Date: 20240229
Docket: CI 23-01-44153
(Winnipeg Centre)
Indexed as: 10008458 Manitoba Ltd. v. 10050429 Manitoba Ltd.
Cited as: 2024 MBKB 40

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

10008458 MANITOBA LTD.,	)	
	)	Peter Halamandaris
applicant,	)	for the applicant
	)	
- and -	)	Peter F. Aiello
	)	for the respondent
	)	
10050429 MANITOBA LTD.,	)	
	)	JUDGMENT DELIVERED:
respondent.	)	February 29, 2024

HARRIS J.

INTRODUCTION

[1] The applicant, 10008458 Manitoba Ltd. (the Tenant), seeks to set aside a Notice of Default (the Notice) under subsection 18(2) of ***The Landlord and Tenant Act***, C.C.S.M. c. L70 (the ***Act***) served upon it by the respondent, 10050429 Manitoba Ltd. (the Landlord). The Tenant says that the Notice is defective because it lacks sufficient specificity of the alleged breaches, that any alleged breaches were waived by the Landlord or that the Landlord is estopped from relying on the breaches; and even if there were breaches, the Tenant is

entitled to relief from forfeiture. For the reasons that follow, I find that the Notice was defective and that the Tenant was not in breach of the Lease.

THE FACTS

[2] The Landlord owns commercial property located at 275-279 Garry Street in the City of Winnipeg. On or about October 21, 2020 the Tenant entered into a lease agreement (the Lease) in respect of that property. The Tenant's dealings throughout were with Jeff Silverstein (Silverstein), the agent of the Landlord. The directors of the Landlord at that time were David Rich (Rich) and Kamaljit Dhillon (Dhillon).

[3] In February 2021, the Landlord made it known to the Tenant that it wished to sell the property. However, the Tenant only wished to purchase the portion of the property that it leased and not the entire property. The Tenant sought out partners and located Girma Tessema (Tessema), but Tessema did not want partners. The Landlord would not sell the property to Tessema without Tessema coming to an agreement with the Tenant concerning compensation to be paid to the Tenant with respect to the leasehold improvements made by the Tenant.

[4] On or about April 27, 2021, the Tenant and Tessema reached such an agreement as evidenced by an e-mail exchange between Tessema and Silverstein. A Share Purchaser Agreement entered into in April 2021 provided that Tessema had two years to pay for the shares of the Landlord which were held in escrow during that time.

[5] From May 1, 2021, Tessema was entitled to the rents being generated by the property and he became actively involved in the management of the leased property. Tessema became a director of the Landlord on August 1, 2023. Both Rich and Dhillon ceased to be directors on the same day.

[6] On or about October 30, 2023, the Landlord issued the Notice to the Tenant for alleged defaults under the Lease. The Landlord had not previously advised the Tenant about any breaches. Following receipt of the Notice, the Tenant sought particulars of the alleged breaches and correspondence was exchanged between counsel in an attempt to clarify the alleged breaches. In the absence of an agreement not to interfere with the Tenant's quiet enjoyment of the property until the hearing of this application, the Tenant obtained an Order from Huberdeau J. on November 30, 2023 preventing the Landlord from so interfering.

Is the Notice of Default defective?

[7] Pursuant to subsection 18(2) of the ***Act***, a pre-condition to the right of re-entry or forfeiture for a breach of a lease, other than a failure to pay rent, is service upon the lessee of "notice specifying the particular breach complained of, and if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor for the breach." Thus, a pre-condition for the Landlord's right of re-entry for the forfeiture is notice to the Tenant specifying:

(a) The particulars of the breach;

(b) The actions required to remedy the breach; and

(c) Compensation, if any, for the breach.

[8] The Tenant says that the Notice served by the Landlord does not provide any particulars regarding alleged breaches, does not advise as to the action required to remedy the alleged breaches, nor does it set out the compensation required in consequence of the breaches. Putting aside that the Notice refers to the alleged failure to pay rent, which is not within the scope of subsection 18(2) of the ***Act***, the Notice alleges that:

> …you are in default of your obligations as set out by the Lease, including, but not limited to breaches of the following paragraphs contained therein:
>
> - 1.15 – Permitted Uses;
> - 3.01 – Lease and the Premises;
> - 3.02 – Tenant Covenant to Pay Rent;
> - 3.03 – Term and Rent;
> - 3.04 – Payments;
> - 3.05 – Additional Rent;
> - 5.02 – Repair by the Tenant;
> - 9.01 – Consent Required;
> - 10.02 – Installations and Changes by Tenant;
> - 10.03 – Alterations by Tenant;
> - 10.04 – Not to Overload Floors;
> - 10.05 – Dangerous Articles;
> - 15.01 – Purpose of Use;
> - 15.03 – Conduct of Business;
> - 16.02 – Cleanliness;
> - 16.03 – Compliance with Laws;
>
> (the "Breaches").
>
> You caused the Breaches by failing to pay some of, or all, corresponding and appropriate taxes; failing to pay for some of, or all of, the appropriate and corresponding utilities; failing to pay some of, or all of, the rent per the Lease; leasing to other tenants without consent of the Landlord; demolishing the bathroom without written consent of the landlord; bringing dangerous machines to the premises; failing to remove all debris you

> created by improperly demolishing the bathroom; and, generally, by using the Premises contrary to its Permitted Use as set out by the Lease, among other things.

[9] The Tenant raised numerous concerns about the adequacy and accuracy of the Notice which were brought to the Landlord's attention through counsel. In various communications after the Notice was received, the Landlord's complaints were identified as follows:

(a) On November 6, 2023, the Landlord indicated that the complaints were that GST was not paid, parking was not paid and the bathroom was demolished;

(b) On November 7, 2023, the Landlord also indicated that an issue was that the Tenant was subletting without consent;

(c) On November 20, 2023, in respect of the allegation that there was default in rent, confirmed that rent in the amount of $5,990.00 had always been paid. The Goods and Services Tax (GST) had not been paid, but that was because the understanding was between the Landlord and Tenant that GST was not payable because of the nature of the Tenant's business; and

(d) In Tessema's affidavit of December 12, 2023, for the first time he claimed $44,468.04 in unpaid utilities.

[10] Tessema was cross-examined on his affidavit, again revealing the inadequacy of the Notice. For example, the Notice alleged that rent was owing in the amount of $51,600.00, but in cross-examination, Tessema could not say how

that figure was broken down. The Notice also indicated that property taxes were not paid, but in cross-examination, Tessema indicated that they were in fact paid.

[11] In ***2567267 Ontario Inc. v. Saverio Lucia Holdings Ltd.***, 2023 ONSC 994, the court considered notice provided to a tenant under section 119(2) of Ontario's ***Commercial Tenancies Act***, R.S.O. 1990, c. L.7 which is identical to section 18(2) of the ***Act***. In ***Saverio***, the court emphasized (at para. 37), "…that the notice must be certain and unambiguous and provide the tenant with all the necessary information to ensure that the tenant is not misled…". The "…purpose of the notice requirement in s. 19(2) is 'to warn the tenant that its leasehold interest is at risk and to give the tenant an opportunity to preserve that interest by remedying the breaches complained of and, where necessary, by compensating the landlord…'." (at para. 36). (Referring to ***780046 Ontario Inc. v. Columbus Medical Arts Building Inc.***, 1994 ONCA 1188, at p. 464)

[12] The Tenant is entitled to know the facts underlying the alleged breaches and what it must do to remedy the breaches. Here, the Notice is vague at best. It is devoid of sufficient details about the alleged breaches.

[13] The assertion that the Tenant was "leasing to other tenants without consent of the Landlord" provides no details whatsoever. Similar language was found to be defective in ***Saverio***.

[14] With respect to the bathroom, the Notice alleges a breach by "failing to remove all debris you created by improperly demolishing the bathroom". There are no details about what was done in breach of the Lease.

[15] The amount of rent allegedly owing ($51,600.00) was not revealed until cross-examination of Tessema. The only amount substantiated was the GST, the result of a misunderstanding by both the Tenant and Landlord as to the Tenant's obligation to pay GST having regard to the business carried on by the Tenant. When that misunderstanding was recognized, the Tenant paid the GST. It was a mutual misunderstanding and therefore, was not a breach of the Lease.

[16] Numerous other alleged breaches were not pursued. Further, there was absolutely no specificity as to what the Tenant was required to do in order to remedy the alleged breaches, nor does the Notice identify the compensation required to be paid to the Landlord.

[17] I am satisfied that the Notice was defective and must be set aside.

Did the Tenant breach the Lease and if so, has the Landlord waived the breach and/or have it estopped from relying on the breach?

[18] Following the service of the defective Notice on or about October 30, 2023, counsel for the parties had discussions regarding the various issues raised by the Notice. Ultimately, counsel were able to narrow down the issues as follows:

(a) the failure of the Tenant to pay GST on the rent;

(b) the renovation of a bathroom by the Tenant without written consent of the Landlord;

(c) the subleasing by the Tenant without written consent of the Landlord; and

(d) whether the Tenant was in default of payment of utilities.

The failure of the Tenant to pay GST

[19] This was discussed above, and no more need be said – there was no breach.

Subleasing without written consent

[20] There is no dispute that the Lease stipulates the Tenant cannot sublease space without the written consent of the Landlord. It is also clear that the Landlord, through its agent, specifically waived this requirement.

[21] In an e-mail dated November 10, 2023, and copied to David Rich, Silverstein advised Mike Vasilica, the principal of the Tenant, as follows:

> Understand that Rich was always in agreement to the following with you and your Lease agreement:
>
> > 7. Approved financing was your first tenant. All these tenants that you eventually subleased, had the knowledge of your landlord being David Rich without any concerns.. David was only concerned with receiving his $5,590 per month from you mike, per month.

[22] In an affidavit sworn December 21, 2023, Silverstein deposes that the "Tenant had the permission of the Landlord, through Rich and myself as agent, to select subtenants without the Landlord's consent or approval".

[23] There is no doubt that the Landlord can waive by oral agreement or conduct, a provision of a lease, including one that requires consent to be in writing. (***Campbell v. 1493951 Ontario Inc.***, 2020 ONSC 4029 at paras. 18, 19 and 27; ***Majdpour v. M&B Acquisition Corp.***, 2001 ONCA 8622 at paras. 23-25.)

[24] This is so whether the lease contains a non-waiver provision such as the one in the Lease at bar. (***Barclays Bank v. Metcalfe & Mansfield***, 2011 ONSC 5008)

[25] In ***Barclays Bank***, the court said as follows (at paras. 232-234):

> Even if what was at issue was simply a waiver, the case of *Fitkid (York) Inc. v. 1277633 Ontario Ltd*. 2002 CanLII 9520 (ON SC), [2002] O.J. No. 3959 indicates that a non-waiver clause is not necessarily the end of the matter. In that case, it was held by Swinton J. that a landlord who had the right to terminate a lease for failure of the tenant to pay rent waived that right by later accepting some rent and doing other acts consistent with the lease being in force. It was argued that the following provision in the lease precluded such a finding:
>
> > Landlord's failure to insist upon a strict performance of any covenant of this Lease or to exercise any option or right herein shall not be a waiver or relinquishment for the future of such covenant, right or option, but the same shall remain in full force and effect. Acceptance of rent, whether due before or after and [sic] event of default, whether with or without knowledge of such default, shall not operate as a waiver by the Landlord of any right, including its right of forfeiture.
>
> Swinton J. rejected that argument and stated:
>
> > Even where there is a term in the lease governing waiver, the cases on waiver indicate that courts look at the conduct of the landlord to determine whether it has elected not to terminate the lease in the circumstances after the right of forfeiture arises. In my view, despite the wording of Paragraph 41 of the lease, the acceptance of rent accruing after the act which gave the landlord a right of forfeiture is a waiver in law, since that acceptance presupposes the continued existence of the landlord and tenant relationship.
>
> There is also authority that variation of a contract is effective even if the contract purports to exclude subsequent oral variations and also that oral statements may operate as a waiver of rights evidenced by an earlier written document or may set up an estoppel. See S.M Waddams, *The Law of Contracts*, *supra*, at para. 329 and *Shelanu Inc. v. Print Three Franchising Corp* (2003), 2003 CanLII 52151 (ON CA), 64 O.R. (3d) 533 at para. 50.

[26] Moreover, where a Landlord has accepted rent with knowledge of a breach, this constitutes a waiver at law. (***Delilah's Restaurant Ltd. v. 8-788 Holdings Ltd.***, 1994 BCCA 3170 at paras. 27 and 29.; ***Delilah's*** was followed in this court

in ***Sturgeon Tire (1993) Ltd. v. Ramon Clifford Burron et al***, 2014 MBQB 73 at paras. 49-51)

[27] In the case at bar, the Landlord has been accepting rent since March 2021 and has done so up until the cross-examination of Tessema on January 15, 2024 – 3 months after the Notice was issued.

[28] I agree with the Tenant that the cases relied on by the Landlord to support its assertion that consent not in writing is not valid where the Lease requires written consent, are all distinguishable on the facts and do not support the Landlord's assertions. In ***A and B Auto Leasing & Car Rentals Inc. v. Amer Al-Dabbas***, 2018 ONSC 4383, the court rejected the tenant's evidence that it had verbal approval for alterations. Having made that finding, the court's comment about the requirement for written consent is *obiter*. In ***Airside Event Spaces Inc. v. Langley (Township)***, 2021 BCCA 306, the court dealt with a situation where there was acquiescence to a temporary arrangement with a subtenant, but not to a permanent arrangement. Importantly, the landlord did not have knowledge of the sublease or of non-permitted uses.

[29] I am satisfied that the Tenant was not in breach of the Lease as the Landlord clearly waived its right under this portion of the Lease.

Bathroom renovations without written consent

[30] The Landlord also complains that the Tenant renovated a bathroom without consent in writing. I am satisfied, based on the evidence of Silverstein, that the Tenant was authorized by the Landlord to renovate the entire leased premises,

including the bathroom area, as this Tenant saw fit, which would include any necessary demolition. Silverstein deposes, in relation to the bathroom area, that it was non-functional and filthy with a mouse infestation and odour problems resulting from sewer backup. Pictures produced by the Tenant show a room without ordinary bathroom fixtures, so referring to it as a bathroom are generous.

[31] The legal principles which I have referred to above in relation to leasing without consent apply equally to this renovation. The Landlord clearly waived the requirement for written consent and the Tenant was entitled to rely on that waiver.

Utilities

[32] When the Tenant entered the Lease, it was determined that it would pay $1,290.00 per month on account of utilities with an adjustment made at the end of the year once the Landlord received all of the billings. The Landlord now alleges that the Tenant owes $44,000.00 without providing a credit for any amounts paid. The Landlord says that it is not required to include unrented space when calculating the Tenant's proportionate share of utilities.

[33] The Tenant says that all rentable space is to be included to determine its proportionate share of utilities and as the facts are, that it has overpaid and has a credit of $2,539.05.

[34] The fundamental question is whether the Tenant's share of utilities is based upon the percentage of rentable space that it occupies or rented space only. In other words, is unrented space included or excluded in the denominator?

[35] In my opinion, clause 1.17 of the Lease is clear that the denominator includes all of the rentable premises "whether actually rented or not". The Landlord's calculation, based on exclusion of the unrented space, is contrary to the plain terms of the Lease. As counsel for the Tenant points out, if a Landlord believes that a Tenant is not paying for the utilities that it consumes, it has the option of separately metering the Tenant's premises pursuant to clause 1.06 of the Lease. I am satisfied that the Tenant is entitled to a credit of $2,539.05 in respect of utilities.

[36] To summarize, the Notice was served upon the Tenants pursuant to subsection 18(2) of the ***Act*** is defective and of no force and effect, and the Tenant was not in breach of the Lease in any respect. Because of my conclusions that the Tenant was not in breach of the Lease, it is unnecessary for me to consider whether the Tenant is entitled to relief from forfeiture.

[37] The Tenant is entitled to costs which, if not agreed upon, may be spoken to.

_____ J.