

**CITATION:** 11889796 Canada v. Donnelly, 2023 ONSC 1462

**COURT FILE NO:** CV-22-00681949

**DATE:** 20230302

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:**

**11889796 CANADA INC.**

Plaintiff

**AND:**

**DONNELLY HOSPITALITY MANAGEMENT LIMITED and JEFF  
DONNELLY**

Defendants

**BEFORE:** Justice Papageorgiou

**COUNSEL:** Riccardo Del Vecchio for the Plaintiff

Nathan Lean, for the Plaintiff

**HEARD:** March 2, 2023

**ENDORSEMENT**

[1] This is a motion for default judgment by 11889796 Canada Inc. (the “Landlord”) against Donnelly Hospitality Management Limited (the “Tenant”) and Jeff Donnelly (“Donnelly”) for \$275,152.79 in damages flowing from a breach of a lease agreement.

**Service Issues**

[2] The Landlord issued the Statement of Claim on May 31, 2022.

[3] The Tenant and Donnelly were served in accordance with the Rules of Civil Procedure on June 2, 2022 and July 10, 2022, respectively. They did not respond and were noted in default on August 16, 2022.

[4] In accordance with Justice Chalmers’ endorsement dated January 19, 2023, both defendants were served with the Motion Record for default judgment in accordance with the Rules on January 31, 2023.

### **Consequences of noting in default**

[5] Pursuant to r. 19.02, having not defended the proceeding, the defendants are deemed to admit the truth of all allegations of fact made in the Statement of Claim. However, this does not mean that judgment flows automatically. The plaintiff must still prove its damages.

[6] Further, pursuant to r. 19.06 a plaintiff is not entitled to judgment on a motion for judgment or at a trial merely because the facts alleged in the statement of claim are deemed to be admitted, unless the facts entitle the plaintiff to judgment.

### **Background**

[7] The Tenant is a B.C. corporation with registered offices in British Columbia and at all material times carried on business under the name, Dutch Love, operating a cannabis retail store.

[8] Donnelly is the sole officer and director of the Tenant.

[9] On or about February 18, 2020, the Tenant entered into a lease agreement (the “Original Lease”) for the Premises with the former owner of the Premises, 2538067 Ontario Inc. (the “Former Landlord”). Donnelly executed the Original Lease as President.

[10] On or about February 19, 2022, the Landlord purchased the Premises from the Former Landlord and became the successor in interest.

### **Default pursuant to the Original Lease**

[11] The Tenant did not pay the rent payable pursuant to the Original Lease in March, 2022.

[12] On or about March 4 and March 9, 2022, the Landlord delivered a notice of default advising that the Tenant was in breach of its obligations under the Original Lease. It gave the Tenant until March 23, 2022 to cure the default, failing which the Landlord would exercise its right to re-enter the Premises.

[13] The Tenant did not cure the default.

[14] On March 23, 2022, the Landlord attended the Premises for the purposes of changing the locks. It discovered that the Tenant had abandoned the Premises and had removed all of its inventory and chattels without notice to the Landlord contrary to the terms of the Original Lease.

[15] On July 29, 2022, the Landlord entered into a new lease effective October 1, 2022 for a term of five years (the “Subsequent Lease”). The Subsequent Lease provided for payments to the Landlord of approximately 1/2 of the monthly rate payable by the Tenant pursuant to the Original Lease.

[16] The Landlord claims damages under a variety of heads of damages as against the Tenant as follows: a) Rent Arrears and Vacancy Arrears in the amount of \$67,272.73; b) the difference

between rent payable pursuant to the Subsequent Lease and the Original Lease in the total amount of \$186,247.89; c) realtor and property management costs in the amount of \$21,632.17. These total \$275,152.79.

[17] The Landlord claims damages against Donnelly also in the amount of \$275,152.79 pursuant to section 50 of the *Commercial Tenancies Act*, R.S.O., c. L.7.

**Rent Arrears and Vacancy Arrears**

[18] I am satisfied that the Landlord has proven its entitlement to \$67,272.73 in rent arrears and vacancy arrears which represents the 7 months of unpaid rent prior to the Premises being re-leased.

[19] Judgment will go in respect of this amount as against the Tenant.

**Realtor and Property Management fees**

[20] In order to release the Premises, the Landlord paid \$1,271.25 for readying the Premises and showings, a brokerage fee in the amount of \$11,327.53 and legal fees in the amount of \$9,033.39 which are payable in full pursuant to section 9.02(B) of the Original Lease.

[21] Judgement will go in respect of these amounts as well.

[22] However, I am ordering that all other issues shall proceed to trial pursuant to r. 19.05(3) for the reasons set out below.

**Difference between the future rent payable pursuant to the Original Lease and the Subsequent Lease**

[23] With regard to the damages for re-renting the premises, the evidence filed shows that the Landlord re-rented the Premises for 5 years. The following is the comparison of the actual rent payable pursuant to the Original Lease annually, compared to the actual rent which will be paid pursuant to the Subsequent Lease:

	Lease (annually)	Subsequent Lease Annually	Difference
Year 1	\$81,859.08	\$43,392	
Year 2	\$83,497.20	\$45,561	
Year 3	\$85,170	\$47,839.68	
Year 4	\$86,875.44	\$50,226.24	
Year 5	\$88,613.49	\$52,748.40	
	\$426,015.21	\$239,767.32	\$186,247.89

[24] In *Morguard Corporation v 6753060*, 2018 ONSC 4910, Justice Perell reviewed the law in this area. He had granted only partial judgment in respect of past arrears due and did not grant judgment in respect of the balance of the lease term. At paragraph 22 he indicated that the proper measure of damages under this head is the present value of the future rent payable pursuant to the breached lease minus the present value of lease payments pursuant to the new lease.

[25] None of the calculations provided by the Landlord herein are in present value dollars.

[26] As well, there is an obligation on the Landlord to mitigate its damages. The annual rental payments in respect of the Subsequent Lease is a little over ½ of the Original Lease. The amount is so strikingly below the Original Lease amount that in my view, the Landlord must present some evidence in support of the fact that this is the reasonable fair market rate. The Landlord provided no evidence describing the efforts it made to re-lease the Premises, other offers received, the number of showings or anything (e.g. changed market conditions) that could explain why the amount is so drastically different.

### **Penalty as against Donnelly pursuant to s. 50 of the Commercial Tenancies Act**

[27] Section 50 of the *Commercial Tenancies Act* states:

50. Penalty for fraudulently removing or assisting to remove goods

If a tenant so fraudulently removes, conveys away or carries off the tenant's goods or chattels or if any person willfully and knowingly aids or assists the tenant in so doing, or in concealing them, every person so offending shall forfeit and pay to the landlord double the value of such goods or chattels, to be recovered by action in any court of competent jurisdiction.

[28] The Landlord points out that it has pleaded that Donnelly willfully and knowingly assisted the Tenant in removing all goods; these facts are admitted, therefore, Donnelly is liable pursuant to this section. I have no difficulty with that overall proposition.

[29] However, the Landlord has provided no evidence as to the value of the Tenant's goods or chattels that were wrongfully removed. Instead, the Landlord claims the full amount of any damages ultimately awarded as against the Tenant pursuant to this section, e.g. the rental arrears, the difference between the future rent payable pursuant to the Original Lease and the Subsequent Lease as well as realtor and property fees.

[30] The Landlord provides no clear authority for this approach.

[31] Instead the Landlord cites the general policy of section 50 as set out in *General Leaseholds Ltd. v. 661255 Ontario Inc.*, [1989] OJ No 2151 which is to impose a penalty for improper conduct:

9. Section 50 and its companions ss. 48 and 49 have their roots in the English *Distress for Rent Act, 1737* (U.K.), 11 Geo. 2, c. 19. The purpose of those sections was to fortify the landlord's security for payment of rent by allowing the landlord to seize the delinquent tenant's goods and to pursue the goods if they have been clandestinely removed from the premises. A penalty is imposed on the tenant or anyone who aids the tenant who fraudulently removes the goods with the intent to defeat the landlord's right to distrain for arrears of rent. The penalty is fixed as a forfeiture to the landlord of an amount equal to twice the value of the goods removed. **The amount of forfeiture is not related to the amount of arrears of rent...[Emphasis added]**

The forfeiture to the landlord is separate from and in addition to the landlord's right to claim the arrears of rent and any other relief...

It is clear that s. 50 is not only penal in nature, it fixes a penalty which may bear no relation to the arrears of rent. It allows for the possibility of a windfall to the landlord at the expense of a fraudulent tenant. For example, a tenant who is in arrears of rent of \$1,000 and who removes goods worth \$1,000,000 will forfeit \$2,000,000 and will still be liable for the arrears.

[32] This does not assist the Landlord. Indeed, as set out above, the Court in *General Leaseholds* specifically stated that the forfeiture to the landlord is not related to the amount of arrears of rent.

[33] The Landlord points out that it cannot provide a value for the removed goods as they have been removed. However, it is always the case that the items have been removed when section 50 is triggered; the section is premised on that and legislature still drafted the section with precise language that bases the penalty on the value of the removed chattels.

[34] While I have sympathy for the Landlord, it has not even provided any evidence that it has attempted to ascertain what chattels may have been there and as such what was removed. There is a former Landlord who may have evidence as to what was in the Premises and the Landlord knows the nature of the store.

[35] Finally, the Landlord has not provided sufficient legal authority or analysis to persuade this Court as to its approach in law.

[36] As such, the Landlord is not entitled this relief at this time.

[37] I am granting partial judgment in the amount of to \$67,272.73 in respect of rent arrears and vacancy arrears, \$1,271.25 in respect of costs for readying the Premises and showings, \$11,327.53 in respect of brokerage fees, and \$9,033.39 in respect of legal fees for total partial damages in the amount of \$87,633.65.

[38] I am awarding pre and post judgment interest at the *Courts of Justice Act* from the date the Statement of Claim was commenced.

[39] The balance of this motion shall proceed to trial in accordance with r. 19.05(3). I am directing that the Trial Co-Ordinator schedule a ½ day trial. I shall remain seized of this matter.

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Justice Papageorgiou

**Date: March 2, 2023**