CITATION: Daniels CCW Corporation v. Shevchuk, 2023 ONSC 2955
COURT FILE NO.: CV-22-00679999-0000
DATE: 20230517

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Daniels CCW Corporation Plaintiff	)	*Dina Peat* and *Kristina Bezprozvannykh* for the Plaintiff
- and –	)	
Larisa Shevchuk t/a Fortius Health and Emmanuel Paul Defendants	)	*Delzad Kutky* for the Defendants
	)	**HEARD**: May 1, 2023

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] This is a motion for a summary judgment in a commercial lease dispute. The Landlord Plaintiff, Daniels CCW Corporation, seeks a judgment against the Defendant Tenant, Larisa Shevchuk, and against the Defendant Indemnifier, Emmanuel Paul. The Landlord seeks a judgment of **$184,359.62** comprised of: (a) $169,964.34 in damages for lost rents; and (b) pre-judgment interest at the rate prescribed in the lease totaling $14,395.28.

[2] For the reasons that follow, I grant the judgment as requested with post judgment interest at the statutory rate.

B. Procedural and Evidentiary Background

[3] On **April 20, 2022**, the Landlord commenced this action.

[4] On **May 30, 2022**, the Tenant and the Indemnifier delivered a Statement of Defence.

[5] On **August 16, 2022**, the Landlord brought a motion for summary judgment supported by the affidavits dated August 16, 2022 and March 20, 2023 from **Nicole Ferrari.** Ms. Ferrari is the Vice President, Commercial Asset Management for the Landlord.

[6] The Tenant and the Indemnifier resisted the summary judgment motion, and they delivered

an affidavit dated September 6, 2022, from Mr. Paul, the Indemnifier.

[7] On **November 25, 2022**, Ms. Ferrari was cross-examined.

[8] The summary judgment motion was scheduled for March 30, 2023, and the Landlord was seeking a judgment for $279,119.68. However, on March 22, 2023, Ms. Ferrari delivered a supplementary affidavit reducing the Landlord's claim to $169,964.34.

[9] The Tenant and the Indemnifier wished to cross-examine Ms. Ferrari on her new affidavit, and on **March 30, 2023**, I adjourned the summary judgment motion, and I made the following file direction:

FILE DIRECTION

1. This is a motion for a summary judgment in a commercial lease dispute.

2. Last week, the Plaintiff delivered a supplementary affidavit from Nicole Ferrari.

3. The Defendant has requested an adjournment, which I am granting, for the purposes of cross-examination.

4. The cross-examination of Ms. Ferrari, which is to be conducted in accordance with Rule 34.12, shall be completed by April 19, 2023.

5. I shall remain seized of the matter, and the motion is adjourned to May 1, 2023 (virtual hearing).

6.The parties may, if so advised, file supplementary facta.

7. Costs in the cause.

[10] Ms. Ferrari was cross-examined on April 19, 2023.

[11] The summary judgment motion was argued on May 1, 2023, and I reserved judgment.

C. Facts

[12] The Landlord owns a commercial building at 27 Rean Drive, Toronto, Ontario.

[13] On **May 5, 2015**, the Landlord and the Tenant signed a written lease of premises at 27 Rean Drive with a gross leasable area of approximately 1,090 square feet. The initial term of the lease was five years to expire on May 31, 2020. Pursuant to sections 1.01(g), 4.01 and 4.02 of the Lease, the Tenant agreed to pay "Minimum Rent" of $25.00 per square foot, being $2,270.83 per month. Pursuant to sections 4.01, 4.03 5.02, and 6.02 of the Lease, the Tenant agreed to pay a proportionate share of operating costs and taxes as "Additional Rent".

[14] On **May 1, 2015**, pursuant to a written Indemnity Agreement, the Indemnifier agreed to be liable to the Landlord for all Rent and other amounts payable by the Tenant under the Lease.

[15] On **January 1, 2022**, the Landlord and the Tenant entered into a Lease Extension Agreement and agreed to amend the Lease to extend the term of the Lease for a further period of five (5) years, commencing on June 1, 2020 and expiring on May 31, 2025. The parties agreed that the Minimum Rent payable for the Extended Term of the Lease would be the annual sum of $30,520.00, or $2,543.33 per month plus HST, based on the rate of $28.00 per square foot per annum. The parties further agreed that the Tenant's new trade name would be "Fortius Health".

[16] Pursuant to section 15.01(a) of the Lease, an "Event of Default" occurs when the Tenant

defaults in the payment of Rent and fails to remedy such default within five (5) days after written notice. Section 15.01(b) of the Lease provides that, if an Event of Default occurs, the Landlord may forthwith re-enter the Premises without prejudice to its right to recover arrears of rent and any damages caused by the Tenant's default.

[17] Beginning on or about **October 1, 2020**, the Tenant stopped paying rent.

[18] On **July 19, 2021**, the Landlord delivered a Notice of Default to the Tenant advising that the arrears in rent totaled $49,842.80.

[19] On **November 2, 2021**, and again on **November 18, 2021**, the Landlord demanded payment of rent and stated that if the rent was not paid it intended to exercise its rights and remedies under the Lease.

[20] On **December 23, 2021**, the Indemnifier sent the Landlord an email stating that the Tenant's business was not able to survive the impact of the COVID-19 pandemic and that the Landlord should follow up on terminating the Lease.

[21] The Landlord, however, did not terminate the Lease and on **February 2, 2022**, the Landlord delivered another Notice of Default. The arrears had grown to $84,732.76.

[22] The Tenant failed to cure the default by the time period specified in the Default Notice and on **February 11, 2022**, the Landlord re-entered the Premises and terminated the Lease. The landlord delivered what has come to be known as a Kelly Douglas Notice.

[23] The Landlord delivered a Notice of Termination to the Tenant advising that as a result of her failure to remedy the default set out in the Notice of Default, the Landlord had exercised its right to re-enter the Premises. The Notice stated that the re-entry was without prejudice to: (a) all outstanding amounts of Rent payable under the Lease; (b) Interest on the outstanding amounts as set forth in the Lease; (c) all payments of annual Minimum Rent, Additional Rent and other sums and charges in arrears or accruing due over what would have been the unexpired Term of the Lease had it not been terminated; and, (d) all damages caused by the Tenant's forfeiture of the Lease (including all legal and other costs and expenses incurred by the Landlord in connection with the forfeiture of the Lease and reletting the Premises).

[24] The Defendants admit arrears of rent of $81,706.59 based on the amounts of Minimum Rent and Additional Rent as set out in a report generated by the Landlord.

[25] After the termination of the Lease, the landlord took steps to re-rent the premises. On **April 11, 2022**, the Landlord gave notice on "LoopNet" and "Zolo" that the premises were available for tenancy. The Landlord listed the premises for rental on the MLS (multiple listing service) at a rental rate of $38 per square foot. The Landlord based the fair market value of the minimum rent on its own expertise as a commercial landlord.

[26] Ms. Ferrari's evidence was that the rental rate being offered was set by using comparable units at 27 Rean Drive and other units in the neighborhood managed by the Landlord's sister corporation Daniels Realty Inc. However, during her cross-examination, the Landlord objected to Ms. Ferrari providing details of the comparable properties.

[27] Over a year passed after the termination of the Lease, until on **March 16, 2023**, the Landlord entered into an agreement to re-rent the Tenant's premises to Miracle Ear Canada Ltd. The term of the lease is ten years commencing from the expiry of the fixturing period. Under the

lease, Miracle Ear Canada takes possession on May 1, 2023 and there is a fixturing period of a maximum of 120 days. The minimum rent for the first five years is $3,003.22 per month (a rate of $34.00 per square foot) and $3,180 per month (a rate of $36.00 per square foot). Under the lease, the Tenant must pay "Additional Rent"; however, no Minimum Rent or Additional Rent is payable during the Fixturing Period other than Additional Rent in relation to any utility, insurance and garbage removal costs during the Fixturing Period. There is a sixty (60) day Minimum Rent Free Period following the commencement date.

[28] If the Fixturing Period lasts the full 120 days, the commencement date of the lease to Miracle Ear Canada will be August 30, 2023. The Additional Rent payable for August 2023 is $129.86. The Additional Rent payable for September 2023 is $2,012.80. The Additional Rent payable for October 2023 is $2,463.09. For November 2023, the Minimum Rent and the Additional Rent payable is $5,502.61 per month.

[29] The Landlord claims damages for lost future Rent for the period commencing from the termination date of the Lease to the end of October, 2023.

[30] The Landlord calculates its damages as follows:

a.	Arrears of Rent	$ 84,732.76
b.	Lost Future Rent (Mar 2022 – Oct 2023)	$ 99,685.60
c.	Credit (Replacement Rent Aug 2023 – Oct 2023)	($4,605.75)
d.	Credit (Excess Rent Nov 2023 – May 2025)	($9,848.27)
e.	TOTAL	$169,964.34

D. Discussion and Analysis

[31] The Defendants have no defence and admit liability for the arrears of rent up to the date of termination of the Lease. Their defence to the Landlord's motion for a summary judgment focusses on the Landlord's claim for lost future rent.

[32] Before the Landlord entered into the lease with Miracle Ear Canada, the Defendants' essential argument was that there are material facts in dispute and the Landlord had failed to lead the evidence necessary for the court to make the necessary findings of fact with regard to the actual value of the rental premises over the unexpired portion of the lease term, which would have required, it was submitted, expert evidence about the fair market rental value of the premises and about the reasonable time for re-letting the premises. Further, at the time before the re-renting to Miracle Ear Canada there were serious issues about the reasonableness of the Landlord's at that time unsuccessful efforts to re-let the premises.

[33] The evidentiary record has changed, but the Defendants persist in advancing their arguments that there has been a failure to mitigate and a failure to properly calculate damages. It is a component of these arguments that the Landlord's conduct in continuing, i.e., not terminating, the Lease from the Tenant's breach in October 2020 until the Kelly Douglas Notice in February 2022, seventeen months later was a failure to reasonably mitigate. It is also a component of the Defendants' argument that there continues to be an evidentiary void about the calculation of the damages for future rental and about the use that can be made about the circumstance that there is

alleged to be a re-rental to Miracle Ear Canada.

[34] Unfortunately for the Defendants: (a) the evidentiary record is more than adequate for a summary judgment and no purpose would be served by sending this action on to a trial; and (b) their arguments about mitigation, the reasonableness of mitigation, and the calculation of a landlord's claim for loss of future rents are incorrect as a matter of the substantive law associated with commercial leases.

[35] I pause to say that for present purposes, I need not discuss what would have been the outcome of the summary judgment motion if the re-letting of the premises to Miracle Ear Canada had not occurred. The re-letting of the premises obviated the need to have expert evidence and the need to do a present value calculation of a judgment that would provide an advance payment of rents payable in the future. With the re-letting of the premises, the Landlord has mitigated its future rental loss and it also has given credit for the increase in rents that it is receiving from the new tenant over the term of the re-letting.

[36] The Defendants are mistaken in their arguments that at some time earlier than it did, the Landlord ought to have accepted the Tenant's repudiation or fundamental breach of the Lease and set about mitigating its losses. That argument has been soundly rejected by the case law.

[37] Leases are an amalgam of property law and contract law. When a lease goes into default, the landlord has a variety of remedies some of which sound in property law and some sound in the law of contract.[1] In *Highway Properties Ltd. v. Kelly, Douglas and Co*.,[2] Justice Bora Laskin described at p. 716 the landlord's four remedial alternatives as follows:

> The developed case law has recognized three mutually exclusive courses that a landlord may take where a tenant is in fundamental breach of the lease or has repudiated it entirely, as was the case here. He may do nothing to alter the relationship of landlord and tenant, but simply insist on performance of the terms and sue for rent or damages on the footing that the lease remains in force. Second, he may elect to terminate the lease, retaining of course the right to sue for rent accrued due, or for damages to the date of termination for previous breaches of covenant. Third, he may advise the tenant that he proposes to re-let the property on the tenant's account and enter into possession on that basis. Counsel for the appellant, in effect, suggests a fourth alternative, namely that the landlord may elect to terminate the lease but with notice to the defaulting tenant that damages will be claimed on the footing of a present recovery of damages for losing the benefit of the lease over its unexpired term. One element of such damages would be, of course, the present value of the unpaid future rent for the unexpired period of the lease less the actual rental value of the premises for that period.

[38] The landlord's first choice of remedy is to sue or to distrain for arrears of rent. This choice treats the lease and the tenant's property interest as continuing and the landlord as having an ongoing claim for rent. Under this choice, since the lease is still alive, there is no claim for damages for loss of the benefit of the bargain and there is no duty to mitigate.[3]

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[1] *7Marli Limited v. Pet Valu Canada Inc*., 2017 ONSC 1796; *Highway Properties Ltd. v. Kelly, Douglas and Co*., [1971] S.C.R. 562.

[2] [1971] S.C.R. 562.

[3] *Anthem Crestpoint Tillicum Holdings Ltd. v. Hudson's Bay Company ULC Compagnie de la Baie D'Hudson SRI,* 2022 BCCA 166; *Jencel 407 Yonge Street Inc. v. Bright Immigration Inc. and Ramroop*, 2021 ONSC 6030; *Innotech Aviation v. Skylink Express Inc.*, 2018 NSSC 93, aff'd 2018 NSCA 32; *Laidar Holdings Ltd. v. Lindt & Sprungli (Canada) Inc.,* 2018 BCSC 66; *7Marli Limited v. Pet Valu Canada Inc*., 2017 ONSC 1796; *AGC Flat Glass North American Ltd. v. CCP Atlantic Speciality Products Inc.*, 2010 NSSC 108; *3709303 Manitoba Ltd. v. Maxer Ltd.*, 2008 MBQB 219; *Transco Mills Ltd. v. Percan Enterprises Ltd.* (1993), 100 D.L.R. (4th) 359

[39] This situation in landlord and tenant law is similar to the situation in real property law when there is an abortive real estate transaction and the innocent party to the breached contract has the choice of treating the agreement at an end and suing for damages, which would entail a duty to mitigate or of suing for specific performance in which case there is no duty to mitigate.

[40] The landlord's second choice is to retake possession of the premises and terminate the lease. The termination of the lease can be by way of a surrender or by way of a forfeiture of the tenant's property interest in the land. Surrender ends a lease because the parties agree, or are taken to have agreed by operation of law, to end the relationship of landlord and tenant. A surrender by operation of law occurs when the parties' conduct is inconsistent with the continued existence of the lease.[4] Forfeiture ends a lease because the landlord exercises a unilateral right to reclaim the land; i.e., to re-enter, and by this way of ending a lease the tenant loses or forfeits its property interest in the land.

[41] The third remedial choice is a variation of the first choice. The landlord does not accept the tenant's repudiation as grounds for ending the lease, but instead of seeking rent from the defaulting tenant, the landlord would re-rent the premises on behalf of the defaulting tenant. To invoke this choice, the landlord has to give the tenant notice that the re-renting is on the tenant's account.[5]

[42] The landlord's fourth choice is the mechanism of a notice advising the tenant of the claim for prospective damages. In *Highway Properties*, Justice Bora Laskin did not do away with the concepts of forfeiture, surrender, or surrender by operation of law; rather, he stopped the "dogmatic application of surrender irrespective of intention," and the Court provided the means for making normal contract remedies available for lease defaults. If a lease is terminated, the measure of damages is the present value of the unpaid future rent for the unexpired period of the lease, less the actual rental value of the premises for that period plus reasonably foreseeable consequential losses.[6]

[43] Thus, where the landlord terminates the lease and delivers what has come to be known as a "Kelly Douglas Notice," the measure of damages for the tenant's breach is not the total of the rental payments for the balance of the lease term.[7] Such a measure would fail to account for the costs saved by the breach and fail to take into account that the landlord is free to benefit from its property by leasing to a new tenant, which is what has occurred in the immediate case.

[44] Where the landlord terminates the lease, the landlord is obliged to mitigate its damages in accordance with the normal contract law principles. For example, in *L.A. Furniture v. 330061 Alta. Ltd.*,[8] the landlord did not make a reasonable effort to re-rent the premises, and it was awarded

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(B.C.C.A.); *B.G. Preeco 3 Ltd. v. Universal Explor. Ltd.*, [1987] 6 W.W.R. 127 (Alta. Q.B.); *Highway Properties Ltd. v. Kelly, Douglas and Co*., [1971] S.C.R. 562.

[4] *250669 B.C. Ltd. v. Poplar Properties Ltd.* (1987), 48 R.P.R. 283 (B.C.S.C.); *Fountainbleu Apt. Ltd. v. Hamilton*, [1962] O.W.N. 223 (Co. Ct.); *New Regina Trading Co. Ltd. v. Canadian Credit Men's Trust Association*, [1934] S.C.R. 47; *Mickleborough v. Strathy* (1911), 23 O.L.R. 33 (Div. Ct.).

[5] *Green v. Tress* (1927), 60 O.L.R. 151 (C.A.); *Crozier v. Trevarton* (1914), 32 O.L.R. 79.

[6] *Ossory Canada Inc. v. Wendy's Restaurants of Canada Inc*. (1997), 36 O.R. (3d) 483 (C.A.); *Cormier v. Federal Business Development Bank* (1982), 40 N.B.R. (2d) 155 (N.B.C.A.); *Windmill Place v. Apeco of Canada Ltd.* (1976), 72 D.L.R. (3d) 539 (N.S.C.A.); *Highway Properties Ltd. v. Kelly, Douglas & Co.*, [1971] S.C.R. 562.

[7] *A.B. Investments Ltd. v. Khan*, 2011 ONSC 4491 at para. 29.

[8] [1989] 1 W.W.R. 171 (Alta. Q.B.). See also *Adanac Realty Ltd. v. Humpty's Egg Place Ltd.* (1991), 15 R.P.R. (2d) 77 (Alta. Q.B.).

only nominal damages.

[45] In *Windmill Place v. Apeco of Canada Ltd.*,[9] the tenant agreed to lease a portion of a building. The tenant repudiated and the landlord re-rented the space. The landlord argued that the new lease was not in mitigation of the lost lease and was an independent transaction. In other words, the landlord argued that but for the tenant's repudiation, the landlord would have had two leases and not just one. The Supreme Court of Canada agreed with this argument. A transaction to be mitigatory must be one arising out of the consequences of the breach and in the ordinary course of business.[10]

[46] In *Toronto Housing Co. Ltd. v. Postal Promotions Ltd.*,[11] the landlord did not immediately accept the tenant's repudiation of a lease. The landlord waited nine months before re-renting and then signed a very favourable lease that would yield a rent beyond that achievable under the original lease. The landlord sued only for the rent lost during the nine months pending the new lease. The landlord's argument was that the lease was alive during the nine months, and, therefore, the principles of mitigation that deny recovery for losses actually avoided did not apply for this period of lost rent. This argument did not succeed. Whether or not the landlord had a duty to mitigate, it had in fact mitigated. Thus, the case is authority for the principle that a landlord must give credit for the success of its mitigation.

[47] In the context of landlord and tenant law, the point of when, if at all, a landlord must accept a termination and mitigate, rarely arises because most defaulting tenants have no financial means to pay accruing rent and so there is no advantage to the landlord in keeping the lease alive. The point, however, has arisen in some cases and the courts have consistently held that the landlord's choices are mutually exclusive and there is no duty to mitigate if the landlord chooses to keep the lease alive.[12] This caselaw forecloses the tenant's argument that the Landlord in the immediate case ought to have accepted the repudiation of the lease and begun exercising its obligation to mitigate at some point in time before it issued its Kelly Douglas Notice.

[48] With respect to the issue of mitigation, the onus is on the defendant to prove any failure to mitigate, but the plaintiff must prove his or her calculation of damages. Where it is alleged that the plaintiff has failed to mitigate, the burden of proof is on the defendant, who needs to prove both that the plaintiff has failed to make reasonable efforts to mitigate and that mitigation was possible.[13] In assessing the innocent party's efforts at mitigation, the courts are tolerant, and the innocent party need only be reasonable, not perfect; in deciding what is a reasonable way to mitigate the effects of a breach of contract, the innocent party is not to be held to too nice a standard; it need only act reasonably, using what it knows then, without hindsight, and it need not

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[9] (1976), 72 D.L.R. (3d) 539 (N.S.C.A.).
[10] *Karas v. Rowlett*, [1944] S.C.R. 1; *British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways*, [1912] A.C. 673.
[11] (1982), 39 O.R. (2d) 627 (C.A.), affg. (1981), 34 O.R. (2d) 218 (H.C.).
[12] See the cases cited in footnote 3 and also: *4266715 Manitoba Ltd. v. Major Management Corp*., 2009 MBQB 105, affd. 2009 MBCA 118; *3709303 Manitoba Ltd. v. Maxer Ltd*., 2008 MBQB 219; *Glenview Management Ltd. v. Axyn Corp*, [2003] O.J. No. 124 (Master); *607190 Ontario Inc. v. First Consolidated Holdings Corp*., [1992] O.J. No. 2074 (Gen. Div.).
[13] *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51 at paras. 23-25*; Miller v. Wang*, 2018 ONSC 7668; *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20 at para. 30; *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324.

do anything risky.[14] In mitigating, the landlord's efforts need not be perfect and mitigation is measured against a standard of reasonableness.[15]

[49] In the current circumstances of the immediate case, which have changed from the situation before the new lease to Miracle Ear Canada, the Landlord has mitigated, and the re-letting may be used as a measure of that mitigation without calling expert evidence to provide an opinion about market values or about the reasonable time it ought to take to find a replacement tenant.

[50] The onus of proving a failure to mitigate or a failure to mitigate adequately, then turns to the Defendants. The onus is on the defendant tenant to lead evidence that the landlord's efforts were not reasonable or that the re-leasing was improvident or untimely.

[51] That evidence has not been led in the immediate case. What was led was an examination of the process of negotiating the new lease for the property, which appears to have been the normal give and take of bargaining. Although there were conditions to the lease, it appears that it has become a binding agreement and the Landlord has mitigated its loss of future rentals.

[52] The Defendants, who have had since October 2020 to find an assignee or subtenant of the Lease or to find a replacement tenant once the Lease was terminated have not provided any evidence that the Landlord's efforts at mitigating were unreasonable or that the Landlord missed opportunities to re-let the premises. As already noted above, the Landlord cannot be faulted for not mitigating during the period before the Kelly Douglas Notice.

[53] Thus, in the immediate case, the Landlord has shown that there was a breach of the Lease and that after its termination, it took reasonable efforts to mitigate and did mitigate a substantial portion of the loss of future rentals. The Defendants have not met the onus of showing that there has been a failure to mitigate or that the Landlord's calculations of damages for breach of the Lease are incorrect.

E. Conclusion

[54] For the above reasons, I grant the Landlord judgment of **$184,359.62**. If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the Landlord's submissions within twenty days of the release of these Reasons for Decision followed by the Defendants' submissions within a further twenty days.

Perell, J.

Released: May 17, 2023

[14] *DHMK Properties Inc. v. 2296608 Ontario Inc.*, 2017 ONSC 2432 at para. 73; *Janiak v. Ippolito*, [1985] 1 S.C.R. 146 at para. 28; *Banco De Portugal v. Waterlow & Sons, Ltd*., [1932] AC 452 (H.L.).
[15] *Taggart (Mer Bleue) Corporation v. Carte Blanche Lounge*, 2020 ONSC 5582; *Calloway REIT (Westgate) Inc v. Elita's Perfect Touch Hair Studio Inc.*, 2019 ONSC 5755; *Ivest Properties Limited et al v. Philthy McNasty's Restaurants Inc.*, 2011 ONSC 4487.

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