement granted Strada a rent-free period from May 1, 2012 to September 30, 2012.

[17] Shortly after execution of the Lease Amending Agreement, Strada and Twin Dragons also agreed on the balance outstanding on the Leasehold Improvement Allowance. This agreement was reflected in an e-mail dated September 26, 2012.

[18] On March 4, 2013 Strada executed the Estoppel Certificate, which stated that:

There is no existing dispute, claim, setoff, defence or counterclaim by or against the Landlord, except as provided in Exhibit A.

[19] Exhibit A to the Estoppel Certificate did not identify any of the claims or losses presently asserted by Strada.

[20] Mr. Cooper contended that the Estoppel Certificate was made to Strada's lender and thus could not be relied on by the Manager in disallowing the claim of Strada. I do not agree. The Manager was required to investigate the claim and rely on evidence obtained, which this Estoppel Certificate was. In his affidavit filed on this motion, Mr. Rubino did not offer any explanation for executing the Estoppel Certificate that would justify his claim. In my view the Manager was entitled to rely on the Estoppel Certificate.

[21] The Manager made no reversible error in relying on the Estoppel Certificate in disallowing the Strada claim.

## **Proof of Damages**

[22] In the statement of claim of Strada the damages claimed were \$350,000. In the claim filed with the Manager the damages claimed were \$550,000. Strada's claim was supported by printouts of email correspondence with Twin Dragons. It did not include any detailed description of either the cause or quantum of Strada's alleged loss. The lack of supporting documentation was relied on by the Manager in disallowing the claim.

[23] In his affidavit filed on this motion, Mr. Rubino said the damages were \$611,000 consisting of additional wages and salary of \$206,000, loss of income from restaurant operations of \$220,000, loss of income from TIFF and holiday season events of \$120,000 and additional construction costs due to delays of \$65,000. Mr. Rubino said that at the closing of the sale of the Spadina building, Strada owed approximately \$120,000 in overdue rent and that without wishing to have a further discussion on whether the Rent Free Period agreed to in the Lease Amending Agreement was sufficient, given further and repeated delays in construction caused by the Landlord following its execution, he offset the full amount from the claim so that he was submitting a total claim of \$491,000.

[24] This information in Mr. Rubino's affidavit is not any reliable information of damages. Mr. Rubino claims that Strada spent exactly \$206,000 on "additional wages and salaries". These wages and salaries are alleged to relate to staff that were hired to begin preparing for opening the Restaurant but not able to work at the Restaurant because of the construction delays. Based on the information provided, it is impossible to know how the \$206,000 figure was calculated. There is no information with respect who these employees were, what they were paid, when they started work or why the employees could not do whatever preparation they were hired to do.

[25] There was no documentation supporting additional construction costs said to have been incurred. If the losses claimed had been suffered, then supporting documents should have been readily available to Strada. The absence of supporting documents was specifically highlighted in the Manager's 34<sup>th</sup> Report on July 10, 2015, but Strada has made no attempt to file further evidence to support its claim.

[26] Moreover, a reference to a loss in income says nothing about the costs that were saved or the profitability of the restaurant business operated by Strada before it closed the restaurant.

[27] The Manager was entitled to rely on the lack of documentation supporting the claim of \$550,000 filed by Strata. The Manager made no reversible error in relying on the lack of documentation in disallowing the Strada claim.

### **Conclusion**

[28] The disallowance by the Manager of the Strada claim is upheld.

[29] The Manager is entitled to its costs. If costs cannot be agreed, brief written submission not exceeding three pages along with a proper cost outline may be made by the Manager within 10 days and Strada shall have 10 further days to make brief written responding submissions not exceeding three pages in length.



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Newbould J.

**Date:** September 10, 2015