ENTRY ORDER

SUPREME COURT DOCKET NO. 2020-039

JULY TERM, 2020

Pearl Street Partners LLC v. Backstage LLC,* Vincent Dober, Sr.* & People's United Bank	}	APPEALED FROM:
	}	
	}	
	}	Superior Court, Chittenden Unit
	}	Civil Division
	}	
	}	DOCKET NO. 657-8-18 Cncv
		Trial Judge: Helen M. Toor

In the above-entitled cause, the Clerk will enter:

Tenant Backstage, LLC and its managing member Vincent Dober, Sr. appeal the civil division's judgment in favor of landlord Pearl Street Partners, LLC in this commercial eviction action. We affirm.

Based on the evidence presented by the parties at trial, the civil division made the following findings. In 2013, landlord agreed to lease commercial space to tenant for ten years. Tenant operated a bar on the premises. The lease agreement required tenant to provide proof of commercial general liability insurance written on an occurrence basis with a combined single limit of not less than $2 million for personal injury to one or more persons in a single accident and $250,000 for property damage, as well as not less than $2 million in dram shop liability coverage. The agreement required that the insurance include landlord as an additional insured on the general liability and dram shop policies, provide primary coverage without any contribution from landlord's insurance, and provide for thirty days' notice to landlord before cancellation. The agreement provided that if tenant defaulted under any of its provisions and failed to cure the default within fifteen days of receiving written notice from landlord, landlord could terminate the lease.

During the early years of the lease period, landlord did not closely examine the evidence of coverage provided to it by tenant. However, in April 2018, landlord learned from the news that tenant had been sanctioned by the Vermont Liquor Control Board for serving alcohol to an intoxicated customer and for tenant's owner, Dober, tending bar while highly intoxicated. The underlying incidents occurred in February 2018. Landlord was concerned about potential future liability and decided to review tenant's insurance certificate. Landlord learned that the insurance did not satisfy the lease provisions in several respects: it did not list landlord as an additional insured on the dram shop policy, it did not provide that coverage was primary and noncontributory, it provided only $1 million in personal injury coverage and $100,000 in property damage coverage, and it did not require thirty days' notice to landlord before cancellation.

On May 1, 2018, landlord sent a letter to tenant giving tenant fifteen days to cure the default. The letter asked tenant to contact its insurer to retroactively adjust the coverage and provide an updated certificate of insurance. Dober promptly provided the letter to his insurance agent but did not tell landlord he had done so or follow up with the insurance agency to make sure the default was cured within the fifteen-day period. Nor did he send the insurance agent a copy of the lease agreement. During the next four weeks, tenant did not provide an updated certificate of insurance or communicate with landlord. On May 30, landlord sent another letter stating that tenant continued to be in default and giving tenant's lender the sixty-day cure right it had under the lease. Landlord calculated the sixty days as expiring on June 30. Dober did not speak to his insurance agent until the end of June.

The insurance agency issued revised insurance certificates dated June 6, 2018, July 2, 2018, and July 5, 2018. The insurance agent emailed the June 6 certificate to landlord on July 2, and the July 2 and July 5 certificates on July 5. None of the certificates cured all of the problems identified by landlord. It was not until the July 5 version—issued after the cure period expired—that landlord was listed as an additional insured on the dram shop coverage and the umbrella coverage was clarified to provide $2 million in coverage per person under the general liability policy. Even then, the policy did not state that it was primary and noncontributory coverage or require thirty days' notice to landlord prior to cancellation. None of the certificates showed retroactive coverage for occurrences prior to the issue date.

On July 3, landlord sent notice that the lease would terminate on July 5 and that tenant had to vacate the premises by July 13. Tenant failed to vacate by that date. On July 9, the Liquor Control Board suspended tenant's license for seven days for allowing an intoxicated person to stay on the premises without supervision in April. In August 2018, landlord filed this action for possession.

The parties agreed to present evidence on the merits before addressing the issue of damages. Following a one-day bench trial in January 2019, the court issued a written decision holding that landlord was entitled to terminate the lease and take possession of the premises. Tenant argued that termination was inequitable because the breaches were not material and tenant had invested substantial resources in improving the premises. The court rejected these arguments, holding that even though tenant had cured some of the defaults, its failure to ensure that landlord was an additional insured under the dram shop coverage, that the coverage was primary, or that landlord was entitled to thirty days' notice prior to cancellation were material breaches of the lease giving landlord the right to evict. The court found that tenant failed to take reasonable steps to remedy the violations after being notified by landlord and therefore was not in a position to argue that it was being unfairly treated. The court ruled that landlord was entitled to possession, and a writ of possession was issued shortly thereafter. Tenant sought permission to take an interlocutory appeal, which the trial court denied. After holding an evidentiary hearing regarding damages, in January 2020 the court entered final judgment for contractual damages and ordered tenant to pay landlord's attorney's fees. This appeal followed.

On appeal, tenant argues that the evidence does not support the court's findings that tenant materially breached the lease. Tenant claims that the negotiations leading to execution of the lease agreement only addressed an increase in coverage from the $1 million secured by the previous

tenant to $2 million, and tenant obtained the required amount of coverage within the cure period. According to tenant, the other insurance requirements were not mentioned during the negotiations in 2013 or in landlord's testimony at trial, and therefore were not essential terms of the agreement. Tenant further claims the court abused its discretion by terminating the lease when it could have instead fashioned an equitable solution such as ordering tenant to cure the violations within a set time and pay reasonable attorney's fees and costs to landlord. We address each argument in turn and find both to be without merit.

As we have often stated, Vermont law disfavors forfeiture of a lease. Mongeon Bay Props., LLC v. Malletts Bay Homeowner's Ass'n, 2016 VT 64, ¶ 51, 202 Vt. 434 [Mongeon Bay I]. Accordingly, "[t]o support a judgment of forfeiture, the breach complained of may not be trivial or technical." Champlain Oil Co. v. Trombley, 144 Vt. 291, 297 (1984). Whether a breach of a lease is material is a question of fact that we review for clear error. See id. (affirming trial court's finding that tenant's breach of commercial lease was material); see also Mongeon Bay I, 2016 VT 64, ¶ 22 ("On review, we will uphold the trial court's findings as long as they are supported by any credible evidence in the record . . . .").

Landlord's manager testified at trial that when landlord enters into a lease with a tenant, "we present a lease to the tenant for them to sign, and that has the insurance requirements in it that we expect and need." The representative testified with regard to the dram shop coverage provision that "a specific point of the negotiation with [tenant] was that these limits be raised because of concern about the nature of the business." Landlord typically included a provision in the lease requiring landlord to be listed as an additional insured so that landlord's insurance would not have to cover the tenant's liabilities, which was "a much safer and stronger position for the landlord." During the negotiations with tenant, landlord specifically communicated to tenant that the insurance had to list landlord as an additional insured under the dram shop policy. It also urged tenant to bring the lease agreement to the insurance agency when seeking coverage to ensure that the policy complied with all of the provisions. Strict compliance with the insurance coverage provisions was important to landlord because landlord could be held liable for the consequences if tenant overserved liquor or violated liquor laws. Landlord's representative testified that he had not examined tenant's insurance coverage in detail "until I realized and was brought face-to-face with the reality of the exposure that we were dealing with due to [the] violations" for which tenant was sanctioned by the Liquor Control Board in April 2018, as well as subsequent violations. At that point, he discovered the numerous deficiencies in the insurance certificate provided by tenant, and promptly notified tenant of the default.

The above evidence supports the trial court's conclusion that tenant's failure to obtain insurance coverage containing the provisions specified in the lease was a material breach. As the court noted, insurance coverage is typically an important component of a commercial lease. See, e.g., 455 Dumont Assocs., LLC v. Rule Realty Corp., 119 N.Y.S.3d 508, 510 (App. Div. 2020) (holding that commercial tenant's failure to obtain full amount of insurance coverage required by lease was material breach). Here, the specific requirements that landlord be listed as an additional insured under the dram shop policy, that tenant's coverage be primary, and that landlord receive thirty days' notice prior to cancellation were essential elements of the agreement between the parties because without these provisions, landlord could be exposed to significant liabilities. See LNM1, LLC v. TP Props., LLC, No. 1170708, 2019 WL 5677637, at *7 (Ala. Nov. 1, 2019)

(explaining that "a tenant's failure to procure required insurance coverage protecting a landlord is tantamount to playing financial Russian roulette" (quotation omitted)). The testimony of landlord's representative supports the court's determination that tenant's noncompliance with these provisions was not a trivial or technical violation of the lease terms.

The record also supports the court's conclusion that tenant never fully cured the breach because even the final revised certificate of insurance failed to indicate that tenant's coverage was primary or that landlord was entitled to notice before cancellation. Tenant also did not obtain retroactive coverage, meaning that landlord was potentially exposed to unknown claims arising during the period that coverage was insufficient. See 425 Dumont Assocs., 119 N.Y.S.3d at 510 (noting that prospective coverage obtained by tenant did not cure breach because policy did not protect landlord from claims arising during period of insufficient coverage). Under these circumstances, landlord was entitled to terminate the lease. Mongeon Bay I, 2016 VT 42, ¶ 66 (explaining that landlord may elect to terminate lease if tenant fails to perform valid promise, thereby depriving landlord of significant inducement to making of lease (citing Restatement (Second) of Property: Landlord & Tenant § 13.1).

Tenant argues, however, that the trial court should have considered whether forfeiture of the lease would result in a substantial hardship to tenant and whether landlord could have been compensated by some other equitable remedy short of termination. We considered and rejected a similar argument in Mongeon Bay I. In that case, the lessor of land abutting Lake Champlain sought to terminate tenant's ground lease for violating a provision that prohibited waste. The trial court found that tenant had breached the lease by neglecting the property, resulting in significant erosion to the shoreline. However, it concluded that termination would be inequitable and instead awarded damages to the lessor. We reversed, explaining:

> The general maxim that forfeiture under a lease is disfavored by law is well established in our cases, but this general statement of policy does not support the suggestion that in the face of an established default and a lessor's timely invocation of a contractual right to terminate, a court may decline to terminate the lease pursuant to its terms.

Id. ¶ 51. We held that the general policy disfavoring forfeitures did not authorize the trial court to invoke equitable principles to decline to enforce the lease provision calling for termination in the event of a default where the landlord timely exercised that right. Id. ¶ 63. As in Mongeon Bay I, the lease in this case permitted landlord to terminate and seek possession in the event of a default. Landlord acted promptly to exercise that right once it discovered tenant's default.[*] Not only did tenant fail to cure all of the material breaches within the cure period, but tenant still had not fully remedied the material breaches as of the time of the trial court's hearing. On these facts, landlord

[*] Tenant suggested below that landlord waived the right to terminate the lease for insufficient insurance coverage by failing to raise the issue earlier in the tenancy. The trial court rejected this argument because the lease agreement provided that failure by landlord to seek default for a violation did not constitute a waiver of the right to do so for a later violation. On appeal, tenant does not challenge this ruling or otherwise argue that landlord failed to timely invoke the termination clause.

was entitled to invoke the forfeiture clause in the lease. Even if we assumed that the trial court had the discretion to grant the relief sought by tenant, under these circumstances, the trial court did not abuse its discretion.

Tenant argues that Mongeon Bay I is distinguishable because the alternative remedy to termination in that case would have involved an expensive and exhaustive reinforcement of eroded shoreline and further court oversight. Here, tenant argues, the alternative remedy was simple: give tenant more time to obtain the proper coverage and order it to pay landlord's expenses. We find tenant's argument unpersuasive. Our decision in Mongeon Bay I did not turn on the relative ease or difficulty of carrying out the proposed equitable remedy, but rather the trial court's lack of authority to invoke equity to avoid a contracted-for termination provision. Id.; see also Mongeon Bay Props., LLC v. Malletts Bay Homeowner's Ass'n, 2017 VT 27, ¶ 4, 204 Vt. 351 (reiterating holding of Mongeon Bay I). Similar to Mongeon Bay I, the lease agreement in this case authorized landlord to terminate the tenancy in the event of a default if tenant failed to cure the default after fifteen days' notice. Tenant materially breached the lease, did not cure the default, and landlord sought to enforce the termination clause. As stated above, under Mongeon Bay I, under these facts, the trial court lacked discretion to fashion an alternative equitable remedy; even if the court had such discretion, it did not abuse that discretion. Id.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Karen R. Carroll, Associate Justice