CITATION: 2693693 Ontario Inc. v. Palmieri et al., 2024 ONSC 1881
COURT FILE NO.: CV-21-00000173-0000
DATE: 2024 04 08

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
2693693 ONTARIO INC.	S. Bhangu, for the Plaintiff
Plaintiff	
- and -	
ROSEMARY PALMIERI, DE ZEN REALTY COMPANY LTD., JOHN DOE 1, SAM JONATHAN LEE, MASTER'S ROOFING AND SUPPLIES INC., AND JOHN DOE 2	D. Himelfarb, for the Defendants Rosemary Palmieri and De Zen Realty Company Ltd. Y. Enbar, for the Defendants Sam Jonathan Lee and Master's Roofing and Supplies Inc.
Defendants	
	HEARD: March 13, 2024

REASONS FOR JUDGMENT

Bloom, J.

I. INTRODUCTION

[1] The Defendants, Palmieri and De Zen, move for summary judgment dismissing the action as against them. The Defendants, Lee and Master's, move separately for summary judgment dismissing the action as against them.

II. UNDISPUTED FACTS AND PROCEDURAL CONTEXT

[2] The Plaintiff signed a commercial lease with the Defendant, De Zen, in October or November of 2019 for a storage unit located at 95 Joymar Dr., unit 7, Mississauga, Ontario.

[3] Palmieri was the principal of De Zen.

[4] The material provisions of the lease were articles 6.12, 10.01, and 10.02 which provide as follows:

> **Liability to Invitees, Licences**
>
> 6.12. The Landlord shall not in any event whatsoever be liable or responsible in any way for any personal injury or death that may be suffered or sustained by the Tenant or any employee of the Tenant or any other person who may be on the Premises or any Common Facilities or for any loss or damage or injury to any property belonging to the Tenant or to its employees or to any other person while such property is on the Premises. In particular (but without limiting the generality of the foregoing) the Landlord shall not be liable for any damage to any such property caused by steam, water, rain or snow which may leak into, issue or flow from any part of the Building or any adjoining premises or areas or from any water, steam, sprinkler or drainage pipes or plumbing works or form any

other place or quarter or for any damage caused by or attributable to the condition or arrangement of any electrical
or other wiring or for any damage caused by anything done or omitted to be done by any other tenant.

Tenant's Insurance

10.01. During the whole term, the Tenant shall at its expense:

(a) insure the Tenant's interest in the Premises, and the property of every description included in Tenant's leasehold improvements, including all leased and specially contracted equipment used solely for Tenant's purposes, in a stated amount for its full replacement cost against all risk of loss or damage covered under an all risk policy of insurance;

(b) maintain public liability and property damage insurance, including personal injury liability, contractual liability, employers liability and owners and contractors protective broad form property damage occurrence insurance coverage with respect to the Premises and their use by the Tenant, coverage to include the activities and operation conducted by the Tenant and any other person performing work on behalf of the Tenant and those for whom the Tenant is in law responsible in any part of the Premises including, without limitation, non-owned automobiles. Such policies shall:

(i) be written on a comprehensive basis with inclusive limits of not less than $2,000,000 for bodily injury to any one or more persons or property damage or such higher limits as the Landlord, acting reasonably, or any Mortgagee requires from time to time, subject to availability, at rates not to exceed twice the current rates paid by the Tenant: and

(ii) contain a severability of interests clause and cross liability clause;

(c) maintain comprehensive mechanical and electrical apparatus, including boiler and machinery, insurance on a blanket repair and replacement basis with limits for each accident in an amount not less than the replacement cost of all boilers, pressure vessels, air-conditioning equipment and miscellaneous electrical apparatus owned or operated by the Tenant or by others in the Premises or relating to or exclusively serving the Premises, if necessary;

(d) maintain business interruption and any other form of insurance as the Landlord, acting as a prudent Landlord, or any Mortgagee

requires from time to time in form, in amounts and for insurance risks against which a prudent Landlord would insure;

(e) alter or improve any of the insurance policies placed under this Section as the Landlord, acting as a prudent owner, or any Mortgagee requires from time to time.

Contract Provisions

10.02 (a) All contacts of insurance placed by the Tenant shall be written in the names of the Landlord and Tenant as joint insured, and shall to the extent available show the Landlord Tenant and any Mortgagee (to an amount that the Landlord's insurance advisors feel a prudent owner and Landlord should be insured for) as joint insured, as their interests may from time to time appear, and shall contain (i) a cross liability clause protecting the Landlord in respect of claims by the Tenant as if the Landlord were separately insured, and (ii) a waiver of any subrogation rights which the Tenant's insures may have against the Landlord and those for whom the Landlord is at law responsible, whether any such damage is caused by the act, omission or negligence of the Landlord or those for whom the Landlord is at law responsible. If both the Landlord and Tenant have claims to be indemnified under any such insurance, the proceeds shall be applied first to the settlement of the Landlord's claim, with the balance to the settlement of the Tenant's claim.

(b) If the Tenant fails to obtain the required policies of insurance, the Landlord may itself obtain such policies and shall give the Tenant a notice setting out the amount and dates of payment of all costs and expenses incurred by the Landlord in that regard to the date of such notice; the Tenant will, with the next instalment of Rent which becomes due, pay this amount to the Landlord with interest at the Interest Rate calculated on the various amounts from their respective dates of payment by the Landlord to the date of repayment by the Tenant. Any sums so expended by the Landlord, together with such interest, shall constitute Additional Rent and to be payable on demand by the Landlord.

(c) The Tenant shall furnish the Landlord with certified copies of policies or other acceptable evidence of all such insurance promptly on request; but no review or approval of any such policies by the Landlord shall derogate from or diminish the Landlord's rights or the Tenant's obligations under this Article.

> (d) The Tenant's proportionate share of the amount of any deductible not received by the Landlord as proceeds of any policy of insurance shall be payable by the Tenant as Additional Rent. The amount of any deductible not received by the Tenant as proceeds of any policy of insurance shall be for the Tenant's own account. Deductible amounts under any policies shall not exceed those which a prudent Landlord or Tenant would allow in insuring a similar circumstances.

[5] On behalf of De Zen, Palmieri retained Master's to repair the roof of the rented premises. Lee, on behalf of Master's, did that work in August of 2020. A fire ensued shortly in the rented premises after the repair work, damaging goods of he Plaintiff.

[6] The Plaintiff alleges in its Statement of Claim liability for the damages in negligence against the Moving Parties; and also alleges in the Statement of Claim as an alternative basis of liability against Palmieri and De Zen damages for breach of contract.

[7] The two sets of Moving Parties have crossclaimed against each other.

III. ARGUMENTS OF THE PARTIES

A. Arguments of Palmieri and De Zen

[8] The Defendants, Palmieri and De Zen, argue that there is no genuine issue requiring a trial with respect to the claim against them; and that, therefore, summary judgment ought to be granted dismissing the action against them.

[9] They argue that summary judgment is appropriate where, as here, the interpretation of a lease is at issue.

[10] They contend that the Plaintiff had the relevant duty to insure under the terms of the lease, and, accordingly, assumed the risk of loss if that duty was not fulfilled.

[11] They submit, moreover, that the Plaintiff did not plead waiver of any material term of the lease in the Statement of Claim; nor did the Plaintiff establish an evidentiary basis creating a genuine issue requiring a trial on that question.

[12] Palmieri and De Zen also argue that Article 6.12 of the lease excludes the liability alleged against them in the Statement of Claim.

[13] Lastly, they contend that the lease does not obligate the landlord to render the leased premises insurable; and that the Statement of Claim did not plead the existence of that obligation.

B. Arguments of Master's and Lee

[14] Lee and Master's argue that there is no genuine issue requiring a trial on the claim against them; and that, therefore, they are entitled to summary judgment dismissing the action as against them.

[15] They adopt the arguments of Palmieri and De Zen on the appropriateness of summary judgment in the case at bar.

[16] They argue that the waiver of subrogation in the insurance obligations of the lease imposed on the Plaintiff, preclude the liability alleged against them by the Plaintiff.

[17] They argue that the Plaintiff did not plead in the Statement of Claim a waiver of the Plaintiff's obligations to insure imposed by the lease, including the waiver of subrogation. Moreover, Lee and Master's argue that the Plainttiff did not establish an evidentiary basis creating a genuine issue requiring a trial on the question of whether there had been a waiver of the Plaintiff's obligations to insure under the lease, including the waiver of subrogation.

[18] Lee and Master's argue that, based on the Plaintiff's allegations that they were at the material times agents of De Zen, they were shielded from liability by an exclusion clause in the lease.

[19] Lastly, they contend that the lease does not obligate the landlord to render the leased premises insurable; and that the Statement of Claim did not plead the existence of that obligation.

C. Arguments of the Plaintiff

[20] The Plaintiff argues that the provisions in the lease imposing on the Plaintiff a duty to insure and those excluding damages claimed by the Plaintiff, are inapplicable, because they could not apply until the landlord rendered the leased premises insurable. The Plaintiff makes this argument, while conceding that it was not pleaded in the Statement of Claim or argued in its factum.

[21] The Plaintiff argues that De Zen waived the Plaintiff's obligations under the lease regarding obtaining insurance and the application of the article 6.12 exclusion clause. The Plaintiff makes those submisisons, while conceding that they are not subject of a plea in the Statement of Claim, and that it has not moved to amend its claim to make that plea. Further, it expressed in oral submissions that it intends to seek such an amendment, but has not yet done so; and stated that examinations for discovery have taken place.

[22] The Plaintiff argues that the article 6.12 exlusion clause applied only to natural disasters beyond the control of De Zen, and not the loss subject of its claim.

Further, the Plaintiff argues that the clause was unconscionable, and, therefore, inapplicable to the loss.

[23] The Plaintiff contends that its claim raises a genuine issue requiring a trial; and that a trial is required at which evidence beyond the terms of the lease will be called to allow a determination of how the lease was negotiated, how the parties conducted themselves during the term of the lease, and how the fire was caused.

IV. GOVERNING PRINCIPLES

[24] In this part of the reasons for judgment I set out some of the procedural and substantive principles I have applied in my analysis. Other substantive principles will be reviewed in the analysis, itself, where the discussion will be linked closely with factual elements addressed at the same time.

A. The Principles relating to Summary Judgment

[25] In Yamada *v. Joseph-Walker,* [2023] O. J. No. 1341 (Ont. Sup. Ct.) at paras. 18 to 21 Justice Emery set out the principles governing whether a case is an appropriate one to be decided on a motion for summary judgment:

18 The Supreme Court of Canada set out the principles the court is to apply on motions for summary judgment in *Hryniak v. Mauldin,* 2014 SCC 7*.* In *Mayers v. Khan*, 2017 ONSC 200 (aff'd at 2017 ONCA 524), Glustein J. summarized the *Hryniak* principles as follows:

> Summary judgment must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims. It is no longer merely a means to weed out unmeritorious claims but rather a "legitimate alternative means for adjudicating and resolving legal disputes" (Hryniak, at paras. 5 and 36);
>
> An issue should be resolved on a motion for summary judgment if the motion affords a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive process to achieve a just result than going to trial (Hryniak, at paras. 4 and 49);
>
> On a motion for summary judgment, the judge must first determine if there is a genuine issue requiring a trial based only on the evidence before the judge and without using the judge's fact-finding powers. If there appears to be a genuine issue requiring a trial, the judge should then determine if the need for a trial can be avoided by using the powers under Rules 20.04(2.1) and (2.2) (Hryniak, at para. 66); and
>
> The standard for determining whether summary judgment will provide a fair and just adjudication is not whether the procedure is as exhaustive as a trial, but rather "whether it gives the judge confidence that [the judge] can find the necessary facts and apply the relevant legal principles so as to resolve the dispute" (Hryniak, at para. 50). A judge must be confident that he or she can fairly resolve the dispute (Hryniak, at para. 57).

19 On a motion for summary judgment, each party is required to put their best foot forward. A self-serving affidavit is not sufficient to create a genuine issue for trial in the absence of detailed facts and supporting evidence. See *Guarantee Co. of North America v. Gordon Capital Corp.*, 1999 CanLII 664 (SCC) at para. 31, and *Grewal v. Khaira et al.*, 2021 ONSC 4908, at para 25.

20 The Court of Appeal explained in *Broadgrain Commodities Inc. v. Continental Casualty Company*, 2018 ONCA 438 that on a summary

> judgment motion, the court will assume that all necessary evidence has been tendered. A motions judge is entitled to presume that the evidentiary record is complete and there will be no further evidence at trial. A motions judge is not required to resort to the enhanced powers provided by subrules 20.04(2.1) and (2.2) to backfill a party's evidentiary shortcomings.
>
> **21** The anticipation of a party to have better evidence at trial will not defeat a motion for summary judgment: *Van Nispen v. McCarron & Chobotiuk Financial Services Inc.*, 2020 ONCA 146, at para. 4.

[26] The interpretation of a lease by means of the application of settled legal principles to it, is an appropriate subject of a motion for summary judgment.

In *Orion Interiors Inc. v. State Farm and Casualty Co.*, [2016] O.J. No. 1054 at para. 13 (Ont. C.A.) the Court stated:

> **13** There is no merit to this argument. At issue was the interpretation of the lease between the parties and the application of settled law to that lease. This court has determined that summary judgment is appropriate for deciding landlord/tenant waiver of subrogation cases: see Amexon Realty Inc. v. Comcheq Services Ltd. (1998), 37 O.R. (3d) 573, 1998 (C.A.).

B. Enforceability of an Exclusion Clause

[27] In Tercon *Contractors Ltd. v. British Columbia (Transportation and Highways),* [2010] S.C.J. No. 4 at paras. 62 and 121 to 123 all members of the Court accepted the following principles articulated by Justice Binnie in relation to the application of exclusion clauses in contractual documents:

> **121** The present state of the law, in summary, requires a series of enquiries to be addressed when a plaintiff seeks to escape the effect of an exclusion clause or other contractual terms to which it had previously agreed.
>
> **122** The first issue, of course, is whether as a matter of interpretation the exclusion clause even *applies* to the circumstances established in evidence. This will depend on the Court's assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, "as might arise from situations of unequal bargaining power between the parties" (*Hunter*, at p. 462). This second issue has to do with contract formation, not breach.
>
> **123** If the exclusion clause is held to be valid and applicable, the Court may undertake a third enquiry, namely whether the Court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts.

V. ANALYSIS

[28] I have considered the arguments of the parties, the evidence adduced, and the applicable principles. I have concluded that I must grant the motions at bar; and, accordingly, I dismiss the action as against both sets of Moving Parties. I shall now set out my reasons.

A. The Plaintiff Assumed the Risk of Loss by virtue of its Obligations to Insure under the Lease

[29] The principles applicable to the lease in the case at bar as regards the issue of the assumption of risk and obligation to insure are set out in the judgment of Justice Doherty of the Ontario Court of Appeal in *D.L.G. & Associates Ltd. v. Minto Properties Inc.,* [2015] O. J. No. 5494 at paras. 17 to 22. They can be summarized as follows: (1) A covenant in a commercial lease by a tenant to obtain property insurance operates as an assumption by the tenant of the risk of loss or damage caused by the peril to be insured against. (2) That type of covenant is not an exclusion clause subject to an analysis as to enforceability in accordance with the principles set out in *Tercon, supra.* (3) In any event, in the context of a negotiated commercial lease between arms length parties, there is little room for an argument that a tenant's covenant to insure is unconscionable.

[30] Those principles are directly applicable to Articles 10.01 and 10.02 of the lease in the case before me, which set out the tenant's obligations to insure. Article 6.12, while not part of the tenant's obligations to insure, supports my interpretation of the terms and effect of Articles 10.01 and 10.02.

[31] The effect of the tenant's assumption of the risk by virute of its obligations to obtain property insurance in Articles 10.01 and 10.02, is to exclude liability in respect of the claims made against the landlord, De Zen, and any of its agents.

Those agents according to the allegations, admissions, concessions, and submissions of the Plaintiff include Palmieri, Lee, and Master's.

B. The Waiver of Subrogation under the Lease Supports the Absence of Liability of Lee and Master's

[32] Another aspect of Article 10.02(a) is the waiver of subrogation, which states that the insurance to be obtained by the tenant is to contain "(ii) a waiver of any subrogation rights which the Tenant's insurers may have against the Landlord and those for whom the Landlord is at law responsible, whether any such damage is caused by the act, omission or negligence of the Landlord or those for whom the Landlord is at law responsible."

[33] Given that Lee and Master's are assumed to be agents of De Zen for purposes of analysis, as discussed above, that clause applies to them as persons for whom the Landlord is at law responsible. It would have prevented a successful action by the insurer of the tenant against Lee and Master's in the exercise of the subrogation rights of the insurer. That construction strenghtens the analysis I have already given of the legal effect of the Plaintiff's obligations to insure; it would be absurd if the Plaintiff could maintain an action against Lee and Master's that was barred to its insurer, simply by violating its insurance obligations under the lease by refusing to obtain insurance.

C. There was no Waiver by the Landlord of the Plaintiff's Obligations to Insure

[34] The Plaintiff argues that its duty to insure, and any restrictions in the lease limiting its ability to seek damages subject of its claim, are inapplicable, because they could not apply until the landlord rendered the premises insurable. I reject this argument, because it was neither pleaded in the Statement of Claim, nor in the Plaintiff's factum.

[35] The Plaintiff also argues that its obligations to insure under the lease and the application of article 6.12 were waived by the landlord. Those allegations are not contained in the Statement of Claim, nor has a motion to amend that pleading been made to include them. I reject those arguments for that reason. However, I reject them also on the merits; I will now address that point.

[36] The manager of the Plaintiff, Ken Singh, provided affidavit evidence that he was unable to obtain insurance for the tenant respecting the leased premises from 5 to 8 insurance brokers, including one referred to him by Palmieri, because of the condition of the premises; that the landlord did not give notice to the tenant of termination of the lease or notice to provide a copy of the tenant's insurance, because of the failure of the tenant to provide a copy of the insurance policy to the

landlord; and that he did not become aware of the exclusion clause, article 6.12, until after the fire.

[37] In Halsbury's *Laws of Canada-Equitable Remedies* (2020 Reissue) HER-20 Nature of Waiver, the following statement of law appears:

> ***HER-20*** **Nature of waiver.**
> Waiver involves the act of waiving or not insisting on a right, claim or privilege or the giving up of an advantage the waiving party would have had but for the waiver. Waiver is an election to dispense with something of value, to give up, relinquish or surrender a known right intentionally, or conduct that warrants an inference of the relinquishment or waiver of such a right.
>
> **Distinction from estoppel.** Waiver involves knowledge and intention and is distinguishable from estoppel, which may arise without intent to mislead. Waiver depends on what the waiving person intends to do, whereas estoppel depends on what the person has caused his or her adversary to do. Waiver involves the acts and conduct of both parties and does not necessarily imply that a party has been misled to his or her prejudice or into an altered position, which estoppel always involves.**1**
>
> **Prerequisites for waiver.** To constitute waiver, two prerequisites are generally necessary: knowledge of the existence of the right or privilege relinquished and the possessor's right to enjoy it; and clear intention to forego the exercise of the right.**2** Where one party leads another party by his or her conduct to believe that the strict rights arising under a contract will not be insisted on and intends that the other party should act on that belief, which the other party does, the first party cannot later insist on the strict legal rights, since this would be inequitable.**3** Parties may waive or suspend their rights, and the rights may be lost or not permitted to be enforced strictly without notice to the other side, such as in contracts with stipulations as to time.**4** Where a party has a vested right or interest, the party cannot waive or abandon the right except by acts equivalent to an agreement or licence.**5** Anyone may waive a statutory benefit in his or her favour.**6**

[38] Singh's evidence falls far short of establishing the landlord's knowledge of the existence of the tenant's obligations and other protections allegedly waived and its right to enjoy them, and a clear intention by the landlord to forego the exercise of the rights allegedly waived. Accordingly, I also reject the waiver argument on its merits.

D. Article 6.12 is a Valid Exclusion Clause which Precludes Liability of De Zen and its Agents

[39] In my view Article 6.12, based on the application of the three steps in the test set out in Tercon*, supra*, is a valid exclusion clause which excludes the liability of De Zen and those alleged by the Plaintiff to be its agents, Palmieri, Lee, and Master's. I shall now explain how I have arrived at that conclusion.

[40] The clause confers protection on the landlord, De Zen. That protection would also apply to its agents, since, as a corporation, it would act through agents; the Plaintiff has not argued otherwise.

[41] Moreover, the clause, contrary to the argument of the Plaintiff, is not limited to excluding liability for natural disasters beyond the control of the landlord. The clause, while enumerating certain foreseen risks to be excluded, does so "without limiting the generality of the foregoing." It provides that the landlord "shall not in

any event whatsoever be liable ... for any loss or damage ... to any property belonging to the Tenant."

[42] Despite the argument of the Plaintiff that the clause is invalid as unconscionable, evidence was not called by the Plaintiff which established that the clause was unconscionable when the contract was made. The lease was signed in a commercial context by arms length parties. Those are relevant circumstances weighing against a successful argument of unsconscionability. That proposition is reflected in the reasoning of Justice Doherty in *D.L.G., supra.*

[43] Lastly, I note that the Plaintiff has not even argued that the clause should not be enforced on grounds of public policy; and I decline to find that it is unenforceable on that basis.

E. The Case is Appropriate for Summary Judgment

[44] Finally, I reject the Plaintiff's argument that this matter is not an appropriate one to be decided by way of summary judgment.

[45] I reject the Plaintiff's submission that a trial is necessary so that evidence can be called relating to the negotiation of the lease, the conduct of the parties during the term of the lease, and the cause of the fire. I am entitled to assume that

the necessary evidence has been adduced by the parties to address the matter justly. It has been on that basis that I have arrived at the findings that I have made.

F. Disposition

[46] For the reasons set out above I grant both motions for summary judgment, and dismiss the action against both sets of Moving Parties.

VI. COSTS

[47] I shall receive written submissions as to costs of no more than 4 pages, excluding a bill of costs. The Moving Parties are to serve and file their submissions within 14 days; the Plaintiff is to serve and file its submissions within 14 days of being served with the last of the submissions of the Moving Parties; and there shall be no reply.

_____

Bloom, J.

Released: April 8, 2024

CITATION: 2693693 Ontario Inc. v. Palmieri et al., 2024 ONSC 1881
COURT FILE NO.: CV-21-00000173-0000
DATE: 2024 04 08

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

2693693 ONTARIO INC.

Plaintiff

- and -

ROSEMARY PALMIERI, DE ZEN REALTY COMPANY LTD., JOHN DOE 1, SAM JONATHAN LEE, MASTER'S ROOFING AND SUPPLIES INC., AND JOHN DOE 2

Defendants

REASONS FOR JUDGMENT

Bloom, J.

Released: April 8, 2024