COURT OF APPEAL FOR ONTARIO

CITATION: Metro 1 Development Corp. Ltd. v. Michael Garron Hospital, 2024 ONCA 60
DATE: 20240125
DOCKET: COA-23-CV-0555

MacPherson, Miller and Paciocco JJ.A.

BETWEEN

Metro 1 Development Corporation Ltd., 8441553 Canada Ltd. cob Coffee House, and 1916179 Ontario Ltd. cob Athen's Bakers

Plaintiffs (Appellants)

and

Michael Garron Hospital (MGH) formerly known as Toronto East General Hospital

Defendant (Respondent)

Gary M. Caplan and Aram Simovonian, for the appellants

Alexander Melfi, for the respondent

Heard: January 12, 2023

On appeal from the judgment of Justice Peter J. Cavanagh of the Superior Court of Justice, with reasons at 2023 ONSC 2853 dated May 12, 2023.

REASONS FOR DECISION

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[1] After being given notice that it was in breach of its lease agreement, the appellant, Metro 1 Development Corporation Ltd. (“Metro 1”), issued a Notice of Action seeking a declaration that its commercial lease with the respondent, Michael Garron Hospital (“MGH”), had not been terminated, or alternatively, relief of forfeiture. One of Metro 1’s sub-tenants, 1916179 Ontario Ltd. (“Athens”), a company whose shares are 50 percent owned by Metro 1’s principal, also sought relief of forfeiture, pursuant to s. 21 of the *Commercial Tenancies Act*, R.S.O. 1990, c. L.7. Metro 1’s request for a declaration was denied, and neither request for relief of forfeiture was granted. Metro 1 and Athens appealed that decision to this court.

[2] At the end of oral submissions, we denied the appeals with reasons to follow. These are our reasons. As we will explain, we were not persuaded that the motion judge misinterpreted the contract by finding that Metro 1 breached the lease by failing to operate a Tim Hortons restaurant, and we saw no basis for interfering with his refusal to grant relief of forfeiture to Metro 1 and Athens.

[3] The material facts can be stated simply. Commencing on December 20, 2012, in a 15-year commercial lease, Metro 1 rented two areas at the MGH designated for food and beverage kiosks, “Space #1” and “Space #2”. As per s. 1.1(c) of the lease agreement, Space #1 was to be “used solely for the purpose of operating a Tim Hortons.” For approximately nine years, Metro 1 did operate a Tim Hortons franchise out of Space #1 through an affiliated company, 8441553 Canada Ltd (“844 Ontario Ltd.”), whose director and shareholder were

the same as Metro 1's. During that time, 844 Ontario Ltd. operated the Tim Hortons franchise pursuant to a ten-year Product Licence Agreement ("PLA") it had with Tim Donuts Limited Group Corp. ("TDL") that could be terminated by TDL on 60-days notice. For many of those years, Athens operated a bakery out of Space #2.

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[4] Effective May 12, 2022, after providing the requisite notice, TDL exercised its right to terminate the PLA with 844 Ontario Ltd. because of food safety concerns. Taking the position that Metro 1 was in breach of the commercial lease by not operating a Tim Hortons franchise in Space #1, MGH gave Metro 1 a 20-day period to cure this breach. During this 20-day period, MGH made inquiries directly to TDL about securing a Tim Hortons franchise for Space #1. On June 1, 2022, the parties agreed to a without prejudice "standstill" agreement, where Metro 1 reserved all of its rights under the lease. It continued to pursue options for securing a Tim Hortons franchise for Space #1, including by further direct discussions with TDL. On October 19, 2022, TDL advised MGH that it would not negotiate any further with Metro 1. Metro 1 claims that it was not advised of this by MGH. On December 9, 2022, MGH terminated the standstill agreement.

[5] Around this same time MGH was relocating its food and beverage kiosks, and Athens was not permitted to move. It vacated Space #2 at the end of January 2023.

[6] Metro 1 argued before us that the motion judge erred in finding that it was in breach of the lease agreement. It denies that it is compelled under the terms of the lease to operate a Tim Hortons restaurant on the premises for the full 15-year term of the lease, despite provisions in the lease agreement requiring it to use Space #1 for that purpose. It argues that the lease necessarily carries an implied term that if it cannot operate a Tim Hortons restaurant in Space #1, it is permitted to operate a food and beverage service with an alternative menu with the consent of MGH, which consent cannot be unreasonably withheld. It argues that this implied term is necessary to give the lease business efficacy and to reflect the intention of the parties, given the "temporal gap" between the 15-year lease and the PLA between 844 Ontario Ltd. and TDL, which provides for a 10-year agreement subject to cancelation on 60 days notice. It submits based on correspondence it sent during negotiations that MGH was fully aware of this temporal gap. Metro 1 claims that the parties therefore understood prior to executing the lease that Metro 1 could not guarantee a Tim Hortons restaurant for the full term of its lease so they must necessarily have intended to include a provision addressing this, which they failed to articulate.

[7] To buttress its position, Metro 1 relies upon a portion of s. 9 of the lease agreement which permits Metro 1 to make changes to the menu with the consent of MGH, which consent cannot be unreasonably withheld, as well as a letter it sent in December 2013, after the lease was executed, warning MGH that TDL could

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terminate the PLA at any time, upon proper notice. It argues that the motion judge erred in these circumstances in failing to find this implied term.

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[8] We reject this submission because the lease could not be clearer in requiring Metro 1 to operate a Tim Hortons restaurant in Space #1, and as the motion judge recognized, to imply the term sought would be inconsistent with the express terms of the lease, which is impermissible: *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, at para. 29; *Energy Fundamentals Group Inc. v Veresen*, 2015 ONCA 514, 388 D.L.R. (4th) 672, at para. 36. Specifically, the “Tenant’s Trade Name” for Space #1 is described in s. 1.1(b) of the agreement as “Tim Hortons”, and, as indicated above, s. 1.1(c) provides that Space #1 “shall be used solely for the purpose of operating a Tim Hortons”. Section 9.1(a) adds that, “[t]he Tenant will use and permit the Premises to be used only for the Tenant’s use set out in Section 1.1(c)” and reaffirms that “[t]he premises will be used solely for the purpose of operating a Tim Hortons restaurant for on and off the premises consumption”.

[9] The provisions permitting changes to the menu that Metro 1 relies upon are in s. 9, which, as just described, explicitly reaffirms the exclusive use of the Space #1 as a Tim Hortons restaurant. The passage from s. 9 that Metro 1 relies upon must be read in that context. It begins by listing the kinds of foods that Tim Hortons carries, and only then provides for that menu to be changed with consent of MGH, which will not be unreasonably held. When the lease is read as a whole, these

provisions permit changes to the Tim Hortons menu, and cannot reasonably be interpreted as anticipating an exception to Metro 1's obligation to have a Tim Hortons restaurant in that space. Certainly, the motion judge did not commit a palpable and overriding error by interpreting the lease agreement in this fashion.

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[10] We reject Metro 1's submission that the motion judge erred by commenting that Metro 1 was aware of the "temporal gap" it seeks to rely upon, without also mentioning MGH's knowledge of that temporal gap. The motion judge was making the salient point that Metro 1 chose to take the risk of committing in the lease agreement to have a Tim Hortons franchise, knowing that it could not assure MGH that it could comply with this obligation. We also rejected the submission that the lease agreement lacked business efficacy because Metro 1 was prepared to take on this risk by executing a lease agreement that did not provide Metro 1 with an out, should it be unable to maintain a franchise on the premises. The motion judge was entitled to find that this was a business choice that Metro 1 made.

[11] We do not accept Metro 1's submission that the motion judge erred in failing to grant relief of forfeiture to Metro 1 and Athens because we can find no error in those decisions.

[12] Metro 1 argues that it should have been granted relief of forfeiture because MGH acted in bad faith by negotiating directly with TDL, thereby impeding Metro 1's ability to cure its breach. We see Metro 1's submission as an attempt to re-

argue relief for forfeiture before us in the hope that we would disagree with the motion judge, which is not our role. The motion judge considered the same arguments and evidence placed before us, and found, as he was entitled to, that MGH had not acted dishonestly or in bad faith but rather reasonably, given that Metro 1 had reasonably concluded that the relationship between Metro 1 and TDL was “beyond repair”. There was ample evidence to support this finding and we see no basis for interfering.

[13] We reject the submission that MGH was obligated by a free-standing duty of good faith to notify Metro 1 when TDL told MGH that it would not negotiate with TDL. Metro 1 took us to no terms of the lease or the standstill agreement that would have required MGH to refrain from communicating with TDL or to disclose its communications to Metro 1. We also disagree with the submission that MGH was obliged to offer any prospective Tim Horton franchisees to Metro 1 as sublease prospects to cure its breach. The duty of good faith in contract law does not require a party to subordinate its interests to those of the other party: *Wastech Services Ltd. v. Greater Vancouver Sewage and Drainage District*, 2021 SCC 7, 454 D.L.R. (4th) 1 at paras. 6, 112-113. Given that TDL terminated 844 Ontario Limited’s franchise for cause and negotiations between TDL and Metro 1 had broken off, MGH had good reason to believe it was not in its interests to attempt to maintain Metro 1’s continued involvement with a Tim Hortons franchise on hospital property.

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MGH was under no obligation to include Metro 1 in any solution it might find to its own interest in maintaining a Tim Hortons franchise on its premises.

[14] The motion judge did not address Athens' application for relief of forfeiture explicitly, but we did not find this to be a basis to interfere in the circumstances of this case. Athens failed to furnish us with any information confirming that it provided the motion judge with any basis for treating it differently than Metro 1, or that this relief was actively pursued before him. It has not made a case on appeal that the motion judge erred by not granting relief of forfeiture to Athens, or by failing to speak to that issue directly in his decision.

[15] We therefore dismissed the appeal.

[16] The appellants are ordered to pay costs to MGH, inclusive of the costs of the interim motion brought before Monahan J.A., and inclusive of disbursements and applicable taxes, in the amount of $22,500, as agreed between the parties.

"J.C. MacPherson J.A."

"B. W. Miller J.A."

"David M. Paciocco J.A."

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