COURT OF APPEAL FOR ONTARIO

CITATION: 8167800 Canada Inc. (Lead Home Renovation) v. Denison Limited, 2024 ONCA 146
DATE: 20240223
DOCKET: COA-23-CV-0470

Gillese and Copeland JJ.A. and Wilton-Siegel J. (*ad hoc*)

BETWEEN

8167800 Canada Inc. t/a Lead Home Renovation

Applicant (Appellant)

and

Denison Limited

Respondent (Respondent)

Stephen Barbier, for the appellant

Mitchell Wine, for the respondent

Heard: February 5, 2024

On appeal from the order of Justice Markus Koehnen of the Superior Court of Justice, dated April 11, 2023.

REASONS FOR DECISION

[1] This appeal is brought by 8167800 Canada Inc. t/a Lead Home Renovation (the "appellant") from certain provisions of an order dated April 11, 2023 (the "Order"), granting the motion of the appellant for relief from forfeiture of the termination of a commercial lease dated December 16, 2019 (the "Lease") by the respondent landlord, Denison Limited (the "respondent").

Background

[2] The appellant is the tenant of premises in a two-unit industrial building located at 410 Denison Street in Markham, Ontario (the “Premises”).

[3] The appellant entered into a lease for the Premises in 2015 with a former landlord. Upon the expiry of the original lease, the appellant and the former landlord entered into the Lease, which commenced on August 1, 2020, and has a five-year term.

[4] The respondent purchased the building subject to the Lease on June 22, 2022. Thereafter, the relationship between the parties deteriorated as the respondent alleged that the appellant breached a number of the terms of the Lease.

[5] Ultimately, the respondent terminated the Lease on February 16, 2023, and retained the services of a bailiff to lock the appellant out of the Premises. In response, the appellant brought an urgent motion for relief from forfeiture. The respondent denied that relief from forfeiture was appropriate and brought a cross-motion seeking a declaration that the Lease was properly terminated and an order for payment of certain amounts that the respondent said were owing.

[6] The motion judge reviewed nine separate breaches alleged by the respondent as the basis for termination of the Lease. The motion judge found that the respondent was not entitled to terminate the Lease and granted the appellant’s

motion for relief from forfeiture. However, in the course of his endorsement dated April 11, 2023, the motion judge made certain findings that resulted in conditions in the Order to which the appellant objects and which form the basis of the appeal.

The Use of the Premises

[7] Section 4.1.c of the Lease permitted use of the Premises "solely for the purpose of warehousing and distribution of building supplies and associated office uses as permitted by municipal by-law". The motion judge found that the appellant was engaged in the construction of kitchen cabinets in contravention of the Lease.

[8] The Order required the appellant to adhere to the permitted uses of warehousing and distribution, but provided the appellant a grace period until December 1, 2023, to allow the appellant to adapt its business to the permitted uses under the Lease. Until that date, the Order permitted the appellant to carry out cutting and sanding of materials in the Premises, but provided that a spray booth located in the Premises was not to become operational.

[9] The principal issue on this appeal is the factual finding of the motion judge that the appellant was engaged in the construction of kitchen cabinets in breach of the terms of the Lease.

[10] The appellant appeals this finding on two alternative grounds.

[11] First, the appellant says that there was no evidence of any manufacturing operations on the Premises as alleged by the respondent. However, there is an MLS listing from the summer of 2022 for the sale of the appellant's business which described the assets being sold as a "Kitchen Cabinet and Home Renovation Business" including "cabinet machinery equipment". The motion judge also found that there were table saws and a sanding machine on the Premises which the appellant used to cut and sand wood for the construction of kitchen cabinets.

[12] On his cross-examination, Shi Xiaobin ("Shi"), the owner of the appellant, acknowledged that he created or customized kitchen cabinets for his home renovation clients and that a spray booth on the Premises, although not currently being used, was available for painting cabinets if requested.

[13] Second, the appellant submitted that its operations did not involve mass production and therefore did not constitute manufacturing as the respondent alleged. In a letter dated August 3, 2022, the appellant's counsel expressed the appellant's view of its compliance with the Lease as follows:

> [T]he equipment on the Premises and the use of the Premises involves custom cutting, fitting and preparation of material which is very much a part of normal distribution of the products warehoused on the Premises … Manufacturing involves the mass production of materials or items and, that is certainly not what is taking place on the Premises.

[14] The motion judge dealt with both arguments in reaching his conclusion that the appellant's business breached the terms of the Lease. The motion judge's conclusion is found in paragraphs 21 and 26 of his Endorsement:

> It does not appear that the premises are being used for the distribution of building supplies. Rather, the premises appear to be being used to construct kitchen cabinets, to warehouse materials used in the construction of kitchen cabinets and to distribute finished kitchen cabinet products from the premises.
>
> …
>
> I am … satisfied that the tenant is carrying on a business that involves more than warehousing and distribution. The tenant is clearly constructing kitchen cabinets in a manner that involves potential safety concerns.

[15] The issue before the motion judge was not whether the appellant's activities constituted manufacturing but whether those activities contravened the use provisions of the Lease. We see no palpable and overriding error in this finding.

The Landlord's Refusal to Consent to an Assignment of the Lease

[16] On the motion, the appellant also claimed damages arising from a refusal of the respondent to agree to an assignment of the Lease to a proposed purchaser of the appellant's business. Section 4.1.l of the Lease required the written consent of the respondent not to be unreasonably withheld to any assignment of the Lease by the appellant.

[17] The appellant received an offer dated May 30, 2022, for the sale of its business. The offer required the respondent's approval to the assignment of the Lease by July 15, 2022. As a result of the respondent's refusal to grant such consent, the offer lapsed after an extension to July 29, 2023.

[18] The motion judge found that the respondent was entitled to refuse the assignment. The motion judge reasoned that "[h]ad the [respondent] agreed to the assignment, it would have agreed to the use of the premises for the construction of kitchen cabinets, including cutting, sanding and painting" which he had found were not permitted uses under the Lease other than by way of an indulgence on the part of the respondent or an amendment of the Lease, neither of which was forthcoming.

[19] Given the determination of the motion judge regarding the appellant's use of the Premises, the order of the motion judge – that the appellant was not entitled to damages from the respondent with respect to the refusal of the respondent to agree to an assignment of the Lease to the proposed purchaser of the appellant's business – was not based on any palpable and overriding error.

The Abandoned Truck

[20] The appellant also appealed a provision of the Order requiring it to remove an abandoned truck from the Premises.

[21] The landlord submitted that the appellant had left an abandoned truck at the rear of the Premises in violation of the bylaws of the City of Markham. In his endorsement, the motion judge stated that, during the hearing, the appellant advised its lawyer that it had already removed the truck. When faced with evidence of the continuing presence of a truck, the appellant suggested, through its lawyer, that there had been a second truck and that it was the second truck that had been removed. The motion judge rejected that explanation.

[22] The motion judge held that, regardless of whether there was one abandoned truck or two abandoned trucks, he was satisfied that the bylaws of the City of Markham were being violated and ordered that the abandoned truck in the rear parking lot of the Premises was to be removed by the appellant on or before June 11, 2023.

[23] The appellant says that the motion judge failed to specify which section of the by-laws of the City of Markham was contravened or to find that the appellant was a "building trade contractor" for the purpose of a particular section of the by-laws. The specific provision (s.4.3.7) of the city by-law at issue, by-law 108.81, was before the motion judge. At the hearing of the motion, the appellant did not challenge the application of the by-law or the characterization of the appellant as a building trade contractor for the purposes of the by-law.

[24] Accordingly, the motion judge did not make a palpable and overriding error in ordering the removal of the truck.

Allegation of Bias

[25] The appellant argues that the motion judge demonstrated bias in adding the following remarks at the conclusion of his Endorsement:

> In concluding, I note that much of the frustration here has arisen because of the tenant's approach to issues. English is clearly the second language of the tenant's principal. Either because of that or because of personal tendencies, his communications have been unnecessarily aggressive and confrontational. That has undoubtedly had an effect on the landlord's response. If the tenant disagrees on an issue with the landlord, I would strongly encourage the tenant to communicate that through a lawyer who can adopt a more nuanced and less aggressive tone. The old adage that you catch more flies with honey than with vinegar is worth remembering here.

[26] Shi's explanation for the acrimonious communications between himself and the respondent was that they took place at a time when he was urgently seeking to sell his business in order to take care of his dying mother, and that he was prevented from doing so by unreasonable inspections and demands of the respondent. There is, however, no evidence that Shi ever communicated his personal circumstances to the respondent.

[27] In any event, the remarks of the motion judge must be understood in the overall context of his endorsement. The motion judge denied the respondent its

requested declaration that the termination of the Lease was valid and granted the appellant relief against forfeiture. He also rejected a number of the respondent's allegations of default on the part of the appellant. Coming after these determinations, the comments of the motion judge were directed toward minimising the prospect of future acrimony between the parties for the remainder of the Lease term. They do not establish a basis for a reasonable apprehension of bias.

Costs

[28] Lastly, the appellant appeals the determination of the motion judge that each side should bear its own costs. The appellant says that this was unreasonable because the motion judge granted the appellant's request for relief against forfeiture. In his endorsement, the motion judge noted this outcome but went on to find that the appellant largely brought the issue upon itself by various actions articulated in the Endorsement.

[29] The appellant failed to seek leave to appeal the costs award of the motion judge. In any event, the award of costs was within the discretion of the motion judge. In this case, success was divided on the motion. The appellant is unable to satisfy the test to interfere with a costs award which requires demonstration that the motion judge has made an error in principle or that the costs award is plainly

wrong: *Hamilton v. Open Window Bakery Ltd*., 2004 SCC 9 at para. 27. Leave to appeal the costs order is therefore denied.

Conclusion

[30] Based on the foregoing, the appeal is denied in its entirety. Costs in the agreed amount of $14,000 on an all-inclusive basis are payable by the appellant.

"E.E. Gillese J.A."
"J. Copeland J.A."
"Wilton-Siegel J. (*ad hoc*)"