

CITATION: 1327068 Ontario Limited v. 2170758 Ontario Ltd., 2024 ONSC 4528
COURT FILE NO.: CV-20-00645848-0000
DATE: 20240821

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 1327068 Ontario Limited, Plaintiff / Defendant by Counterclaim

– **AND** –

2170758 Ontario Ltd., Anis Qureshi, and Abdul S. Qureshi, Defendants / Plaintiffs
by Counterclaim

BEFORE: Justice E.M. Morgan

COUNSEL: *Lawrence Wong*, for the Plaintiff / Defendant by Counterclaim

Benjamin Salsberg, for the Defendants / Plaintiffs by Counterclaim

HEARD: August 15, 2024

MOTION FOR SUMMARY JUDGMENT

[1] The Plaintiff is the owner and landlord of a property located 2437 Finch Avenue West, Unit 13, Toronto (the “Premises”). It seeks summary judgment against the tenant – i.e. the corporate Defendant (“217”) – as well as its sole director – i.e. the Defendant, Ms. Anis Qureshi – and its manager – i.e. the Defendant, Mr. Abdul S. Qureshi.

[2] On March 9, 2018, the Plaintiff and 217 entered into an agreement to lease whereby it agreed to lease the Premises consisting of 8,000 square feet of ground floor area plus four 4,000 square feet of storage space in the basement. The Premises is located in a retail plaza, and the tenant sought have the Premises used as a Dollar Store discount shop (the “Agreement to Lease”).

[3] The Plaintiff was represented by a real estate agent, while the Defendants, who are in the business of leasing premises for Dollar Store franchises, were unrepresented. All of the negotiations were between the Plaintiff’s agent, Billy Hong of Re/Max, and Mr. Qureshi. The principal of the Plaintiff and its deponent on this motion, Ken Chau, apparently had little direct contact with Mr. Qureshi; in fact, Plaintiff’s counsel explained at the hearing that Mr. Chou does not speak English and so used his real estate agent for all of the meaningful communications with the tenant.

[4] The Agreement to Lease says that the tenancy was to commence on May 1, 2018 for a 10 year term. It was for a 'net net' lease, setting out the rent and additional rent, with four rent-free months at the outset to allow 217 to renovate the premises.

[5] The Agreement to Lease states in Schedule A that: "Abdul S. Qureshi agrees to remain the guarantors of this agreement for the entire duration of the term." Each page appears to be initialed by both parties. Mr. Qureshi concedes in his affidavit that he signed the Agreement to Lease on behalf of 217, but denies that the initials on Schedule A are his own.

[6] In or about the end of April 2018, the Plaintiff delivered a standard lease and indemnity agreement to Mr. Qureshi a review, execution and return. The lease and indemnity agreement described 217 as the tenant and Mr. Qureshi as Indemnifier. Mr. Qureshi signed the lease on behalf of 217 and returned it to the Plaintiff; but he crossed out the names on the documents and wrote in the name of the tenant as "Abdul Qureshi in trust" and the name of the Indemnifier as 217.

[7] The Plaintiff objected to these name changes and delivered a fresh draft lease without the cross-outs and the changed names. Mr. Qureshi has never signed the lease in the format proffered by the Plaintiff. Despite that, on or about April 24, 2018, Mr. Qureshi was given the keys and 217 took possession of the Premises. In the first week of May 2018, 217 paid a deposit of \$92,294.06 to the Plaintiff.

[8] In or about the last week of April 2019, after having the keys to the Premises for one year but without ever having done the renovation or having actually moved in, and without ever paying any further rent beyond the 4 months' rent reflected in the deposit, 217's tenancy was terminated.

[9] The Landlord relies upon the terms of the Agreement to Lease and seeks to enforce those terms in their entirety. These include, *inter alia*, the following terms as summarized by Plaintiff's counsel:

- (a) A term of ten (10) Years commencing May 1, 2018, and ending on April 28, 2028;
- (b) A basic annual rent of \$128,000.00 for the first two (2) years, \$140,000.00 for the next four years and the \$156,000.00 for the remaining four (4) years;
- (c) Additional rent and proportionate share of the cost of operation and maintenance of site, and the additional rent is estimated to be \$94,704.60 annually for the first year of the lease term;
- (d) Tenant pays its own utilities;
- (e) Tenant has 4 months of rent-free period from May 1, 2018, to August 31, 2018, and Tenant is only required to pay its own utilities during the rent-free period.

(f) The Landlord agrees to leave all the existing shelves, counters, office chairs, desks, tables, commercial fridges, sign and freezers for the Tenant to use. It is acknowledged by Landlord and Tenant that the Landlord leave these items in as-is where-is condition and the Tenant is accepted as-is where-is condition and to maintain these mention items at the Tenant's own expenses. The Tenant was not allowed to remove or sell these chattels; and

(g) In the event the Tenant left the unit abandoned with no business operation for two (2) months or more without giving the Landlord any notification, the Landlord shall have the right for full access without notice to the Tenant and take back the unit. All contents in the unit shall be in the possession of the Landlord.

[10] There are a number of substantive disputes between the parties that make it impossible to come to specific determinations or findings of fact at this point. A brief synopsis of those points, and the missing evidence relating to those points, is as follows:

- Mr. Qureshi negotiated all aspects of the Agreement to Lease with Mr. Hong. He denies having agreed to being a personal guarantor or indemnifier for 217 and denies having initialled Schedule A on which the oddly phrased “remain the guarantor” language, but no appointment of him as guarantor in the first place, appears. He also questions how the sentence dealing with him as a guarantor found its way into the Schedule A.

The Plaintiff has provided no affidavit from his agent who negotiated every aspect of the Agreement to Lease – i.e. Mr. Hong. It is likely Mr. Hong who did the drafting of the negotiated portions of the Agreement to Lease, which is otherwise based on a standard form of agreement. The only evidence comes as hearsay through Mr. Chao who admittedly played no part in the actual negotiations. The Chao affidavit frequently resorts to referencing only a vague and unidentifiable source of the hearsay; although I am prepared to admit the affidavit as evidence despite its reliance on hearsay of this nature, I cannot give it any substantial weight.

- The beginning of 217’s tenancy coincided with the Plaintiff doing a large-scale renovation of the entire exterior of the shopping plaza in which the Premises is located. Mr. Qureshi complains that the Premises was blocked of by scaffolding and other objects preventing access, and that in any case the contractor stored a large amount of equipment in the Premises preventing its use. Mr. Chao responds that he advised the contractor to deal directly with 217 and that the Plaintiff was not otherwise involved in this agreement between the contractor and Mr. Qureshi.

The photographs in the record show the Premises covered by a maze of scaffolding and obscured from view. It is unclear whether there is a path meandering through

the scaffolding to access the front door, but the Premises was so hidden that it is credible that a retail business would not be willing to start operating there. The photos also show the inside of the Premises with a substantial amount of space consumed by construction equipment being stored or parked there.

Mr. Qureshi denies agreeing with any contractor that the Premises could be used for storage. Mr. Chao has not identified the contractor, and in cross-examination said that he could not recall and has no records of who the contractor is. This was a major project re-cladding the entire building; it is not credible that the Plaintiff has no record of who did the contracting work or who was paid for the contracting work. In the absence of evidence from this crucial actor, and in view of the failure of the Plaintiff to provide a name – including a corporate name – for the contractor who erected the scaffolding and stored the equipment in the Premises, I cannot make a determination of whose version is right with respect to the physical state of the Premises.

- It is unclear when monthly rental payments were supposed to commence. The Plaintiff says that there was supposed to be four months rent free – i.e. until September 2018 – in order to allow for the Premises to be renovated. Mr. Qureshi says that the Premises was inaccessible until December 2018 and that the four months’ rent-free period must have started then. Mr. Chao says that the renovation ended in October 2018.

Again, without either Mr. Hong or the unnamed contractor providing evidence, I cannot tell when the proper starting date of the tenancy should be fixed – that is, if it ever started at all, which is also a live issue. And without a starting date, the Plaintiff’s evidence on damages cannot be determined since one cannot calculate how much lost rent and other expenses, if any, there has been.

- The Plaintiff alleges that the Premises was left by 217 in a state of disrepair and with fixtures that are missing that belonged to the Plaintiff. Mr. Qureshi responds that he does not know how the Premises were damaged or who took the fixtures, but points out that the contractor was the only one actually using the Premises during the period when 217 had the key and was in possession of the Premises.

Without the unnamed contractor’s evidence, it is not possible to make any affirmative finding in respect of the Plaintiff’s claim of physical damage and loss.

- The Plaintiff alleges that 217 abandoned the Premises in March/April 2019 by sneaking out at nighttime without notice to the landlord and removing all of the fixtures. At his cross-examination, Mr. Qureshi produced a photograph of a notice of eviction indicating that it was posted by a bailiff on the door of the Premises. This notice was produced by Mr. Qureshi after the time set in the motion timetable

for production of evidence had passed. The Plaintiff took the position that the notice is therefore inadmissible and refused to answer any questions about it.

The significance of the notice remains a mystery. The Plaintiff has not provided any evidence about it, including from the bailiff whose name appears on the face of the notice. As landlord, it is the Plaintiff who would have retained and instructed the bailiff, and who would know when the notice was posted and for what purpose. Without Mr. Chao having addressed this point, and without evidence from the bailiff, it is not possible to determine whether the tenant abandoned the Premises or the landlord forcibly evicted the tenant.

- The Plaintiff seeks summary judgment under the Agreement to Lease, but also includes the two individual Defendants. While Ms. Qureshi is admitted to be 217's sole director and Mr. Qureshi is admitted to be 217's business manager, there is no evidence that they had any personal interest other than in their corporate capacities or that they used 217 as a vehicle for personal gain or to any manipulative end. If evidence for piercing the corporate veil of 217 exists, the Plaintiff has not adduced it in evidence in this motion.

[11] In each of these instances – and these are only the most prominent examples; there may be more – the Plaintiff has failed to “put its best foot forward”, as the moving party in a summary judgment motion is obliged to do: *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 OR (3d) 423, at 434 (Gen. Div.), at p. 434. The Plaintiff's non-production of crucial witnesses and evidence means that this requirement has not been satisfied.

[12] In fact, the gaps in the evidentiary record have made it impossible for me to make the findings of fact necessary to resolve the case at this point. Given that these gaps impact on the liability question as well as the damages issues, they effectively undermine the possibility of summary judgment. A mini-trial, with evidence on discreet issues being presented by oral testimony, will not suffice under the circumstance. The evidentiary gaps are not on discreet points, but rather are fundamental to the entire claim.

[13] In short, a full trial of all issues is called for. Summary judgment, or a summary mini-trial, is simply not a more proportionate or expeditious means to achieve a just result than going to trial: *Hryniak v. Mauldin*, [2014] 1 SCR 87, at para. 4.

[14] The expense of this motion will not go to waste. The motion records and cross-examinations can be used in lieu of, or as part of, discovery. In fact, the entire experience will serve each side well in more speedily preparing their respective cases for trial.

Disposition

[15] The Plaintiff's motion is dismissed. The action is to proceed to trial once all of the pre-trial stages are complete.

[16] Costs of the motion will be in the cause.

Date: August 21, 2024

Morgan J.