CITATION: FCP (BOPC) Ltd. v. Suzy Shier (Canada) Ltd., 2023 ONSC 3228
COURT FILE NO.: CV-21-00664417-0000
DATE: 20230530

ONTARIO SUPERIOR COURT OF JUSTICE

RE: FCP (BOPC) LTD., ARI FCP Holdings Inc., and CPPIB FCP Holdings Inc., Plaintiffs

-and-

Suzy Shier (Canada) Ltd., Defendant

BEFORE: Robert Centa J.

COUNSEL: Brendan Jones, for the plaintiffs

Mordy Mednick, for the defendant

HEARD: May 25, 2023

ENDORSEMENT

[1] The plaintiffs, FCP (BOPC) LTD., ARI FCP Holdings Inc., and CPPIB FCP Holdings Inc., (collectively, the "Landlord") seek summary judgment against a former tenant Suzy Shier (Canada) Ltd. for rent arrears totaling $367,668.44.

[2] Suzy Shier rented two units in First Canadian Place from the Landlord pursuant to a 10-year lease running from September 1, 2011, to August 31, 2021. Rent was due under the lease on the first day of every month.

[3] During the COVID-19 pandemic, the Landlord provided temporary rent deferrals to Suzy Shier and other tenants from April 2020 to February 2021. On April 15, 2021, the Landlord advised Suzy Shier that the deferred rent had to be repaid on or before June 15, 2021. Suzy Shier did not repay the deferred rent and failed to pay the rent in full as it came due. Following a year end adjustment, Suzy Shier owed $367,668.44. Suzy Shier does not dispute the calculation of the amount.

[4] The Landlord sued Suzy Shier under the lease for the amounts owing. Based on the lease and the statement of claim alone, I have no doubt that the Landlord would be entitled to judgment for the amount claimed.

[5] In its statement of defence, however, Suzy Shier submits that it was not required to pay the rent owing because of a rent relief agreement between the parties. For the reasons set out below, I find that this defence does not raise a genuine issue requiring a trial.

[6] For the reasons that follow, I grant the Landlord's motion for summary judgment. There are no genuine issues requiring a trial.

Test on a motion for summary judgment

[7] Summary judgment is an important tool for enhancing access to justice where it provides a fair process that results in a just adjudication of disputes.[1] Used properly, it can achieve proportionate, timely, and cost-effective adjudication.

[8] On a motion for summary judgment, I am to:

a. determine if there is a genuine issue requiring a trial based only on the evidence before me, without using the enhanced fact-finding powers under rule 20.04(2.1);

b. if there appears to be a genuine issue requiring a trial, determine if the need for a trial could be avoided by using the enhanced powers under

i. rule 20.04(2.1), which allows me to weigh evidence, evaluate the credibility of a deponent, and draw any reasonable inference from the evidence; and

ii. under rule 20.04(2.2), which allows me to order that oral evidence be presented by one or more parties.[2]

[9] In para. 66 of *Hryniak v. Mauldin*, the Supreme Court of Canada emphasized that I must focus on whether the evidence before me permits a fair and just adjudication of the dispute and cautioned that judges should not use the enhanced powers where their use would be against the interests of justice:

> On a motion for summary judgment under rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, without using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

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[1] 2014 SCC 7, [2014] 1 S.C.R. 87, at paras. 4-7.
[2] *Royal Bank of Canada v. 1643937 Ontario Inc*., 2021 ONCA 98, 154 O.R. (3d) 561, at para. 24.

[10] On a motion for summary judgment, the court assumes that the parties have each advanced their best case and that the record contains all the evidence that would be led at trial. Each party is obliged to put their best foot forward. They are not permitted to sit back and suggest that they would call additional evidence at trial.[3]

[11] In my view, based on the evidence before me on this motion for summary judgment, there is no genuine issue for trial. I am able to reach this conclusion without relying on any of my enhanced powers under rules 20.04(2.1). The summary judgment process has provided me with the evidence required to fairly and justly adjudicate this dispute in a timely, affordable, and proportionate way.

The rent relief agreement does not raise a genuine issue requiring a trial

[12] Suzy Shier's primary defence to the action is that there was a binding rent relief agreement in place between the parties. I disagree. That defence does not raise a genuine issue for trial.

[13] Taylor Borg of Beauleigh Retail Consultants is the Landlord's retail leasing consultant. On September 24, 2020, Mr. Borg sent an email to Suzy Shier attaching the Landlord's offer to provide Suzy Shier with further rent relief. In substance, the Landlord offered to forgive 50% of the rent owing for the period from April to June 2020, and to charge only 12% of gross revenue plus utilities from July 1, 2020, to the earlier of August 31, 2021, and when the tenant's gross revenue was 80% or more of its typical pre-pandemic levels.

[14] In his covering email, Mr. Borg highlighted that the "outside date for execution of the agreement is Tuesday September 29, 2020" (emphasis in original).

[15] The rent relief offer was even more explicit. It stated that if Suzy Shier did not sign and return the offer by September 29, 2020, the offer was revoked. The Landlord also confirmed that time remained of the essence. The offer stated:

> Please indicate your agreement with the terms of this letter agreement by September 29, 2020 by signing where indicated below (counterpart signatures, and electronic execution by pdf, similar readable format, or Docusign, each being binding and enforceable as between the parties as an originally signed agreement bearing the date first indicated above). If not signed and returned by such date the offer constituted by this letter shall be deemed revoked.

[3] *Prism Resources Inc. v. Detour Gold Corporation*, 2022 ONCA 326, 162 O.R. (3d) 200, at para. 4; *Ntakos Estate v. Ntakos*, 2022 ONCA 301, 75 E.T.R. (4th) 167, at para. 38; *Salvatore v. Tommasini*, 2021 ONCA 691 at para. 17; *Miaskowski (Litigation guardian of) v. Persaud*, 2015 ONSC 1654, 51 R.P.R. (5th) 234, at para. 62, rev'd on other grounds, 2015 ONCA 758, 342 O.A.C. 167.

> Finally, as is necessary and prudent for us to advise, the Landlord reserves all rights, claims, remedies and defenses it has under the Lease and at common law. Time remains of the essence.

[16] The parties agree that Suzy Shier did not return the signed agreement by September 29, 2020. Instead, Suzy Shier amended the Landlord's offer by unilaterally changing the day of the month on which the rent would be paid. Suzy Shier made the handwritten change and initialed it to this effect:

> The Interim Percentage Rent shall be calculated monthly on a non-cumulative basis but otherwise shall be reported and payable monthly, within ~~ten~~ fifteen days after the last day of each calendar month in the Rent Reduction Period. The Tenant shall furnish the Landlord with a written statement, substantially in the form annexed hereto as Schedule A, or such other form as the Landlord may from time to time designate to the Tenant, signed and certified as correct by the Tenant or the Tenant's duly authorized agent, setting out in all reasonable detail the amount of the Gross Revenue for the immediately preceding calendar month during the Rent Reduction Period.

[17] The handwritten change is initialled and the date beside the signature of the Suzy Shier representative is September 28, 2020. The parties agree, however, that Suzy Shier did not return the document to the Landlord until October 2, 2020.

[18] The decision of the Court of Appeal for Ontario in *Sotiropoulou v. Beaudin* is binding on me and dispositive of Suzy Shier's defence.[4] The decision stands for two propositions: first, if an offer is not accepted by its stated deadline, it expires; and second, if a party's response to an offer is not a precise acceptance of all terms, that response is not an acceptance of the offer, it is merely a counter-offer. The court held as follows:

> [1] The parties had negotiations, including a meeting, an offer by the appellants and a counter-offer by the respondents. The respondents' counter-offer provided by its terms that it would become null and void at 8:00 p.m. on March 15, 2012, if not accepted.
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> [2] It was not accepted within the time specified. There was no communication of the acceptance of the counter-offer and nothing heard from the appellants until their lawyer's requisition letter of March 23, 2012. By that time the respondents' counter-offer had expired.

[4] 2014 ONCA 168.

> [3] In our view, there was no error on the part of the motion judge to have concluded that there was never a meeting of the minds and no binding agreement.
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> [4] Counsel submits that the terms of the respondents' counter-offer were not essential terms of the agreement. However, the law is clear. As Professor Fridman notes, "[m]ore than once has it been said that an acceptance must correspond precisely to the terms of the offer": G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011), at p. 57. Otherwise, the purported acceptance is "at most a counter-offer, and a further communication of assent will be required from the offeror" before a contract is formed: S.D. Waddams, *The Law of Contracts*, 6th ed. (Toronto: Canada Law Book, 2010), at para. 60.

[19] I find that the Landlord revoked its offer at 12:01 a.m. on September 30, 2020, because Suzy Shier did not return it by that time. Moreover, Suzy Shier never accepted the Landlord's offer in a clear an unambiguous manner.[5] Instead, it changed the date that rent was due, which the parties agree was a material term of the agreement. If Suzy Shier made that change on September 28, as the date beside the signature suggests, that had the legal effect of rejecting the Landlord's offer. Suzy Shier then made a new offer to the Landlord on its proposed terms. The Landlord never accepted this offer. There was no meeting of the minds and, therefore, no agreement.

[20] Suzy Shier submits that Mr. Borg responded to Suzy Shier's October 2, 2020, email one minute after it was sent by saying "Thank you Erin, have a wonderful day." This response does not raise a genuine issue regarding whether or not, by this message, the Landlord accepted the Suzy Shier's counter proposal. This simple, courteous, email is obviously not a clear and unambiguous acceptance of Suzy Shier's offer and there is nothing in Mr. Borg's affidavit evidence or cross-examination transcript to suggest otherwise.

Suzy Shier has not raised any other issues requiring a trial

[21] Despite the able submissions of Mr. Mednick, I find that none of the other issues raised by Suzy Shier require a trial.

[22] Suzy Shier submits that the Landlord has not explained why it did not accept its counter-offer. That issue is not relevant to the proceeding and is not one requiring a trial.

[23] Suzy Shier submits that in subsequent emails, the Landlord referred to providing a revised agreement to Suzy Shier, or that it would offer a new or updated agreement. This is also irrelevant. None of the subsequent communications or the ongoing efforts the Landlord made to accommodate its tenants in light of the rapidly developing government rent relief

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[5] *120 Adelaide Leaseholds Inc. v. Oxford Properties Canada Ltd*., 1993 CarswellOnt 5327 (C.A.), at para. 1.

measures are relevant to the action. These issues do not require a trial. There is no evidence that the Landlord accepted the Suzy Shier counteroffer.

[24] Suzy Shier relies on the doctrine of waiver by conduct or promissory estoppel. These arguments do not raise a genuine issue for trial. The evidence is clear that the Landlord never accepted Suzy Shier's counter-offer and did not behave as if it did. The doctrine of waiver does not apply to the facts of this case.[6] A reasonable person would not believe that the terms of the rent relief agreement were in effect. Here it is important to recall that Suzy Shier did not simply return the signed agreement past the deadline. It rejected the Landlord's offer and made a counter-offer. There is no evidence that the Landlord ever accepted this counter-offer, and a reasonable person could not conclude otherwise. It would not be reasonable for Suzy Shier to rely on the Landlord's silence to mean that it had accepted Suzy Shier's counter-offer. Suzy Shier had significant outstanding rental arrears. The fact that it made some payments by direct deposit after October 2, 2020, does not mean that the Landlord is deemed to have accepted Suzy Shier's counter-offer. Suzy Shier had an independent obligation through the lease to make those payments. There is no evidence to suggest, and therefore no issue requiring a trial, that the Landlord made an unequivocal and conscious intention to abandon its rights.[7] Section 19.6 of the lease reinforces that no obligation or term of the lease will be considered to have been waived by the Landlord unless the waiver is in writing. There is no genuine issue requiring a trial arising from the defences of waiver by conduct or promissory estoppel.

[25] Suzy Shier submits that it has a defence of bad faith. It alleges that the Landlord revoked the rent relief agreement on December 8, 2020, for purely tactical reasons to force Suzy Shier to renew its lease which was to expire in 2021.

[26] I accept that there is a common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.[8] This, however, does not require the Landlord to subordinate its interests to those of Suzy Shier. This defence does not raise a genuine issue for trial for four reasons.

[27] First, Suzy Shier did not accept the Landlord's rent relief offer. There was no agreement or offer for the Landlord to revoke on December 8, 2020. There was no contract between the parties with respect to rent relief and no duty of good faith performance could arise from a contract that did not come into existence.

[28] Second, although there is a duty of good faith performance of the lease between the parties, there is no evidence that the Landlord breached that duty. The lease did not require the Landlord to provide rent relief. Moreover, the Landlord did not mislead Suzy Shier in this

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[6] *2324702 Ontario Inc. v. 1305 Dundas W Inc*., 2020 ONCA 353.
[7] *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co*., [1994] 2 S.C.R. 490, at para. 55; *2324702 Ontario Inc. v. 1305 Dundas W Inc.*, 2020 ONCA 353, at paras. 13 and 14.
[8] *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 93.

regard. The Landlord consistently behaved as if there was no rent relief agreement in place and repeatedly told Suzy Shier that there was no rent relief agreement between the parties. For example,

a. On October 20, 2020, the Landlord wrote to Suzy Shier and offered to permit it to temporarily defer its October 2020 rental payment. Similar deferrals were offered in each month from November 2020 to February 2021;

b. On November 30, 2020, the Landlord provided Suzy Shier with a 2021 annual rent statement setting out the rent payable for 2021. On December 8, 2020, Suzy Shier requested a revised statement to reflect a reduced rent payment consistent with the rent relief agreement. On that same day, the Landlord advised Suzy Shier that there was no rent relief agreement in place;

c. On January 29, 2020, Suzy Shier requested that the Landlord agree that the rent relief agreement was in place and applied retroactively to July 1, 2020. The Landlord again advised that there was no rent relief agreement in place.

[29] Third, nothing turns on how the Landlord described the reason that there was no rent agreement in place. The question of whether or not there was a meeting of minds and, therefore, the formation of a contract, is a question of mixed fact and law. Whether or not the Landlord's representatives identified the same reason for which I have found there is no contract is immaterial. The Landlord delivered a consistent message: there is no rent relief agreement in place. The reasons they gave, especially when measured against the fast-changing environment of government support programs, are irrelevant to the Landlord's claim and cannot raise a genuine issue for trial.

[30] Fourth, the fact that the parties entered into negotiations over a renewal of the lease is irrelevant to the issues raised in the claim. In the negotiation of the renewal, each party is entitled to take positions that advance their economic interests. The Landlord was entitled to make proposals that would see Suzy Shier pay its rental arrears. Suzy Shier was entitled to resist that request or, as it did, to argue not only that its rent should be lowered but that the Landlord should forgive all arrears. On March 4, 2021, a representative of Suzy Shier sent the following message:

> With the government closure and the complete lack of traffic in [First Canadian Place], Suzy strongly feels that we should not be paying any rent since the closures started March 2020. We pay rent in exchange for the landlord bringing traffic to the mall and this obviously has not happened and it is not unreasonable for us to expect this. We would like to find a way to resolve this amicably but at this point we are not prepared to pay the arrears. Perhaps some form of arbitration or court can be utilised to come to a solution in a professional manner.

[31] I note that Suzy Shier's position in this email asserted an entitlement to benefits far beyond those provided for in the Landlord's offer of rent relief that Suzy Shier rejected. There is nothing wrong with Suzy Shier taking that position. Both parties were at liberty to advance their economic interests during the lease renewal negotiations and, in doing so, neither party breached a duty of good faith performance of the lease. The negotiations over the renewal lease are irrelevant to the matters at issue on the claim and cannot implicate the duty of good faith performance. This does not raise a genuine issue for trial.

Issues related to documentary production

[32] Suzy Shier submits that the Landlord did not make satisfactory production of documents in this proceeding. It submits that there are gaps in the Landlord's productions and that the Landlord redacted impermissibly some documents.

[33] The Landlord submits that Suzy Shier's document requests amounted to a "fishing expedition." The Landlord submits that it answered almost all of Suzy Shier's requests for documents, which it submits were largely about the Landlord's dealings with other tenants. It maintains that it redacted certain commercially sensitive information about its dealings with other tenants. When Suzie Shier insisted on seeing an unredacted copy of an email, the Landlord made that message available on a counsel's eyes only basis. When Suzy Shier raised in its factum another redacted message, that message was also made available on a counsel's eyes only basis.

[34] I wish to emphasize several points. First, all relevant documents should be produced in unredacted form. If the producing party wishes to redact certain information from the documents, absent consent of the other party, the burden is on that party to obtain court approval for such redactions. Second, if a party wishes to redact information from a document on the basis of solicitor-client communication privilege or litigation privilege, the party should produce a detailed Schedule B to its affidavit of documents to allow the other party to assess the privilege claim and to decide whether or not it wishes to bring a motion to challenge the privilege assertion. Boiler-plate claims of privilege in Schedule B provide little assistance to the opposing party or the court. A discovery plan could and should have addressed these issues.

[35] I do not think Suzy Shier's complaints about the Landlord's productions raise an issue requiring a trial. I reach this conclusion for several reasons.

[36] First, Suzy Shier did not bring any production motions. While this is not determinative, it is relevant to my consideration of the seriousness of any remaining gaps in the record.

[37] Second, the Landlord was prepared to allow Suzy Shier to review redacted email messages on a counsel's eyes only basis. While this approach is not perfect, the Landlord's willingness to provide access to these documents provided significant procedural fairness to Suzy Shier.

[38] Third, the redacted documents that Suzy Shier raised in their factum were provided to Suzy Shier and to me before the hearing. It is not clear to me that the documents were relevant, much less helpful to Suzy Shier or harmful to the Landlord.

[39] Fourth, to the extent that Suzy Shier objected to the Landlord withholding or redacting documents related to other tenants, I do not think that those issues are relevant to the matter raised in this proceeding or on this motion.

[40] Fifth, having reviewed the transcripts from the cross-examinations of Denise Wong, Taylor Borg, and the correspondence between counsel regarding document requests and undertakings, I am satisfied that the Landlord attempted to provide Suzy Shier with relevant documents and explanations about why certain information was redacted. It would have been better, of course, if the Landlord had complied with the principles set out in paragraph [34], however, I do not see a pattern of obstruction or conduct that would cause me to draw any adverse inferences against the Landlord. The production issues, however, may be relevant to the issue of costs.

Conclusion and costs

[41] For the reasons set out above, I grant summary judgment in favour of the Landlord. I order that Suzy Shier pay $367,668.44, inclusive of HST.

[42] I also award the Landlord prejudgment interest at the BMO prime rate plus 5%, to be calculated in accordance with paragraph 5.10(a) of the lease. The parties indicated that they are likely to be able to agree on the correct calculation of prejudgment interest. If there are any issues remaining in dispute, the parties may arrange a further attendance through my judicial assistant.

[43] I also award the Landlord postjudgment interest on the amounts listed above at the BMO prime rate on the date of this endorsement plus 5%.

[44] The parties are urged to agree on the issue of costs. If the parties are not able to resolve costs of this action, the Landlord may email its costs submission of no more than three double-spaced pages to my judicial assistant on or before June 7, 2023. Suzy Shier may deliver responding submissions of no more than three double-spaced pages on or before June 14, 2023. No reply submissions are to be delivered without leave.

Robert Centa J.

Date: May 30, 2023