IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Wentworth Properties Inc. v. Zetan Enterprises Corporation,* 2023 BCSC 1634

Date: 20230609
Docket: S226315
Registry: Vancouver

Between:

Wentworth Properties Inc.

Petitioner

And

Zetan Enterprises Corporation

Respondent

Before: The Honourable Justice Girn

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:	R.A. Shaw
Counsel for the Respondent:	A.D. Sekunova
Place and Date of Hearing:	New Westminster, B.C. May 16, 2023
Place and Date of Judgment:	New Westminster, B.C. June 9, 2023

THE COURT: These reasons were delivered orally. I have since edited them without changing the substance.

Overview

[1] By way of petition, Wentworth Properties Inc. (“the landlord”) seeks:

> An order pursuant to sections 18 to 21 of the *Commercial Tenancy,* R.S.B.C. 1996, c. 57 (the "*CTA*"), for an inquiry to determine:
>
> (a) whether the respondent was a tenant of the petitioners for a tenancy which has been determined by notice;
> (b) whether the respondent holds possession of the Premises described below, against the right of the petitioner;
> (c) whether the respondent has wrongfully refused to go out of possession of the Premises of the petitioner; and
> (d) whether the petitioner should be granted a Writ of Possession for the Premises pursuant to section 21 of the *CTA*.

[2] The landlord alleges that Zetan Enterprises Corporation (“the tenant”) breached the terms of the lease agreement by breaching two particular aspects of the lease:

1) the use covenant; and

2) failure to pay rent.

[3] As a result, the landlord says it was entitled to terminate the lease and seek a writ of possession pursuant to s. 21 of the *CTA*.

[4] The tenant submits the petition should be dismissed on the grounds that there are no triable issues to be decided. The tenant also argues that the petition is an abuse of process and should be struck. As well, the tenant says that the landlord has waived its right to rely on the alleged breaches and is estopped from enforcing the termination notice and demand for possession because this issue was already decided by Justice Watchuk in an earlier ruling.

[5] The *CTA* establishes a two-stage summary procedure to obtain a writ of possession under s. 21. This application relates to the first stage of the hearing. The procedure for the first stage is governed by ss. 18 and 19 of the *CTA*. The parties agree that the petition meets the procedural requirement under s. 18 of the *CTA*. The only issue before me is whether the landlord has established a *prima facie* right to an inquiry into its petition for an order of possession under s. 19.

Legal Framework

[6] The two-stage inquiry under the *CTA* is set out in ss. 18, 19, and 21, which read as follows:

> **Landlord may apply to Supreme Court**
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> 18 (1) In case a tenant, after the lease or right of occupation, whether created in writing or verbally, has expired, or been determined, either by the landlord or by the tenant, by a notice to quit or notice under the lease or agreement, or has been determined by any other act whereby a tenancy or right of occupancy may be determined or put an end to, wrongfully refuses, on written demand, to go out of possession of the leased land, or the land that the tenant has been permitted to occupy, the landlord may apply to the Supreme Court
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> (a) setting out in an affidavit the terms of the lease or right of occupation, if verbal;
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> (b) annexing a copy of the instrument creating or containing the lease or right of occupation, if in writing;
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> (c) if a copy cannot be annexed by reason of it being mislaid, lost or destroyed, or of being in possession of the tenant, or from any other cause, then annexing a statement setting forth the terms of the lease or occupation, and the reason why a copy cannot be annexed;
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> (d) annexing a copy of the demand made for delivering possession, stating the refusal of the tenant to go out of possession, and the reasons given for the refusal, if any; and
>
> (e) any explanation in regard to the refusal.
>
> (2) This section extends and shall be construed to apply to tenancies from week to week, from month to month, from year to year, and tenancies at will, as well as to all other terms, tenancies, holdings or occupations.
>
> (3) An application under subsection (1) shall be commenced at a registry of the Supreme Court located in the judicial district where the land is situated.
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> **Court to appoint time and place of inquiry, etc.**

> 19 If after reading the affidavit it appears to the court that the tenant wrongfully holds and that the landlord is entitled to possession, the court shall appoint a time and place to inquire and determine whether the person complained of was a tenant of the complainant for a term or period which has expired, or has been determined by a notice to quit or otherwise, whether the tenant holds possession against the right of the landlord and whether the tenant has wrongfully refused to go out of possession, having no right to continue in possession.
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> **Court to issue writ of possession.**
>
> 21 (1) If at the time and place appointed under section 19 the tenant, having been notified as provided, fails to appear, the court, if it appears to it that the tenant wrongfully holds, may order a writ to issue to the sheriff, commanding him or her to place the landlord in possession of the premises in question.
>
> (2) If the tenant appears at the time and place, the court shall, in a summary manner, hear the parties, examine the matter, administer an oath or affirmation to the witnesses adduced by either party, and examine them.
>
> (3) If after the hearing and examination it appears to the court that the case is clearly one coming under the true intent and meaning of section 18, and that the tenant wrongfully holds against the right of the landlord, then it shall order the issue of the writ under subsection (1) which may be in the words or to the effect of the form in the Schedule; otherwise it shall dismiss the case, and the proceedings shall form part of the records of the Supreme Court.

[7] The first stage, or what is also commonly referred to as the threshold stage, involves the court to inquire whether a date should be set for an inquiry into and determination of the parties' respective rights relating to the premises. The onus at this stage is not an onerous one. In fact, it is often made *ex parte*. At stage one, the court's inquiry is limited. As stated in *The Owners, Strata Plan VIS2030 v. Ocean Park Towers Ltd.*, 2016 BCCA 222, at para. 16 the court says:

> The court’s jurisdiction is limited to determining if the applicant has demonstrated a triable issue. The court should not weigh the evidence or resolve questions of credibility except in determining if the applicant has complied with the procedural requirements of the proceeding (*Yehia* at 3). At this stage, the order applied for is "in the nature of an interlocutory order which does not determine the legal rights of the parties" (*Melanson* at para. 17). It is simply to grant or not to grant an inquiry into the landlord’s application.

[8] In order for the hearing to proceed to stage 2, the court must find that the landlord has established a *prima facie* case for possession. In *Ocean Park*, the court

went on to clarify that it is at the second stage where the substantive issues raised in the petition are determined. At para. 17, the court writes:

> [17] The ultimate determination of the landlord's application rests with the judge at the second stage of the proceeding. At that stage the function of the judge is to determine in a summary manner the substantive issues including the reasons for the notice of termination and whether they support the granting of the landlord's application for an order for possession (*0723922 B.C. Ltd. v. Karma Management Systems Ltd.*, 2008 BCSC 492 at para. 36; and *Rossmore Enterprises Ltd. v. Ingram*, 2013 BCSC 894 at para. 41).

Factual Background

[9] There are some facts which are not in dispute. They are:

- The landlord is the owner of a commercial unit located at 360 Robson Street in Vancouver, British Columbia (the "premises").
- When the landlord purchased the building in which the premises are located, a different tenant was occupying the premises. The landlord assumed the lease that was in place with the previous tenant. That lease was also renewed at some point.
- Around June 15, 2020, the landlord was contacted by the original tenant regarding the potential sale by the assignee of the original tenant's business to the respondent tenant.

[10] During negotiation of a renewal lease with the landlord, the respondent tenant's representative asked whether the landlord would consider a change of use for the premises to allow uses other than specific uses identified in the original lease.

[11] Specifically, the tenant asked whether they could add retail/showcase of luxury clothing and accessories as an additional use. The landlord advised the tenant, on multiple occasions, that the landlord would not consider such a change of use prior to agreeing to any assigning or renewal of the lease by the tenant.

[12] The landlord and the tenant ultimately agreed to the terms of an assignment of the remainder of what is referred to as the second renewal lease, (the

"Assignment") and a third renewal lease was signed for a five-year term to commence on August 1, 2020. Specifically, two terms of the third renewal lease are important for the purposes of this hearing:

1) Rent was fixed at $3,600 per month commencing August 1, 2020; and

2) The use covenant remained unchanged in this third renewal lease.

[13] The respondent tenant took possession of the premises on July 21, 2020.

[14] The landlord alleges that the tenant breached two parts of the third renewal lease.

Breach of the Use Covenant

[15] The first one is breach of the use covenant. On July 22, 2020, the landlord's representative noticed clothing racks and hangers in the premises that appeared to be for retail sale. The tenant was advised by the landlord's representative that merchandise being sold for retail purposes would be a violation of the use covenant. The tenant responded that there was no point of sale on any of the clothing items. On August 5 and August 7, 2020, these items, including jewellery and clothing, were again seen by the landlord's representatives as being displayed for sale at the premises. The landlord says that at this point it was clear that the tenant was breaching the use covenant of the lease.

Non-Payment of Rent

[16] The second breach is the non-payment of August 2020 rent. The landlord says that the tenant did not pay the August, 2020 rent on the 1st of the month and says that the tenant knew what the amount was, as it was clearly stipulated on the third renewal lease.

[17] The landlord says they did not have authority to take money from the tenant's bank account, as that information was only provided by the tenant for the purposes of a credit check, and no authorization was signed by the tenant. The landlord further submits that they also attempted to charge the August, 2020 rent to the

account of the previous tenant with no success. The tenant ultimately provided rent approximately week later.

Termination of the Lease

[18] The landlord instructed their counsel to issue a notice of termination and re-entry to the respondent for breach of the covenant to pay rent and the use covenant.

[19] The terms of the lease did not require the landlord to give the tenant notice of default before electing a remedy. The notice of termination was delivered to the tenant on August 7, 2020.

[20] On August 21, 2020, the tenant filed a notice of civil claim against the landlord disputing that they breached any of these terms.

[21] Specifically, the tenant pleaded:

a) that the items on display were not for sale but rather were displayed to present ambiance of a luxury décor for their internet café; and

b) that the tenant did not know the amount payable for August 1 and had assumed the landlord had the banking information for direct debit and that they provided a cheque to the landlord shortly afterwards.

[22] The tenant sought relief that it was not breaching the lease, among other relief. As well, in the alternative, relief from forfeiture was sought. The landlord filed a response disputing the claims asserted by the tenant.

[23] On August 24, 2020, the tenant filed an urgent notice of application seeking an interim order that the landlord deliver possession of the premises and, alternatively, relief from forfeiture.

[24] This application was heard three days later before Justice Watchuk on August 27, 2020.

[25] Justice Watchuk made the following comments:

> [2] That is a long way of saying if a transcript is needed, the thinking of the court has evolved over the course of the last hour and a half. At present, and having heard from counsel the result is, as discussed, that the applicant's plea for relief in 1(d). relief from forfeiture is granted. 1(a), (b), and (c), I propose be adjourned generally, and I will hear from you, counsel, at the end if we need to change anything that I am giving to Madam Registrar.
>
> [3] The plaintiff is granted relief from forfeiture pursuant to s.24 of the *Law and Equity Act.* The relief from forfeiture is in the context of having had the lease on the premises rented by him from the landlord defendant terminated. That is the relief which is relieved against.
>
> [4] The bases on which the lease was terminated were two alleged breaches of the lease, being the use provision and rent provision. Even with the evidence as presented, which is relatively extensive, and submissions which have been most helpful, I find at the conclusion of this hearing (as by way of analogy in summary trials) that I am unable, by virtue of mostly or likely time, to make findings of credibility which are not possible on the materials. I find I am therefore unable to make findings with regard to whether or not there were breaches.

[26] The tenant resumed possession of the premises and continued to operate the business and paid regular rent to the landlord.

[27] The landlord did not appeal Justice Watchuk's order. They argue there was no need to appeal it given that it was an interim order, and they expected to make their defence to the notice of civil claim that the tenant had initiated. This petition was filed on August 4, 2022.

[28] The tenant on this application argues that the landlord has brought this application two years after the alleged breaches. They say that the two alleged breaches are minor in nature. The tenant still has two years left on the lease and wants to continue operating because they have expended time and resources that have not only improved its own business, but also the premises.

[29] However, more importantly, they submit there are no triable issues, and as such, the petition at the second stage is bound to fail.

[30] The tenant raises two arguments.

Issue of Waiver

[31] This is no dispute that the landlord continued to accept rent from the tenant after the alleged breaches and after it served the notice of termination.

[32] The tenant argues that by accepting rent for over two years, in spite of the alleged breaches, it constitutes a waiver at law.

[33] The tenant submits that the landlord's application for the hearing must fail.

[34] They rely on *Delilah's Restaurants Ltd. v. 8-788 Holdings Ltd.*, 1994 B.C.L.R. (2d) 342 (C.A.) [*Delilah's*]. The court in *Delilah's* was faced with an appeal from the landlord of a chambers judge decision at a stage-two hearing. One of the alleged breaches in that case was a change in the shareholders of the tenant. One of the arguments before the court was whether the landlord had waived compliance with the provisions of the lease by accepting rent for a period of at least two months, with full knowledge of the breaches.

[35] I agree with Justice Shergill's comments in *Jacklin Property Limited v. MV Fitness International Inc.*, 2022 BCSC 126, on the effect of *Delilah's* involving waivers in situations where the landlord continues to accept rent in spite of alleged breaches. At para. 36, Justice Shergill writes:

> [36] The *Delilah* case reveals that the issue of whether acceptance of rent after knowledge of an alleged breach constitutes a waiver, is a live one, and dependent on the specific facts of a particular case. In my view, having regard to Article 20.03 of the Lease, and the material before me, it is not certain that the Landlord in this case is bound to lose simply because it accepted rent from the Tenant after it became aware of the alleged breaches.

[36] In the case before me, I agree with the landlord that this is a triable issue, one that should be determined at the stage-two inquiry. At this stage of the inquiry, I do not have to determine whether the landlord will be successful or not.

Abuse of Process and Issue Estoppel

[37] The tenant submits that the court should strike the petition if it is otherwise an abuse of process. They submit that the doctrine of *res judicata* is part of the concept

of an abuse of process, and they rely on *Stoneman v. Denman Island Local Trust Committee*, 2013 BCCA 517 at para. 63.

[38] Issue estoppel operates when three conditions are met:

1) The same question has been decided;

2) The judicial decision which is said to create the estoppel was final; and

3) The parties to the judicial decision which is said to create the estoppel are the same as the parties to the proceedings in which the estoppel is raised.

[39] The tenant also relies on *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248 at p. 254. In this case, the tenant submits that the three preconditions for issues estoppel have been met:

1) the breaches alleged in the petition are the same as those raised in the application before Justice Watchuk and have been resolved or determined by Justice Watchuk;

2) the application before Justice Watchuk resulted in an order for relief from forfeiture, which is a final order, and was not appealed by the landlord; and

3) the parties to this petition and to the notice of civil claim are identical.

[40] The tenant says that the proceeding before Justice Watchuk was fair and final. It would be unfair to allow the applicant landlord to relitigate the same issues raised in the 2020 action in the subsequent claim.

[41] The tenant argues that the petition is an abuse of process because it is an attempt at obtaining a different result on the same set of facts that were before Justice Watchuk. The tenant submits that Justice Watchuk already determined the issue, and it has been resolved.

[42] In the alternative, the tenant says that if the Watchuk order was not a true grant of “relief from forfeiture”, which they deny, and the landlord is entitled to

proceed with the inquiry under s. 19 of the *CTA*, the tenant argues that the complexity of this matter and the issues in dispute make it unsuitable for summary determination in this petition, and should rather be resolved through the notice of civil claim that has been filed.

[43] The landlord disagrees. They say the Watchuk order was not a final order but rather it was interim. As such, there was no need for them to file an appeal. As well, the landlord responds that the issues were not decided by Justice Watchuk. The application before Justice Watchuk was for interim relief, which is clearly stipulated in the tenant's notice of application they filed on August 24th.

[44] In para. 2 of her reasons for judgment, Justice Watchuk specifically notes that relief in para. 1(d) is granted but that the remaining were adjourned generally. That is paras. 1(a), (b), and (c). She notes in para. 4 that she is unable to make any findings with respect to whether there were any breaches or not. In my view, this is a triable issue that should be dealt with at the next stage.

Discussion

Prima Facie Right to Possession

[45] Section 19 of the *CTA* requires the court to determine if the landlord has established a *prima facie* right to an inquiry. At this stage of the inquiry, as I have noted previously, my role is limited to determining if the applicant, which is the landlord, has demonstrated a triable issue. Pursuant to s. 19 of the *CTA*, the question I must ask, if after reading the affidavit material filed in support of this petition, it appears to me that the tenant wrongfully holds the premises and the landlord is entitled to possession: See *Jacklin* at para. 39.

[46] In my view, the answer is yes.

[47] In concluding that the landlord has met its burden to establish a *prima facie* right to an inquiry, I have considered the following:

- the tenant tried to negotiate a change in the use covenant prior to assuming the lease and was denied.

- there is some evidence to support that the tenant breached the use covenant (clause 14.1). This includes affidavit of the various employees of the landlord along with photographs of the premises and items therein on display; the employees' discussions with staff at the premises; and photographs taken by the Bailiff after the landlord lawfully entered the premises.

[48] Although there is hearsay evidence in some of these affidavits, the landlord submits that hearsay evidence in interlocutory applications is permissible. In any event, I do not need to rely on the portions that are hearsay to arrive at my conclusion for the purposes of this hearing. I also note that the tenant did not pay August 2020 rent on August 1st. The terms of the lease also did not require the landlord to give the tenant notice of default before electing a remedy that the landlord could enter the premises and terminate the lease (article 26.1).

[49] While the tenant argues they did not breach the use covenant as there was no point of sale, that is something I do not need to decide at this stage. However, as with the issue of waiver, this is a matter for another day before another court. My role at this stage is not to weigh the evidence. It is only to determine if an inquiry should be held into the landlord's application. Accordingly, I conclude on the face of the affidavit evidence the facts establish a *prima facie* case that the tenant wrongfully holds the premises, and that the landlord is entitled to possession.

[50] Given that the notice of civil claim commenced by the tenant is still before the courts, I will comment briefly on the implications of it as it relates to this petition. The civil action has not been set down by the tenant for a hearing, even though they commenced the action in August 2020. Just as Justice Shergill concluded in *Jacklin*, in my view, there is no prejudice to either party in proceeding with the petition prior to the civil action being heard. The defences raised by the tenant in this petition mirror the grounds raised in the civil action. The outcome of the petition hearing will likely be determinative of many of the issues raised in the civil action and, more

importantly, will help narrow the issues in the event the trial of the civil action is still necessary.

[51] It must not be forgotten that the purpose of the summary proceedings contemplated by ss. 18-21 of the *CTA* provides for a just, speedy, and fair resolution of the dispute between the parties on its merits. In the circumstances on the face of the material before me on this application and without weighing the evidence, I find that the landlord has met the requirements under ss. 18 and 19 of the *CTA*. I conclude that the landlord has established a *prima facie* case that the tenant wrongfully held, and the landlord was entitled to possession. Accordingly, I appoint a time and place for the s. 21 summary determination.

Costs

[52] Costs of this stage-one hearing will go to the landlord in the cause of the petition as against the tenant.

"Girn J."