

CITATION: Baran Turk Inc. v. 111518866 Canada Inc., 2024 ONSC 4128
COURT FILE NO.: CV-24-96462
DATE: 2024/07/22

**COURT OF ONTARIO,
SUPERIOR COURT OF JUSTICE**

RE: BARAN TURK INC., Applicant (Moving Party)

AND:

111518866 CANADA INC., Respondent (Responding Party)

BEFORE: C. MacLeod RSJ

COUNSEL: Eric Dwyer, for the Moving Party

Jason Rabin, for the Responding Party

HEARD: July 22, 2024

REASONS FOR DECISION

[1] This is a motion by Baran Turk Inc. for an order permitting it to continue its restaurant business in premises rented from the Respondent landlord. On a previous occasion, the landlord re-entered the premises and purported to terminate the lease on January 5, 2024. The tenant went back into occupation under a “Lease Reinstatement and Amending Agreement” dated January 19, 2024. The landlord has once again purported to terminate the tenancy for late payment of rent and for material breaches of the lease. The Applicant tenant brings this motion for interim relief.

[2] The issue before me is not a determination of the dispute between the tenant and the landlord. The tenant and the landlord have each commenced applications to determine whether or not the landlord is entitled to terminate the lease and for other remedies. The issue before the Court is whether or not a mandatory order or an interim relief from forfeiture should be ordered until the issue can be brought before the Court for a determination of those issues on the merits.

[3] In the Agreement of January 5, 2024 both parties released the other from any claims for breaches predating that Agreement. Accordingly, although there was a history of late payment of rent leading up to the original re-entry and culminating in the agreement to reinstate the tenancy, the landlord is now estopped from relying on the earlier breaches.

[4] The following events took place after that agreement went into operation:

- a. The February 1, 2024 rent cheque bounced and was replaced on February 5, 2024
- b. The March 1, 2024 rent cheque bounced and was replaced in part on March 12, 2024 and in part on April 3, 2024
- c. The April 1, 2024 rent was paid
- d. The May 1, 2024 rent cheque bounced and was replaced on May 3, 2024
- e. Rent was paid on June 4, 2024
- f. The July rent was not accepted because the landlord elected to terminate the lease and exercise a right of re-entry on July 9, 2024. The July rent is held in trust by counsel for the tenant.

[5] Besides the chronic late payment of rent, the landlord alleges the following breaches of the lease and the regulations under the lease:

- a. The tenant kept two dogs tied up in the alley behind the restaurant, which is an alley used by other tenants, in particular children from a day care centre.
- b. The tenant stored garbage in the alley behind the restaurant although told not to do so and despite the obligation under the lease to dispose of garbage in the disposal bins.

[6] The tenant regularly blocked the alley with delivery trucks and parked a motorcycle in the alley obstructing passage by the neighbouring tenant and the children from the daycare centre.

- a. The tenant had damaged the roof by cutting a hole in the roof. Although this was addressed in part by the lease reinstatement agreement, the tenant was making claims against the landlord and refusing to pay a new construction invoice.

[7] In addition to the above, this past weekend, the landlord received a notice from the tenant's insurer that the tenant's insurance policy had been cancelled. This was for nonpayment of premiums and has now been rectified at least insofar as the outstanding June payment has been made and accepted by the broker.

[8] It is apparent from the evidence that there is a significant dispute between the co-owners of the tenant corporation. Mr. Ozturk (who is a co-director and 45% owner) swore an affidavit in support of the landlord. He accuses Mr. Sahin (who is a co-director and 55% owner) of threatening him. Mr. Ozturk advises there is a dispute as to which of them should operate the business but acknowledges that it has been Mr. Sahin who has done so for the past several months.

[9] Mr. Sahin for his part, accuses Mr. Ozturk of trying to force him out of the business and of misappropriating funds. He attests that this is the reason that some of the cheques have bounced including the cheque for payment of the insurance premium.

[10] Needless to say, the dispute between Mr. Ozturk and Mr. Sahin is not before this Court at the moment but it creates some misgivings about whether the Court can have confidence that a tenant involved in an ownership and governance dispute can discharge its financial and other obligations. Equally, however, it raises the spectre that Mr. Ozturk is colluding with the landlord; an assertion the landlord disputes.

[11] While there is no doubt that the rent has been chronically late since the lease was put back into good standing, all of the rental payments have ultimately been paid. Some of the evidence put forward by the landlord concerning other breaches of the lease is hearsay or is vague. It is not clear, for example, where deliveries to the restaurant should be made if not by using the alley. That said, there is no dispute that Mr. Sahin sometimes had dogs tied up behind the restaurant and that there was garbage behind the restaurant and not in the garbage disposal bins.

[12] The tenant acknowledges that if an order is granted putting the tenant back into occupation of the premises, and it is subsequently unsuccessful on the merits, it will be liable in damages. It has given the necessary undertaking. The tenant also acknowledges that it will have to provide proof of insurance, pay the rent as it falls due, comply with the rules and regulations established by the landlord and obey any other terms which the Court may impose as terms of the order.

[13] The tenant argues that if the order is not granted, it will suffer irreparable harm because it will go out of business and lose the substantial sum that has been spent in leasehold improvements and opening the business as well as the benefit of a 10-year lease. I note that the construction company which was responsible for the leaseholds is owned by Mr. Sahin but even if the estimated cost of the leaseholds has been inflated by as much as 100%, the expenditure was significant and the work done to construct and furnish the restaurant in the pre-existing space was substantial.

ANALYSIS AND DECISION

[14] For an injunction or a mandatory order, the test is the three part test set out in *RJR Macdonald*.¹ In the context of this dispute, that test is a) a serious issue to be tried, b) whether the applicant will suffer irreparable harm if the order is not granted, and c) the balance of convenience. While there is no doubt the tenant has breached the lease by repeatedly paying its rent late, and little doubt that there have been some infractions of the rules and regulations forming part of the lease, there are serious issues about the extent of those breaches and whether the landlord has also failed in its certain of its duties and obligations. Certainly, the second and third branches of the test weigh in favour of the tenant. This is not a case where the tenant has deliberately and fragrantly breached the lease and should be disentitled to relief.²

¹ *R.J.R. MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311

² See for example *Michele's Italian Ristorante Inc. v 1272259 Ontario Ltd.*, 2016 ONSC 4888 (CanLII)

[15] It is, however, unnecessary for me to determine if the “serious issue to be tried” criteria is met in this case because the primary remedy sought by the tenant is interim relief from forfeiture. Relief from forfeiture is an ancient discretionary and equitable remedy recognized at common law and by statute.³ Generally, a tenant will be given relief if the court deems it appropriate having regard to a) the conduct of the applicant and gravity of the breaches; b) whether the object of the exercise of forfeiture was primarily to recover money that is owed; and c) the disparity between the value of the property forfeited and the damage caused by the breach.⁴

[16] Even if the landlord is legally entitled to declare the tenant in breach and to exercise its remedies under the lease, the court has the jurisdiction to grant relief. While relief from forfeiture is not granted routinely, in the context of a commercial lease, it will normally be granted where the landlord’s interests under the lease “can be fully vindicated without resort to forfeiture”.⁵

[17] Given the impact on the tenant and its employees of terminating the lease, the commitment of the tenant to keep the lease in good standing and the undertaking in damages, the fact that the restaurant has only recently opened, the amount spent on the leasehold improvements and the significant amount of time left to run on the lease, I am of the view that interim relief from forfeiture is appropriate on these facts.

TERMS OF THE ORDER

[18] After hearing argument, I advised counsel I would grant the motion for interim relief from forfeiture, and I asked counsel for the landlord what terms he would request. Most of the requested terms were reasonable given the circumstances and the tenant agreed they should form part of the order. The following terms will be included as conditions of the Order.

- a. The rent for July is to be paid immediately by certified cheque or by electronic transfer from the funds held in trust by counsel for the Applicant.
- b. Rent is to be paid on the first of each month without delay in accordance with the lease.
- c. The tenant is to provide updated proof of insurance and is to keep the policy of insurance in good standing.
- d. The tenant shall keep the laneway clear of garbage or other refuse shall not bring animals onto the premises or keep animals on the premises.

³ s. 20 of the *Commercial Tenancies Act*, RSO 1990, c. L.7, as amended. S. 98 of the *Courts of Justice Act*, RSO 1990, c. C.43 as amended.

⁴ See *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, 1994 CanLII 100 (SCC), [1994] 2 S.C.R. 490, *Hosen v Lam.*, 2017 ONSC 6992 (CanLII) @ para. 16 and *Jungle Lion Management Inc. v. London Life Insurance Company*, 2019 ONSC 780 (CanLII) @ para. 34

⁵ *Hudson’s Bay Company ULC Compagnie de la Baie D’Hudson SRI v. Oxford Properties Retail Holdings II Inc.*, 2022 ONCA 585 (CanLii) @ para

[19] The tenant shall not otherwise obstruct or block the laneway. The tenant shall not allow parking in the laneway except for delivery vehicles during reasonable times and for the minimal time necessary to affect the delivery in the normal course of operating the restaurant.

- a. All communications between the parties during the continuation of legal proceedings are to flow through legal counsel.
- b. All other terms and conditions of the lease and the lease amendment agreement shall continue in full force and effect.

[20] In the event of a breach of these terms, including late payment of rent or non-payment of rent, the landlord may exercise its remedies under the lease or may bring a motion for a writ of possession.

[21] The landlord also requested the tenant be ordered to pay the sum of \$40,480.87 prior to re-entry. This amount consisted of reimbursement for the locksmith and security necessary for the landlord to take possession, an amount for roof repair previously demanded, and full indemnity for the landlord's legal fees. Arguably the landlord should be entitled to these amounts or most of them under the terms of the lease since the late payment of rent did constitute breach of the lease.

[22] I agree with counsel for the tenant, however, that there is little point in granting relief from forfeiture if the terms on which it is granted are punitive. In addition, as this is an interlocutory order, it may be premature to order full indemnity costs. There is an active dispute about liability for roof repairs and there is an untested allegation that the landlord is colluding with the minority shareholder of the tenant.

[23] On the other hand, the landlord is not at fault for seeking to enforce its remedies given the fact that the lease had been put back into good standing only in February and the tenant had undertaken to pay the rent as it fell due. It is not unreasonable for the tenant to pay an amount to the landlord as a term of this order.

[24] Accordingly, the tenant shall pay the further sum of \$12,000.00 to the landlord prior to being allowed back into occupation of the premises.

[25] This payment will be a credit towards the landlord's claim for reimbursement of expenses and costs of this Motion and is without prejudice to the landlord's claim that it is entitled to full indemnity. The entitlement to costs and expenses and the quantum of those expenses and costs will be reserved to the judge determining the merits of the application and cross-application.

Justice C. MacLeod

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BEFORE: Regional Senior Justice C. MacLeod

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Regional Senior Justice C. MacLeod

Released: July 22, 2024