

Wolfstadt v. Chaiton & Chaiton et al.

[Indexed as: Wolfstadt v. Chaiton & Chaiton]

65 O.R. (3d) 531

**Ontario Superior Court of Justice
Epstein J.**

June 30, 2003

Professions — Barristers and solicitors — Negligence — Leasing transaction — Standard of care — Client signing agreement to lease premises for dental office — Lease containing demolition clause — Lawyer not negotiating amendments to demolition clause in landlord's standard form lease — Lawyer having advised client about risks associated with demolition clause — Client understanding advice and accepting risk — Action for negligence dismissed.

In November 1996, the plaintiff, Dr. W., signed an agreement to lease space for his dental office. At the time, he was an overholding tenant and eager to relocate his dental practice. The agreement contained a term requiring him to sign the landlord's standard form master lease subject to the right to review the master lease and negotiate reasonable changes within ten days. During the ten-day period, Dr. W. retained the defendant CS to act as his lawyer for the transaction. *[page532]*

CS reviewed the master lease with Dr. W., and CS pointed out that it contained a "demolition clause" permitting the landlord to terminate the lease without compensation on 180 days' notice if the landlord demolished, renovated, remodelled or altered the building in which the rented premises were located. The landlord, however, was already in the process of making improvements to the building, and both Dr. W. and CS believed that it was unlikely that the demolition clause would be triggered. CS explained the meaning and implications of the demolition clause, and he also advised Dr. W. that the landlord's representative had indicated that the landlord would not entertain significant changes to the master lease. Dr. W. instructed CS not to request any changes to the demolition clause and rather to negotiate other changes. Several changes were negotiated, and the lease was signed on February 24, 1997.

In April 1997, Dr. W. began practising in his new premises. In December 1997, he received notice that the landlord had sold the building and that notice was being given pursuant to the demolition clause. In response to the notice, Dr. W. moved into another dental office with another dentist and, in due course, arrangements were reached between them to practise dentistry together. Dr. W. alleged that as a result of his re-location, he suffered damages, and he sued CS for professional negligence.

Held, the action should be dismissed.

In advising a client concerning a lease, a lawyer's duty of care is to ensure that his or her client understands the terms of the lease and their consequences. The nature and degree of the explanation and the advice given depends on the type of transaction and the client's circumstances. The lawyer meets the standard of care if, taking into consideration the particular transaction and the client, the lawyer explains the agreement and the risks associated with it in a way that the client is able to make an informed decision as to whether to enter into the transaction and accept the risks. In this case, Dr. W., based on his own experience and the advice, appreciated the risk and nevertheless decided to proceed. In the circumstances of this case and knowing the client's circumstances, CS did not fall below the standard of

care by failing to advise Dr. W. that he could walk away from the agreement based on a clause, the operation of which Dr. W. believed to be remote. Further, Dr. W. failed to discharge the burden of proving causation. There was no evidence to support findings that Dr. W. could have entered into a more favourable lease or that he would have decided not to sign the lease. Accordingly, the action should be dismissed.

Cases referred to

Fellowes, *McNeil v. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456, 37 C.P.C. (4th) 20, [1998] O.J. No. 4050 (QL) (Gen. Div.); *Major v. Buchanan* (1975), 9 O.R. (2d) 491, 61 D.L.R. (3d) 46 (H.C.J.); *Presidential Management and Development Corp. v. Sugarman*, [1998] O.J. No. 382 (QL) (Gen. Div.); *Sykes v. Midland Bank Executor & Trustee Co. Ltd.*, [1969] 2 All E.R. 1238 (Q.B.D.); *Wong v. 407527 Ontario Ltd.* (1999), 179 D.L.R. (4th) 38, 26 R.P.R. (3d) 262, [1999] O.J. No. 3377 (QL), 125 O.A.C. 101 (C.A.), *affg in part* (1996), 1 R.P.R. (3d) 245 (Ont. Gen. Div.)

ACTION for damages for solicitor's negligence.

Stephen R. Jackson, for plaintiff.

Keith M. Landy, for defendants. *[page533]*

[1] **EPSTEIN J.:** — The issue in this action is whether the defendant solicitor, Christopher Stoyan, fell below the standard of care owed to the plaintiff, Dr. Wayne Wolfstadt. The duty of care arose in the course of Mr. Stoyan's acting for Dr. Wolfstadt in finalizing arrangements concerning the doctor's lease of premises in which he intended to practise dentistry. At the time, Mr. Stoyan was with the law firm of Chaiton & Chaiton.

The Facts

[2] On November 21, 1996, Dr. Wolfstadt, without the benefit of legal advice, entered into an agreement to lease for suite 702 at 111 Avenue road (the "premises"). The doctor's real estate agent drafted the agreement. Dr. Wolfstadt signed the document that contained a term requiring him to sign the landlord's standard form master lease. He did this without first seeing the master lease. The agreement, however, did allow the doctor ten days to review the master lease and negotiate reasonable changes.

[3] The master lease contained a paragraph that has become the basis of Dr. Wolfstadt's complaint against Mr. Stoyan. Clause 11(g) of the document provides as follows: "Notwithstanding anything contained in this Lease to the contrary in the event the Landlord intends to demolish, renovate, remodel or alter the building in which the Leased Premises is located, then the Landlord, upon giving the Tenant one hundred and eighty (180) days written notice, shall have the right to terminate this Lease and this Lease shall thereupon expire on the expiration of one hundred and eighty (180) days from the date of the giving of such notice without compensation of any kind to the Tenant." This clause will be referred to as the "demolition clause".

[4] During the ten-day period, Dr. Wolfstadt retained Chaiton & Chaiton and was referred to one of their commercial lawyers, Mr. Stoyan, to represent his interest in reviewing the master lease and completing the transaction.

[5] No written retainer was executed.

[6] Mr. Stoyan, prior to meeting with Dr. Wolfstadt in person, obtained and undertook a detailed analysis of the agreement to lease and the master lease. He made notes on the documents in red ink indicating certain discrepancies and typographical errors. He underlined important provisions and re-drafted certain text with a view to improving Dr. Wolfstadt's position. In the margin of the master lease beside the demolition clause, Mr. Stoyan inserted an "NB". This was an indication that he believed it to be "very important" to discuss with his client. He testified that he had encountered clauses like this before. *[page534]*

[7] Mr. Stoyan's evidence is that on December 12, 1996, he called Mr. Nuez, the landlord's representative, to introduce himself and to discuss the deal. Mr. Stoyan testified that in that conversation, Mr. Nuez informed him of two things. First, the landlord would not be willing to entertain significant changes to the terms of the master lease. Second, the landlord was in the process of making improvements to the building in which the premises were located.

[8] The doctor and Mr. Stoyan met on December 13, 1996, and reviewed the agreement to lease and the master lease. The discussion at this meeting is of some consequence to my determination of the issues raised in the pleadings.

[9] Dr. Wolfstadt testified that Mr. Stoyan reviewed the terms of the master lease and he advised his lawyer about the issues of particular interest and concern to him. With respect to the demolition clause Mr. Stoyan discussed with him the meaning and implications of the clause. Dr. Wolfstadt made notes of the meeting. His note relevant to the demolition clause reads as follows: "sale & demo clause 6 m. Notice". Dr. Wolfstadt also says that he and Mr. Stoyan discussed the facts that the possibility of the landlord demolishing the building and therefore relying on the demolition clause was very remote. This summarizes Dr. Wolfstadt's best recollection of the meeting.

[10] Mr. Stoyan's evidence about the meeting on December 13, 1996 is as follows. He went through the master lease with his client, page by page, and discussed each item with him. He learned that the doctor was overholding in his current location and for a number of reasons was very anxious to move into the premises. With respect to the master lease, his client was interested in such matters as hours of operation and the relocation clause. In terms of the demolition clause, Mr. Stoyan says that he explained the meaning and implication of the clause to Dr. Wolfstadt. He told the doctor that if the landlord decided to demolish or renovate, he could terminate the lease without any compensation to the tenant. In such circumstances, Dr. Wolfstadt would have six months to relocate.

[11] Mr. Stoyan advised Dr. Wolfstadt that it would be best to have the demolition clause removed. However, he expressed his view to the client that given the building was a multi-tenanted commercial building and given the money the landlord was spending to renovate the building, it was "highly unlikely" that the demolition clause would have any effect on the tenancy. The two then discussed the issue including their jointly held view as to the remoteness of the clause being triggered and the fact that the landlord had indicated he would not agree to any material *[page535]* changes to the master lease. They decided that it would be best to concentrate on clauses, such as the relocation clause, that were of greater concern to the doctor and where there was some chance of improving the terms of the master lease. These were the instructions Dr. Wolfstadt ultimately gave to Mr. Stoyan.

[12] While Mr. Stoyan remembers the meeting of December 13 in more detail than does the doctor, several aspects of the meeting are clear. Mr. Stoyan and Dr. Wolfstadt specifically discussed the meaning and consequences of the demolition clause. They agreed that the chances of the landlord's

exercising the clause were very remote. They agreed that Mr. Stoyan would not raise the demolition clause in his negotiations with the landlord. Dr. Wolfstadt instructed his lawyer not to request any changes to the demolition clause.

[13] On December 16, 1996, Mr. Stoyan wrote to the landlord in which he set out his client's concerns about the master lease. This letter, a copy of which was sent to Dr. Wolfstadt, contains no reference to the demolition clause. This fact reinforces my finding that Dr. Wolfstadt did not instruct Mr. Stoyan to pursue the possibility of negotiating any removal of or changes to the demolition clause.

[14] Dr. Wolfstadt then incorporated a numbered company that secured a small business loan to finance the build-out of the premises to make them suitable for a dental office.

[15] The lease was executed on February 24, 1997, in a form that had been revised in accordance with several issues Mr. Stoyan had successfully negotiated on his client's behalf. Prior to executing the lease, Mr. Stoyan and Dr. Wolfstadt met for an hour to review its terms, terms that included the demolition clause.

[16] On April 10, 1997, Mr. Stoyan, after registering the notice of lease on title, sent his client a letter enclosing his account and a summary of the business terms contemplated by the lease. This summary made no reference to the demolition clause.

[17] Dr. Wolfstadt began practising in the premises in April of 1997. In December of that year he was notified that the building was being sold. He received notice pursuant to the terms of the demolition clause that he had six months to vacate.

[18] Dr. Wolfstadt testified that he was shocked by this development. He says that at the time he entered into the lease there was no hint that the building was going to be sold and renovated for a different use.

[19] In response to the notice to vacate, Dr. Wolfstadt moved into a dental office on Yonge Street and associated with his friend, Dr. Glazer, a specialist. At the outset Dr. Glazer allowed Dr. Wolfstadt to practise in these premises on favourable terms *[page536]* to allow him to recover financially from the move from Avenue Road. After a period of time, the two dentists regularized their financial arrangements and they have been practising dentistry together ever since.

Issues

[20] Against the background of these facts, Dr. Wolfstadt raises two issues, as follows:

1. Did Mr. Stoyan fall below the standard of care in advising and representing Dr. Wolfstadt with respect to the lease and in particular the demolition clause?
2. If so, what is the measure of damages Dr. Wolfstadt has proven he suffered as a result of Mr. Stoyan's conduct?

Analysis

[21] In *Major v. Buchanan* (1975), 9 O.R. (2d) 491, 61 D.L.R. (3d) 46 (H.C.J.), Goodman J. set out the duty of a solicitor in circumstances such as this, as follows [at p. 514 O.R.]:

. . . A solicitor has the duty of warning a client of the risk involved in a course of action, contemplated by the client or by his solicitor on his behalf, and of exercising reasonable care and skill in advising him. If he fails to warn the client of the risk involved in the course of action and it appears probable that the client would not have taken the risk if he had been so warned, the solicitor will be liable.

[22] Applying this principle to the facts in this case, in order to establish liability, Dr. Wolfstadt must prove, on balance, that Mr. Stoyan did not provide Dr. Wolfstadt with appropriate advice concerning the demolition clause. The doctor also must demonstrate that had he been adequately warned, it is probable that he would not have entered into the lease.

[23] Two experts in commercial leasing provided me with assistance in making my determination with respect to liability.

[24] Mr. Posen testified on behalf of Dr. Wolfstadt. His report, supported by his oral testimony, sets out his opinion that Mr. Stoyan was negligent in the performance of his legal services relating to the negotiation and conclusion of the lease. Mr. Posen noted that the agreement to lease provided that the parties would execute a lease in the form of the master lease subject to changes and the landlord and tenant would act reasonably with respect to such changes.

[25] In Mr. Posen's opinion, the demolition clause represented such a fundamental change from the terms of the agreement to lease that it would be reasonable, in finalizing the terms of the [page537] lease, to require the deletion of the clause or, at the very least, a compromise to its terms. Mr. Posen goes on to say that it would not have been reasonable for the landlord to refuse to agree to the deletion or compromise to the clause and any such refusal would have constituted a breach of the agreement to lease.

[26] Mr. Posen's view is that a reasonably competent solicitor should have forcibly argued that the demolition clause be removed from the master lease. Alternatively, if the landlord was unwilling to conclude a lease without the demolition clause, the lawyer should have insisted on some form of compromise that would provide for financial compensation to the tenant for the relocation. If neither was possible then the lawyer should have advised his client that as a result of the landlord's position with respect to such a fundamental term, the landlord was in breach of the agreement to lease giving the doctor certain rights against the landlord. Finally, if the tenant did not wish to exercise any rights against the landlord, Mr. Stoyan should have confirmed in writing his client's instructions to conclude the lease.

[27] It is Mr. Posen's opinion that given Mr. Stoyan did not ask that the demolition clause be deleted from the master lease, did not try to negotiate a compromise and did not advise his client of his options against the landlord in relation to the agreement to lease, he fell below the standard of care of a reasonably competent solicitor.

[28] Mr. Haber testified as an expert on behalf of Mr. Stoyan. He noted that Mr. Stoyan went over the demolition clause with his client but Dr. Wolfstadt decided to sign the lease notwithstanding as he was more concerned about the relocation clause and felt that the possibility of the landlord's demolishing the building was remote. Mr. Haber says that in these circumstances, Mr. Stoyan acted as a reasonable solicitor in making his client, who was clearly anxious to complete the transaction, aware of the ramifications of the demolition clause. Mr. Haber noted that in light of the short time period in which the lease had to be signed, the issues that were important to the doctor such as hours of operation, the fact that Dr. Wolfstadt was renting a relatively small amount of space and therefore had little negotiating leverage and the jointly held opinion that it was very unlikely that the building would be demolished,

Mr. Stoyan's advice was appropriate.

[29] The difference in the two opinions lies in how far Mr. Stoyan was required to go, on behalf of his client, in addressing the possible consequences of the demolition clause. Mr. Posen says that a reasonable duty of care requires a lawyer in these circumstances to go much farther than Mr. Stoyan did. Mr. Stoyan, *[page538]* acting as a reasonably competent solicitor, should have at least tried to protect his client against the implications of the demolition clause being triggered or advise him of his options. Mr. Haber, on the other hand, says that Mr. Stoyan's fully advising his client about the nature and effect of the clause and then allowing him to decide whether or not to assume the risk, was sufficient to meet the standard of care required of him.

[30] In my view, the merit of each opinion depends on the circumstances of the case. What has to be pointed out in situations such as this varies with the client. See: *Sykes v. Midland Bank Executor & Trustee Co. Ltd.*, [1969] 2 All E.R. 1238 (Q.B.D.).

[31] Here we have a unique set of facts that are relevant to my assessment of Mr. Stoyan's obligations to Dr. Wolfstadt. Regrettably, not all of these facts were available to Mr. Posen when, on August 25, 1998, he prepared his opinion. This should be contrasted to Mr. Haber, whose opinion is dated December 4, 2001 and who had the benefit of reviewing more information relevant to assessing the situation, most notably the testimony of Dr. Wolfstadt and Mr. Stoyan in their examinations for discovery.

[32] Generally speaking, in advising a client concerning a lease, a lawyer's duty of care is to ensure that his or her client understands the terms of the agreement and their consequences. As previously noted, the nature and degree of the explanation and advice given depends of the type of transaction and the client's circumstances. If, taking into consideration the particular transaction and client, the lawyer has explained the agreement and the risks associated with it in a way that the client is able to make an informed decision as to whether to enter into the transaction and accept any risks that go with it, then the lawyer has met the standard of care.

[33] The evidence is clear that Mr. Stoyan explained the meaning and consequences of the demolition clause to a client who was highly educated and who had experience entering into lease arrangements for his dental practice [Note 9]. The evidence is also clear that to Mr. Stoyan's knowledge, Dr. Wolfstadt fully understood the meaning and consequences of the demolition clause. For a number of reasons, that appeared valid at the time and were discussed with Mr. Stoyan, Dr. Wolfstadt decided to instruct his lawyer not to raise the demolition clause in the negotiations surrounding the master lease. *[page539]*

[34] I find that Dr. Wolfstadt, based on his own experience and the advice provided by Mr. Stoyan, appreciated the risk contained in the demolition clause and nevertheless decided to proceed with the proposed course. In these circumstances, Mr. Stoyan, by taking the steps he did to explain the meaning and consequences of the demolition clause to his client and by reviewing with him the reasons not to pursue the issue in the impending negotiations over the lease, discharged his professional duty to Dr. Wolfstadt.

[35] In argument, counsel for Dr. Wolfstadt relied heavily on the proposition that Mr. Stoyan was negligent in not advising his client that he had the option of walking away from the deal given the fact that the agreement to lease made no mention of the demolition clause. Mr. Stoyan admitted that he did not raise this with his client. He further admitted that the doctor might have had recourse against the landlord as a result of the demolition clause not being in the agreement to lease. However, it was abundantly clear that Dr. Wolfstadt had absolutely no interest in walking away from the premises. He

had every interest in completing the transaction as quickly as possible.

[36] While with the benefit of hindsight Mr. Stoyan may have conducted himself differently and explained this option to Dr. Wolfstadt, this is not the test. In *Fellowes, McNeil v. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456, [1998] O.J. No. 4050 (QL) (Gen. Div.), E. McDonald J. held that "in attempting to answer the difficult question of whether a decision made by a solicitor in the conduct of a case constitutes negligence rather than a mere error in judgment, the court will consider whether the error is so egregious as to constitute negligence". I am not prepared to hold that Mr. Stoyan, knowing how excited his client was about the transaction and how eager he was to sign the lease and move into the premises, fell below the standard of care by failing to advise him that he could walk away from the agreement to lease based on a clause, the operation of which the doctor believed on information he accepted, to be remote.

[37] If I am incorrect in this respect, it is abundantly clear that any negligence on Mr. Stoyan's part was not the cause of any damages Dr. Wolfstadt may have suffered as a result of his having to move out of the premises. It was for the doctor to show that it was probable that if he had received proper advice he could have entered into a lease without the demolition clause or at least with a more favourable one or that he would not have entered into the lease at all. Dr. Wolfstadt failed to prove anything of the kind.

[38] There is no evidence to establish what, if anything, the landlord would have done had Mr. Stoyan asked to have the demolition clause amended or removed. In *[page540] Wong v. 407527 Ontario Ltd.*, [1999] O.J. No. 3377, 179 D.L.R. (4th) 38 (C.A.), Laskin J.A. observed that in circumstances such as this, when called upon to assess a loss in a hypothetical circumstance, the court must first assess the probability that efforts to negotiate a better term would have been successful. In this case Dr. Wolfstadt called no evidence to suggest that the landlord would have been willing to reconsider the demolition clause in the master lease. The evidence is, in fact, that Mr. Stoyan was not able to persuade the landlord to provide full compensation for all costs related to any relocation. Against this background, there is nothing to support an inference that if Mr. Stoyan had taken the steps Mr. Posen suggested, the outcome would have been different.

[39] This takes me to the second part of the causation analysis. Once again, there is no evidence to support a finding that Dr. Wolfstadt would have decided not to sign the lease in its current form had Mr. Stoyan provided him with the advice and services Mr. Posen suggests would have been necessary for him to discharge his duty to his client. In fact all of the evidence suggests otherwise. It is clear that Dr. Wolfstadt was, at the time the lease was being negotiated, in unsuitable accommodation and exposed to the insecurity of a month-to-month tenancy. He very much wanted to move into premises he was designing for himself in what he considered to be a superior building. See: *Major v. Buchanan* (1975), 9 O.R. (2d) 491, 61 D.L.R. (3d) 461 (H.C.J.).

[40] The doctor has failed to discharge his burden of proving causation.

[41] Based on my finding of no negligence and no causation, the action must be dismissed. However, if I am incorrect in my analysis to this point, it may be of assistance for me to examine the doctor's claim for damages arising from his having to move his dental practice.

[42] Dr. Wolfstadt is claiming damages under the following heads:

- (a) loss of income;
- (b) loss of patients;
- (c) moving costs;

- (d) liability pursuant to a personal guarantee with respect to the loan for the leasehold improvements to 111 Avenue Road;
- (e) 17 months worth of financing charges paid for the equipment; and
- (f) storage and insurance costs of the equipment. *[page541]*

[43] I will deal with the first two heads together as, in my view, they are the same damages. Both sides proffered expert evidence regarding the loss of income Dr. Wolfstadt allegedly suffered as a result of his being forced to move from Avenue Road to Yonge Street.

[44] The doctor's expert, Ms. Vegotsky, testified that as a result of the move, Dr. Wolfstadt suffered a loss of income over a period of three years before it returned to levels the doctor enjoyed before the move to Yonge Street. Ms. Vegotsky examined Dr. Wolfstadt's income between January to June of 1997, and January to June of 1998, and calculated a growth in income between those two periods of 26.9 per cent. She used this growth factor to project what the doctor's income would have been over the next three years had he stayed in the premises. She then compared this with Dr. Wolfstadt's actual income over that period and arrived at an income loss associated with the move of \$118,762.

[45] I do not accept this as an accurate calculation. The primary problem is that the base growth rate of 26.9 per cent is not supported by historic data and is overstated. This is no criticism of Ms. Vegotsky. The difficulty stems from the fact that she was only given limited historical data from which to calculate a realistic growth multiple.

[46] Consistent with my observation that Ms. Vegotsky was hampered by the information provided to her, it became clear during her testimony that some of her calculations contained errors. For example she was not aware of certain income splitting between Dr. Wolfstadt and his wife. While she candidly admitted this and tried to assist by presenting revised calculations after her cross-examination, some of her analysis remained troubling.

[47] Third, Ms. Vegotsky calculated a loss of income over a three year period. I agree with Mr. Muccilli that this analysis does not go far enough. The more recent data shows that after a period of time Dr. Wolfstadt's income improved markedly [Note 2]. In fact, according to Mr. Muccilli's calculations if one were to take Dr. Wolfstadt's income before the move and extrapolate it according to the growth he had historically experienced and compare it to the doctor's income levels after the move, the analysis would show that the doctor prospered after the move well beyond his historical experience.

[48] I accept Mr. Maccilli's analysis that lost sales associated with the move are evident only for the first three months after *[page542]* the move and that the proper measure of loss of income associated with the move is \$16,800, before taking mitigation into account.

[49] Dr. Wolfstadt also presented the expert evidence of Mr. Brown who calculated additional losses based on the argument that the doctor lost a number of patients as a result of the move. I reject Mr. Brown's assessment of the doctor's loss in this respect primarily because I find it to be a duplication of the claim for income loss. As well, Mr. Brown's calculations fail to take into consideration the additional patients Dr. Wolfstadt gained as referrals from Dr. Glazer. Finally, the number of patients upon which the calculation is based is not reliable. I am not satisfied that they all were steady patients before the move, were no longer patients after the move and, if so, that their departure could fairly be attributed to the move. Finally, Mr. Brown's report fails to justify satisfactorily the selection of \$225 as being an appropriate value that can be attributed to the loss per patient.

[50] In the result, I accept Mr. Muccilli's loss of income calculation of \$16,800. However, in saying

that, I am mindful that it is clear that the doctor's financial situation actually improved as a result of the move.

[51] Dr. Wolfstadt claims an amount of approximately \$3,500 for moving costs. His counsel quite properly says that I should not include this claim if I include the claim for income loss as these costs have been taken into account in the latter calculation. Since I have attributed a certain amount for loss of income I will not comment further on this part of the damage claim other than to say these moving costs would otherwise be attributable to the move. However, taken alone, they would not affect my conclusion that the doctor would only be entitled to nominal damages due to his having mitigated his damages so successfully.

[52] Mr. Brown's report contains an analysis of Dr. Wolfstadt's claim for a loss on the leasehold improvements he had made to the premises. The evidence is that a financing company advanced the funds used to finance these improvements to the doctor's numbered company. Dr. Woldstadt is only liable for the amount of this loan that he personally guaranteed, namely \$30,726.92, plus interest. The financing company has sued the doctor for this amount as no payments have been made under the guarantee. While counsel for Mr. Stoyan argues that this amount is contingent given the possibility of the doctor's raising a defence to the guarantee, there is no evidence before me to suggest that this is not a valid claim and in fact at trial counsel for Dr. Wolfstadt advised me that his client admits liability for the amount claimed under the guarantee. I therefore would consider this amount plus [page543] costs to be a loss suffered by the doctor by reason of his having to move from the premises.

[53] Dr. Wolfstadt also seeks approximately \$13,500 for storage and insurance costs related to the equipment he was using in the premises and that was not needed in his new arrangement with Dr. Glazer. I do not accept the total amount of this claim due to the doctor's failure to mitigate these losses by not disposing of the equipment a good deal earlier than he did. I find that it would have been reasonable for him to have kept the equipment for three months and then when it became clear he was going to stay with Dr. Glazer he should have sold or otherwise disposed of the equipment. I would therefore reduce this damage claim to \$750, my best attempt at calculating the cost of storage and insurance for the relevant three-month period.

[54] While I have identified certain relatively small amounts as being damages Dr. Wolfstadt suffered as a direct result of the move, I would, in the end, only award him nominal damages due to the fact that the record makes it clear that the amount of mitigation exceeds the amount due. See: *Presidential Management and Development Corp. v. Sugarman*, [1998] O.J. No. 382 (QL) (Gen. Div.).

Conclusion

[55] What happened in this unfortunate situation is that Dr. Wolfstadt had an urgent desire to finalize his tenancy arrangements with the landlord and move into premises that would be the first space he had designed to meet his own needs. He knew that the lease contained risks, particularly in the demolition clause. He assumed that risk as he thought it was remote. In this proceeding he is trying to transfer this assumption of risk to Mr. Stoyan. While I understand Dr. Wolfstadt's frustration over how matters turned out, he took the risk and he must bear the consequences.

[56] In the result, the action is dismissed.

[57] If the parties are unable to resolve the issue of costs, they may make written submissions within 30 days.

Judgment accordingly.

Notes

Note 1: Dr. Worfstadt had, in fact, entered into a lease for premises his practice previously occupied that had a similar demolition clause.

Note 2: The evidence demonstrated that Dr. Worfstadt's net income for each of the years 1996 and 1997 was approximately \$20,000 (subject to income splitting in those years concerning which there is no evidence). By 2002 his income had risen to almost \$100,000.