

CITATION: First of Five Incorporated v. Recipe Unlimited Corporation, 2024 ONSC 317
COURT FILE NO.: CV-23-00000027-0000 (Napanee)
DATE: 2024Jan17

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
FIRST OF FIVE INCORPORATED)
) S. Presvelos, for the Plaintiff/Moving Party
Plaintiff/Moving Party)
)
– and –)
)
RECIPE UNLIMITED CORPORATION) M. Skrow, for the Defendant, Recipe
and J.S.M. CORPORATION (ONTARIO)) Unlimited Corporation
LTD.)
) D. Adams, for the Defendant, J.S.M.
Defendants) Corporation (Ontario) Ltd.
)
)
)
)
) **HEARD:** January 12, 2024

2024 ONSC 317 (CanLII)

TRANMER J.

REASONS FOR DECISION ON MOTION

[1] The plaintiff, First of Five Incorporated (FoF), is the franchisee and Recipe Unlimited Corporation (Recipe) is the franchisor of the combined Harvey’s and Swiss Chalet franchise located in Napanee.

[2] The plaintiff has operated the franchise pursuant to a Franchise Agreement (FA) since March 2014.

[3] There is provision in the FA for renewal in May 2024 for another 10 year term.

[4] JSM is the owner of the premises in which the franchise operates.

[5] Disputes arose between these parties in October 2022.

[6] The chronology set out by Recipe is as follows.

[7] On October 25, 2022, Recipe delivered its first Notice of Default to FoF citing failure to pay monies alleged to be owed.

[8] On November 2, 2022, FoF gave notice under the FA to renew for a further 10 year term.

[9] On December 6, 2022, Recipe delivered its second Notice of Default again citing failure to pay monies alleged to be owed.

[10] On February 7, 2023, the third Notice of Default was delivered citing failure to pay monies and operational deficits.

[11] On April 21, 2023, FoF commenced an action and delivered a motion seeking injunctive relief.

[12] On April 25, 2023, Recipe gave an undertaking in response to the plaintiff's request that it take no action while the matter was before the court in the following words, "please be advised that pending the determination of your client's motion for injunctive relief, Recipe will not terminate the FA or the Sublease... on the basis of the defaults particularized... in the 3 Notices of Default" that had been delivered. Recipe went on to undertake: "We wish to make clear that Recipe's remedial action will not include terminating the FA or the Sublease until the determination of the injunction motion".

[13] I note that the motion before me does not specifically seek to enforce the undertaking as ongoing. The undertaking could be seen as a factor for consideration under the balance of convenience prong of the test for a stay and injunctive relief. Both parties were represented by counsel when the undertaking was given and would know about rights of appeal.

[14] On May 10, 2023, a fourth Notice of Default was delivered citing the failure to remedy the matters identified in the third Notice of Default.

[15] On September 19, 2023, the fifth Notice of Default was delivered citing the previous allegations and it stated that if those defaults were not cured, Recipe will be entitled to terminate the FA and repossess the premises.

[16] The motion brought by the plaintiff for injunctive relief was heard on October 4, 2023.

[17] That motion sought the following relief: "An interim and/or interlocutory injunction against both of the defendants, restraining and enjoining either of them from terminating the lease agreement, the franchise agreement and sublease agreement between the parties dated September 20, 2013, and/or taking any measures that may result in the plaintiff's business being shut down and repossessed until the termination of this matter at trial."

[18] In his decision dated December 7, 2023 on the motion, Justice Carey of this court denied the plaintiff's motion.

[19] On December 10, 2023, the plaintiff's lawyer requested in writing that the defendants refrain from acting on the decision, by terminating the FA, until its motion for leave to appeal to the Divisional Court could be decided. Recipe refused to do so.

[20] On December 12, 2023, in response to Recipe's refusal to refrain from taking any steps to terminate the FA, the plaintiff's lawyer advised the defendants that FoF was bringing an urgent motion to stay pending leave to appeal to the Divisional Court.

[21] On December 12, 2023, the plaintiff's lawyer served the defendants with the motion to stay the decision. As of that time, Recipe had not yet locked FoF out of the premises. As of that date, the plaintiff continued to operate its business on of the premises.

[22] On December 13, 2023, without notice to the plaintiff, Recipe locked the plaintiff out of the premises, changed the locks, occupied the premises, and began significant steps to conduct a new business operation on the premises. In its materials, Recipe identifies this as the termination date of the FA. The evidence of Recipe on this motion describes what it has done and is intending to do to commence a new business operation going forward.

[23] On December 13, 2023, the plaintiff served its Notice of Motion for leave to appeal Justice Carey's decision to the Divisional Court.

[24] Shortly thereafter, the plaintiff served an Amended Notice of Motion, dated December 18, 2023, seeking, in addition to a stay, relief in the nature of a mandatory injunction, pending the determination of its leave to appeal to the Divisional Court.

[25] Before me on this motion is the plaintiff's Amended Notice of Motion which seeks the stay and the additional relief directing Recipe to vacate the franchise premises and restore the premises to the same condition they were in prior to Recipe's takeover and occupation on December 13, 2023.

[26] On this motion before me, the parties filed fulsome materials and made their submissions on the merits of the motion, and as well on the preliminary jurisdiction issue which I deal with below.

Preliminary Issue

Jurisdiction of this Court to grant the relief being sought by the plaintiff

[27] The plaintiff submits that this court has jurisdiction to grant the relief that it seeks in its Amended Notice of Motion under Rule 63.02(1)(a).

[28] Recipe disagrees and argues that it is the Divisional Court, the court to which the leave to appeal is being brought, that has jurisdiction under section 134(2) of the *Courts of Justice Act* to grant any interim order considered to be just.

[29] Recipe argues that a stay of Justice Carey's order accomplishes nothing. It argues that the substantive relief in the nature of a mandatory injunction removing Recipe from the premises is at the heart of the plaintiff's motion before this court.

[30] The reality in this case is that it is the actions taken by Recipe on December 13, 2023, and subsequent thereto, that triggered the Amended Notice of Motion seeking the

additional mandatory injunctive type relief. That is, Recipe's actions, in the face of knowing what further proceedings the plaintiff was bringing, put it in the position of arguing this jurisdictional issue before me.

[31] Recipe submits that Justice Carey's dismissal of the initial motion for injunctive relief resulted in no order barring Recipe from doing what it did.

[32] The plaintiff submits that a stay of Justice Carey's decision, in the face of the leave to appeal his order, would preserve the status quo existing prior to December 13, 2023 on the authority of the plaintiff's "stealing the march" authorities.

The Law

[33] Recipe relies on the decision of Chalmers, J. in *Eagle Capital Corp. v. Minas*, 2023 ONSC 3142. The situation in that case is analogous to the present case, as it deals with the landlord-tenant dispute.

[34] Justice Chalmers was sitting as a judge in the Superior Court of Justice. The motion for leave to appeal was from a decision of the Divisional Court to the Ontario Court of Appeal.

[35] As the plaintiff points out, the relief sought before Justice Chalmers was not for a stay, but for injunctive relief.

[36] Justice Chalmers found that it was appropriate and preferable that that motion for an interim injunction pending the determination of the motion for leave to appeal to the Ontario Court of Appeal be addressed by that court. He declined jurisdiction to hear the motion finding that it was brought to the wrong court. Pursuant to s. 110(1) CJA, he transferred the motion to the Court of Appeal.

[37] Justice Chalmers cited *Hakim Optical Laboratory Ltd. v. 1570710 Ontario Ltd.*, 2010 ONCA 627, but the decision in that case was rendered by the Court of Appeal to whom the motion for leave had been brought.

[38] Recipe also cited *Prince Edward County Field Naturalists v. Ostrander Point GP*, 2014 ONCA 227. Again, in that case, a stay was granted by the court being appealed to, pending disposition of the leave motion.

[39] The plaintiff relies on the decision of Kitley, J. in *1305 Dundas W Inc. v. 2324702 Ontario Inc.*, 2019 ONSC 5068. The order in that case which was being appealed from terminated a commercial lease and required the tenant to vacate the commercial premises.

[40] That is a different situation than the situation before me insofar as the initial motion was not dismissed but required action on the part of the tenant. That is, there was something to stay in that case.

[41] The plaintiff also relies on the decision of Justice Corbett in *Haudenosasunee Development Institute v. Metrolinx*, (Number 2), 2023 ONSC 1170, dated February 17, 2023. However, it is clear in reading the three related cases that Justice Corbett was sitting as a Justice of the Divisional Court, that is, in the court to which the motion for leave to appeal was being brought. (*Haudenosasunee Development Institute v. Metrolinx*, 2023 ONSC 1170, per Hackland J., and *Haudenosaunee Development Institute v. Metrolinx*, 2023 ONSC 1204)

Decision

[42] Regrettably, in the circumstances, I am persuaded that I do not have the jurisdiction to grant the relief sought by the plaintiff on this motion. That jurisdiction lies with the Divisional Court under s.134(2) CJA.

[43] I note that that court has concurrent jurisdiction with this court with respect to the granting of a stay, and that this matter has already been addressed before a justice of that court, and hopefully the matter could be heard with little further delay.

[44] I transfer this matter to the Divisional Court pursuant to s. 110 CJA.

[45] I use the term regrettably because as I indicated, full submissions were made before me on the merits of the motion, such that I am in a position to render a decision on the motion, if I had jurisdiction.

Order

[46] This matter is transferred to the Divisional Court for hearing of the motion brought by the plaintiff.

Costs

[47] It is appropriate in the circumstances, including the effect of the plaintiff arguing the motion in this court and Recipe's actions on December 13, 2023, that the costs of this motion be determined by the court ultimately adjudicating it.

Tranmer J.

Released: January 17, 2024

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CORPORATION (ONTARIO) LTD.

Defendants

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Released: January 17, 2024