

CITATION: Longo v. Yu Cheng, 2024 ONSC 4724
COURT FILE NO.: CV-14-510545
DATE: 20240827

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
Joseph Longo)
)
) Plaintiff) *Jonathan Mesiano-Crookston, for the*
) Plaintiff)
)
- and -)
)
Henry Yu Cheng and 1791325 Ontario Ltd.) Self-Represented, Defendants
)
c.o.b. as Daily Fresh Food Market)
)
) Defendants)
)
) **HEARD:** December 5, 7, 8, 21, 2023 and
) July 19, 2024

2024 ONSC 4724 (CanLII)

JUSTICE J.S. SHIN DOI

- [1] The Plaintiff, Joseph Longo, is a landlord who leased premises for a convenience store. The Plaintiff sues the Defendants the tenant, Henry Yu Cheng, and 1791325 Ontario Ltd., the indemnitor, for outstanding rent in the amount of \$69,903.82 plus interest. The sum of \$69,903.82 consists of the unpaid base rent and additional rent less the recovery of the distress and amounts paid by Mr. Cheng to the Plaintiff.
- [2] The Defendants deny that they owe all the rent. The Defendants counterclaim for damages and allege that the Plaintiff exercised excessive distress.
- [3] For the reasons that follow:
- a. Based on the Lease (as defined below), I find Mr. Cheng liable to pay to the Plaintiff any outstanding annual base rent to the Plaintiff.
 - b. Based on the Lease, I find Mr. Cheng liable to pay the Plaintiff any outstanding additional rent for the years 2009 and 2010. For the calendar year 2009, Mr. Cheng

is liable to pay \$1,766.46. For the period January 1 to December 31, 2010, Mr. Cheng is liable to pay \$6,944.27 in additional rent (Exhibit 4, Joint Book of Documents). The amount of \$4,263.27 remains unpaid as of February 12, 2013.

- c. Based on the Lease and the doctrine of promissory estoppel, for the years 2011, 2012, and 2013, I find Mr. Cheng liable to pay additional rent in the amounts included in the sums already paid by Mr. Cheng (\$4,802.50 or \$4,802.00 per month). Accordingly, based on the Plaintiff's statement of amounts due, no further additional rent is payable by Mr. Cheng for the period January 1, 2011 to November 11, 2013. Mr. Cheng owes the Plaintiff the sum of \$4,802.50 for annual base rent and additional rent for December 2013.
- d. Based on the Lease and the doctrine of promissory estoppel, for the year 2014 until April 30, 2014, Mr. Cheng is liable to pay outstanding additional rent in the amount which is included in the sum of \$4,950 per month. Accordingly, Mr. Cheng is liable to pay the sum of \$19,800 for rent and additional rent for the period of January 1 to April 30, 2014.
- e. Therefore, I find that Mr. Cheng's indebtedness to the Plaintiff is the sum of \$30,632.23 plus interest against which the Plaintiff recovered the amount of \$1,513.82 from distraint and the amount of \$10,000 paid by Mr. Cheng. Mr. Cheng's net indebtedness to the Plaintiff is the sum of \$19,118.41 plus interest. The interest rate submitted by the Plaintiff is 9% per annum pursuant to section 50 of the Lease.
- f. However, I find the Plaintiff liable for damages in the amount of \$81,000 for the distress exercised against Mr. Cheng.
- g. Since, the debt and the damages from the unlawful distress may be set off against each other, in the result, the Plaintiff is liable to pay Mr. Cheng the sum of \$44,627.88.

Facts

- [4] The Plaintiff is the son of the original landlords Vincent J. Longo and Antoinette Longo who are now deceased. Mr. V. Longo died in October 2009 and Mrs. Longo died in January 2013. The Plaintiff acted as an agent for his parents prior to their deaths, and he inherited their interests in the property when they passed. The Plaintiff has title to the property as of November 2013.
- [5] Mr. Cheng immigrated to Canada from China in 2006. From 2006 to 2009, he worked as a labourer because his English language skills were not sufficient to work in the banking industry which he had done prior to his immigration.
- [6] The Defendant 1791325 Ontario Ltd. is a corporation incorporated on February 9, 2009 under the laws of the Province of Ontario (the "Corporation"). The first directors of the Corporation were Victor Y Chang Liu and Mr. Cheng.

- [7] The Longos entered into a letter of intent dated December 26, 2008 with Mr. Liu and Mr. Cheng for a lease of premises. The parties then entered into a lease agreement dated February 27, 2009 for the main floor of a building municipally known as 866 Bloor Street West, Toronto, Ontario.
- [8] The Lease was signed by Mr. Liu and Mr. Cheng personally. As noted below, later in the year, Mr. Cheng purchased Mr. Liu's interest in their business. The Lease was not signed by the Corporation. Attached to the Lease as Appendix A is an indemnity agreement between Vincent J. Longo and Antoinette Longo as Landlord and Mr. Liu and the Defendant Mr. Cheng, which is signed on behalf of the corporation but not personally by Messrs. Liu and Cheng. Mr. Liu signed in his capacity as secretary with authority to bind the corporation and Mr. Cheng signed in his capacity as president with authority to bind the corporation.
- [9] Section 1 of the Lease provides that approximately 1,700 square feet of the main floor and 1,700 square feet of the basement and access to the shared common entrance doorway are included in the leased premises.
- [10] Section 2 set outs the term of the Lease as having a period of five years commencing on May 1, 2009 and ending on April 30, 2014.
- [11] Section 4 of the Lease provides that the Tenant shall pay Annual Base Rent as follows:

ANNUAL BASE RENT

(a) The Tenant shall pay to the Landlord from and after the Commencement Date without deduction, abatement or set-off whatsoever a basic rent, as follows:

Period		Period	Per Annum	¹ Per Month
May 1, 2009	To	April 30, 2010	\$33,600.00	\$2,800.00
May 1, 2010	To	April 30, 2011	\$33,600.00	\$2,800.00
May 1, 2011	To	April 30, 2012	\$36,000.00	\$3,000.00
May 1, 2012	To	April 30, 2013	\$36,000.00	\$3,000.00
May 1, 2013	To	April 30, 2014	\$36,000.00	\$3,000.00

- [12] Section 6 of the Lease, provides that the Tenant shall pay Additional Rent as follows:

ADDITIONAL RENT

(a) The Tenant shall pay, as Additional Rent, its pro rata share, set out as 60% of the total for the entire building, of all operating costs attributable to the premises and to the building and property at which the premises are located. Operating costs means and includes all gross charges, taxes, impositions and expenses of every nature and kind relating to the premises incurred by the Landlord or by others on behalf of the Landlord in connection with the supervision,

operation, cleaning, maintenance, repair, utility charges, water heater rental, electricity and gas heating charges, waste removal, replacement and insurance of the premises and the building and property at which the premises are located;

(b) The Tenant shall pay as Additional Rent, its proportionate share, set out as 60% of the total for the entire building, or its designated proportion of Municipally or Provincially assessed share, whichever shall be greater, or changes in the current assessment as a result of any re-assessments due to alterations or additions to the Leased Premises conducted by the Tenants for the benefit of their business, of realty taxes for the building in which the premises are located. The term "realty taxes" shall include all local improvement rates, duties and assessments against the premises or any part thereof, and the proportionate common areas, whether charged by any municipal, parliamentary or other body during the term of this Lease;

(c) On the first day of each month during the lease term, the Tenant shall pay to the Landlord the sum of money which shall be determined on an annual basis by the Landlord and/or its agents to establish a fund for the payment of the Tenant's proportionate share of realty taxes and operating Costs as set out above. It is acknowledged that such sum is estimated only and may be increased or decreased from time to time by the Landlord as is reasonably required. At the end of each year during the lease term, the parties agree to readjust the fund based on actual expenditures made by the Landlord; Notwithstanding the foregoing, the Landlord hereby projects that the Tenant's estimated share of operating costs and realty taxes for 2009 shall not be less than Twelve Hundred Dollars and 00 cents (\$1,200.00) per month.

(d) The Landlord shall upon request provide annually to the Tenant a statement certified in writing by the Landlord as to the operating costs and realty taxes and the amount thereof payable by the Tenant within thirty (30) days of the end of each year during the lease term, and all appropriate adjustments shall be made within thirty (30) days of the date of delivery of such statement. The Landlord shall be entitled to levy a charge for interest in the amount of six (6%) per cent per annum compounded monthly for any outstanding additional rents for taxes and operating expenses which are unpaid after 30 days.

[13] Section 21 sets out a waiver of exemption from distress, and section 26 sets out the Landlord's right of distress, as follows:

21. WAIVER OF EXEMPTION FROM DISTRESS

The Tenant hereby agrees with the Landlord that notwithstanding anything contained in any statute or other applicable legislation, amendment thereto or replacements thereof, none of the goods and chattels of the Tenant at any time during the continuance of the Term hereby created on the Leased Premises shall be exempted by the Tenant or if any distress is made by the Landlord, this covenant and agreement may be pleaded as an estoppel against the Tenant in any action brought to test the right to the levying upon any such goods as are named as exempted in any Sections of any such statute or other applicable legislation or amendment thereto; the Tenant waiving, as it hereby does, all and every benefit that could or might have accrued to the Tenant under and by any virtue of any Sections of any statute or other applicable legislation, or any amendment thereto, but for this covenant.

26. DISTRESS

Notwithstanding the benefit of any present or future statute, taking away or limiting the Landlord's right of distress, none of the goods and chattels of the Tenant on the Premises at any time during the term shall be exempt from levy by distress for rent in arrears, and that upon any claim being made for such exemption by the Tenant or on distress being made by the landlord, this paragraph may be pleaded as estoppel against the Tenant in any action brought to oppose the

Landlord's right to levy upon any such goods as are claimed to be exempt from distress pursuant to any statute, and the Tenant waives any benefit accruing to the Tenant under any such statute.

- [14] Approximately, six months after the commencement of the Lease, Mr. Cheng purchased Mr. Liu's interest in the business. Mr. Cheng operated the business with his wife and daughter. He informed the Plaintiff that he was the sole operator and no longer in business with Mr. Liu. The Plaintiff acquiesced to these changes to the Landlord and Tenant relationship.
- [15] The Plaintiff testified that at the beginning of the year, he would inform the Tenant what the rent would be for the year. As noted above, rent consisted of base rent plus additional rent for which was 60% of the operating costs of the building plus taxes. The Plaintiff says that he would calculate the rent to be paid each month. He would take the base rent and add to it the operating costs from the year before, which served as an estimate of the operating costs for the current year. He would add taxes, then divide the total to arrive at a monthly amount to be paid.
- [16] Each year, at the end of each year, the Plaintiff would calculate the difference between what the Tenant had paid and the actual current year's building expenses. If the estimate of operating costs from the year before was lower than the actual costs in the current year, he would ask the Tenant to pay the difference; If there was an overestimate, the Tenant would receive a credit.
- [17] By letter dated January 9, 2010, the Plaintiff informed the Defendants that they owed the cost of leasehold improvements in the amount of \$4,982.79, a balance of \$1,766.46 for 2009 operating costs, receipt of \$4,200 (\$2,800 for base rent, \$1,200 for operating costs and \$200 for GST). The Plaintiff informed the Defendants that the amount payable for February to June 2010 would be \$4,615.85 and then \$4,967.54 from July to December 2010.
- [18] By letter dated July 9, 2010, the Plaintiff returned a cheque in the amount of \$4,389.00 and alleged that the Defendants were in breach of the Lease and that the amount of \$4,723.40 was due.
- [19] By letter dated December 21, 2010, the Plaintiff informed the Defendants that the balance of \$6,944.27 was outstanding for 2010 due to the adjusted operating costs. The Plaintiff then informed the Defendants that the 2011 total monthly rent from January 1 to April 30, 2011 would be a total of \$5,311 and that the total monthly rent from May 1 to December 1, 2011 would be \$5,537.
- [20] In 2010, Mr. Cheng objected to the increase in the additional rent. In July 2011, the Plaintiff agreed to meet with an intermediary, Jackie Lee, to discuss the rent.
- [21] By letter dated September 12, 2011 from the Defendants' counsel, the Longos were informed that the Defendants could not afford the current rent in light of the sudden increases, amounting to a 25% premium over the anticipated monthly payments. The

Defendants' counsel noted that the actual rent being charged was in excess of the reasonable market rate and that it was unlikely that any tenant would be willing to pay these inflated charges. The Defendants' counsel proposed monthly rent at the original set rate of \$4,200 going forward and that the Defendants would pay the \$6,944.27 allegedly outstanding from 2010.

- [22] By email dated September 27, 2011, the Defendants' counsel raised the issue of making interim payments. By email dated October 11, 2011, the Defendants' counsel advised that the Defendants would be prepared to agree to a fixed rent in the amount of \$4,700 per month effective January 1, 2011 and arrears up to September 30, 2011 would be the sum of \$12,542.10, and would be paid over six-monthly installments.
- [23] By letter dated December 14, 2011, the Plaintiff delivered a Notice of Rent Default informing Mr. Cheng that he was in arrears in payment of the annual base rent and additional rent in the amount of \$33,955.46.
- [24] The Plaintiff testified that he did agree to reduce the base rent by \$200 per month and to reduce the share of the operating expenses from 60% to 50%. The Plaintiff states that he drew up a letter of agreement and gave it to Mr. Lee to present to Mr. Cheng, but Mr. Cheng refused to accept the new terms.
- [25] The Plaintiff testified that throughout 2011, 2012, and 2013, Mr. Cheng paid rent but short of full payment. On November 3, 2011, Mr. Cheng paid \$4,802.50 per month and not \$5,311 per month; and throughout 2012, Mr. Cheng paid \$4,802 per month and not \$5,311 per month.
- [26] Mr. Cheng testified that he was advised by his lawyer that the additional rent would amount to "\$4,800 or \$4,900 or even \$4,950". He further testified that there was no way he could afford \$5,500. Mr. Cheng was advised that there may be a fluctuation in the property tax.
- [27] The Plaintiff alleges that there was a series of NSF cheques, so he called the Bailiff to distress the property.
- [28] On April 16, 2014, the Bailiff, S. Wilson & Co. Bailiffs Limited, delivered a Notice of Distress to the Defendants for the recovery of rent arrears. The Defendants were informed that the Plaintiff distrained against the Defendants' goods, chattels, inventory, and case at the premises for rent arrears plus all costs and expenses relating to the distress.
- [29] The Plaintiff testified that the distress was levied on April 16, 2014, at 7:00 am, and the goods were held in the store.
- [30] On or about April 17, 2014, there was a theft at the store. The Plaintiff says that he discovered the crime scene because the rear entry door was left open. The Plaintiff alleges that it was Mr. Cheng and his spouse that left the rear entry door to premises open when they took their personal property. The Plaintiff says that the lock was broke open.

- [31] The Defendants, however, allege that it was the Plaintiff or the Bailiff that left the back door open. The Defendants deny that they had any access to the store after the locks were changed.
- [32] The Plaintiff reported the break and enter to the police. The police reviewed the store CCTV video with the Plaintiff. The Plaintiff testified that all he could see and all he has ever seen is a video clip showing one person entering at night and taking boxes. The Plaintiff admits that it is his voice on the video replay. In the video replay, the Plaintiff states that he does not recognize the person doing the break and enter. At trial, the Plaintiff testified that he knew the person was Mr. Cheng because he had known him over the years, and knew his build, the specific way he walked, and the way he moved. The Plaintiff stated that the person knew exactly where in the store to go and which boxes to take when he went into the store.
- [33] Mr. Cheng complains that the Plaintiff and his agent Mr. Lee misled the police in reporting Mr. Cheng as the criminal who committed the break and enter and stole from the store. Mr. Cheng states that he was advised by counsel that the Plaintiff vilified (defamed) him.
- [34] The Plaintiff sold the remaining goods pursuant to the distress. The Plaintiff produced an inventory dated April 28, 2014, indicating what items were sold to Market Convenience Store for approximately \$1,450.00. Another invoice dated April 28, 2014 indicates a cash sale for items including apples and toilet paper for \$63.00. The Plaintiff admits that the sale generated a sum of \$1,513.82 which was applied towards rental arrears.
- [35] The Defendants version of the distraint is different. The Defendants plead that the Plaintiff did not provide the Defendants with a list of property distrained and an appraisal of the value of the property distrained. The Defendants state that the value of the property distrained and ultimately alleged to have been liquidated by the Plaintiff exceed the alleged total sum that was received by the Plaintiff because of the liquidation. Mr. Cheng states that the Plaintiff failed to mitigate his damages by not selling the distrained goods at all or for a reasonable price. Mr. Cheng claims that his goods were valued in the amount of \$120,000 to \$150,000.
- [36] The Defendants allege that when they refused to succumb to the pressures of Ping Lee, the Plaintiff's agent, the Plaintiff retained the services of a bailiff to lock out the Defendants and distrain their goods.
- [37] The Defendants plead that the bailiff distrained the Defendants' goods, however, the Plaintiff and/or the bailiff never provided to the Defendants an inventory of the goods that were distrained to pay for the alleged outstanding amounts of rent. The Defendants say that they paid Mr. Lee a sum of approximately \$15,000 (\$10,000 plus another \$4,802.40 for bailiff fees) for the purpose of fully and finally settling the dispute.
- [38] After the distress, the Plaintiff claims the amount of \$69,903.82 (\$75,568.02 less amounts paid by Mr. Cheng) plus pre-judgment and post-judgment interest, and costs.

Who are the proper parties?

- [39] Mr. Cheng pleads that the Plaintiff is not a proper party to the dispute. I disagree, Joseph Longo is the successor landlord by inheritance from his parents. He acted as agent for the Longos who entered into the Lease and then became the successor under the Lease when his parents passed. Therefore, Joseph Longo is the proper plaintiff.
- [40] Mr. Cheng personally executed the Lease and acquired Mr. Liu's interest in the Lease. The Corporation by its officers indemnified the Longos for the Lease. Accordingly, Mr. Cheng and the Corporation are the proper defendants.

Is Mr. Cheng liable to pay annual base rent to the Plaintiff?

- [41] Mr. Cheng is liable to pay annual base rent to the Plaintiff.
- [42] The Lease, section 4, is clear that the Tenant shall pay annual base rent. Also, Mr. Cheng understood from Mr. Liu that rent in the amount of \$2,800 per month was due for the first two years and \$3,100 per month was due for the last three years.
- [43] The defence of *non est factum* – “where a person signing a document is misled by the misrepresentation of another as to its true nature and character, as distinct from the purport and effect of its contents” (*Prudential Trust Company Ltd. v. Cugnet*, [1956] S.C.R. 914 at p. 924, citing *Marks v. The Imperial Life Assurance Company of Canada*, [1949] O.R. 49-74 (H.C.) at p. 68) does not apply to payment of annual base rent because the Defendants understood the obligation and the Plaintiff did not mislead or make a misrepresentation about the annual base rent payable.

Are the Defendants liable to pay additional rent to the Plaintiff?

- [44] Mr. Cheng is liable to pay additional rent to the Plaintiff. For the years 2011, 2012, and 2013, I find that Mr. Cheng's liability to pay additional rent to the Plaintiff is limited to the amount which is included in the sum of \$4,802.50 per month. For the year 2014 until April 30, 2014, Mr. Cheng's liability to pay additional rent is limited to the amount that is included in the sum of \$4,950 per month. The defence of promissory estoppel applies to Mr. Cheng's obligation to pay more additional rent than those amounts.
- [45] Additional rent is set out clearly in the Lease. Pursuant to the Lease, Mr. Cheng is required to pay the *pro rata* share, set out as 60% of the total for the entire building, of all operating costs attributable to the premises and to the building and property at which the premises are located. Operating costs is defined to include all gross charges, taxes, impositions and expenses of every nature and kind relating to the premises incurred by the Landlord or by others on behalf of the Landlord in connection with the supervision, operation, cleaning, maintenance, repair, utility charges, water heater rental, electricity and gas heating charges, waste removal, replacement and insurance of the premises and the building and property at which the premises are located.
- [46] The defence of *non est factum* does not apply because Mr. Cheng's partner initially understood the concept of additional rent, there was no misrepresentation, and Mr. Cheng came to understand the concept of additional rent. When the Lease was executed, Mr.

Cheng did not understand the concept of additional rent because he did not read, write, or speak English fluently and did not have any experience with commercial leasing. However, Mr. Cheng relied on his business partner Mr. Liu who had experience with commercial leasing and understood the terms of the Lease. Mr. Liu states in his Affidavit sworn on July 27, 2023 that he did not misdescribe the terms of the Lease. Mr. Cheng learned the concept of additional rent through operating the business in 2009-2010 and when he acquired the business from Mr. Liu. Mr. Cheng concedes that “some” additional rent is payable to the Plaintiff. Mr. Cheng is liable for the additional rent for 2009 and 2010.

[47] Mr. Cheng is also liable for additional rent for the years 2011 to 2014 until April 30, 2014. Because of the doctrine of promissory estoppel, the Plaintiff is estopped from claiming additional rent beyond the amount included in the sum of \$4,802.50 per month for the years 2011, 2012 and 2013, and the sum of \$4,950.00 per month for the year 2014 until April 30, 2014.

[48] The principles of promissory estoppel are set out in *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 SCR 50. Sopinka J. held the following at p.57,

The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position.

[49] In *Med-Chem Health Care (Bankrupt), Re*, [2000] O.T.C. 728 (S.C.), Swinton J. held at para 9, that promissory estoppel can arise where the conduct of the promisor indicates an intention not to rely on contractual rights. Swinton J. further held at para. 9 that reasonable reliance by the promisee is sufficient, and detrimental reliance is not required. She held at para. 10,

There was a course of conduct over an extended period that showed an intention by the landlord not to rely on the strict terms of the lease with respect to the amount of the rent. There was also reliance by the tenant, shown by its payment of the rents specified in the schedule provided to its controller. More precisely, according to the evidence before the Registrar, the same rents had been paid by Med-Chem from November, 1996 – a period of more than two years before the bankruptcy...

[50] In the result, Swinton J. concluded, at para. 12, that there would be inequity if the creditors could claim the amounts of rent in the written offers to lease without regard to the course of dealing between the parties.

[51] *Med-Chem* was distinguished in *Vancouver City Savings Credit Union v. Norenger Development (Canada) Inc.* 2002 BSC 934 but the court still considered fairness and justice in its determination. The court found at para. 90 that “it would not be unfair or unjust for the landlord to recover past taxes in accordance with the terms of the lease, properly interpreted, notwithstanding its historical requests for payment on a different basis.”

- [52] The Plaintiff argues that promissory estoppel does not apply because there was no promise or assurance. The Plaintiff submits that he never deviated from charging 60% of the operating costs as additional rent. Mr. Cheng, however, argues that there was a promise made by the Plaintiff that the total amount of rent would be between \$4,800 to \$5,000 per month. Mr. Cheng claims there was an initial agreement between the parties and then the Plaintiff changed his mind. Mr. Cheng submits that the Plaintiff agreed that the total rent would be increased from \$4,100 to \$4,200 to \$4,500 and then to \$4,800. He also states that the Plaintiff increased the total rent from \$4,850 to \$5,400 in 2014 and that his “little shop” was not able to afford it. Mr. Cheng alleges that the Plaintiff “did not keep his [word]”. Mr. Cheng states that he discussed with the Plaintiff that if the total rent was \$4,900 as long as it was under \$5,000, the store could continue operating but they could not afford \$5,400. Mr. Cheng further argues that the operating costs could not have increased by that much because the property taxes remained the same.
- [53] I find that there was a course of conduct over an extended period of time that showed an intention by the Plaintiff not to rely on the strict terms of the Lease with respect to the amount of additional rent payable. The Plaintiff submitted copies of statements and notices that he delivered to Mr. Cheng but Mr. Cheng always disputed the amounts owing and the Plaintiff did not take any further steps to enforce the terms of the Lease. There was reliance by Mr. Cheng on the Plaintiff’s conduct, shown by Mr. Cheng’s payment of the additional rent, the acceptance of the payments by the Plaintiff, and the fact that Mr. Cheng continued to operate his business in the leased premises. Mr. Cheng testified that if the rent increase was reasonable, he would continue to rent the premises.
- [54] The amount of additional rent had been disputed by Mr. Cheng since 2010, the second year of the Lease. The Plaintiff testified that Mr. Cheng always denied that he owed additional rent or funds for operating expenses. There was a constant dialogue between the parties as to the amount of additional rent payable. The Plaintiff agreed to meet with an intermediary (Mr. Jack Lee) twice, at the request of Mr. Cheng, to try to settle the additional rent. The Plaintiff testified that he agreed to reduce the base rent by \$200 per month to reduce the share of the operating expenses from 60% to 50%. The Plaintiff stated he was compassionate and that he also came from a family of immigrants. The Plaintiff further stated that he understood “how tough things are for new immigrants.” The Plaintiff drew up new terms, but a new written agreement was not signed by Mr. Cheng. The Plaintiff’s conduct from 2010 to 2014 indicates that he did not intend to comply with the strict terms of the Lease.
- [55] Notably, the Plaintiff did not take steps to terminate the Lease from 2010 to 2014 despite the alleged shortfall in the additional rent that was paid. The Plaintiff only commenced distress to enforce his rights in the month that the Lease expired. In my view, the Plaintiff is estopped from claiming the full amount of the additional rent and it would also be unfair, unjust, and inequitable for the Plaintiff to recover the full amount of the shortfall in the additional rent given the conduct of the parties and the course of dealings of the parties over an extended period.

Are the Plaintiff’s claims extinguished by the limitation period?

- [56] The Plaintiff's claims for rent arrears are not extinguished by the limitation period, contrary to the Defendants' position. The Defendants plead that the Statement of Claim was issued on August 19, 2014 and that it was issued after the second anniversary of the day on which the claim in alleged rental arrears was discovered or ought to have been discovered.
- [57] There is a six-year limitation period for arrears of rent pursuant to the *Real Property Limitations Act*, R.S.O. 1990, c. L. 15, s.17(1). The basic two-year limitation period in the *Limitations Act*, 2002, S.O. 2002, c. 24, Sch. B., s. 4, does not apply to the arrears of rent. The first rent arrears were discovered by the Plaintiff in 2009/2010 and the Plaintiff commenced this proceeding against the Defendants in 2014. The Plaintiff's claims for rent arrears from 2009 to 2014 are within the six-year limitation period.

Is the Plaintiff liable for damages for the distress?

- [58] I find the Plaintiff liable for damages for the distress because it was irregular and excessive. I award damages to Mr. Cheng in the amount of \$81,000.
- [59] Pursuant to the *Commercial Tenancies Act*, R.S.O. 1990, c. L.7, s.43, the Plaintiff may seek rent in arrears through distress, but the distress must be reasonable.
- [60] Section 53 of the *Commercial Tenancies Act*, provides that the person distraining shall cause the goods and chattels so distrained to be appraised by two appraisers who shall first be sworn to appraise them and that after such appraisal, the person so distraining may lawfully sell the goods and chattels so distrained for the best price that can be got for them towards satisfaction of the rent for which they were distrained and of the charges of the distress, appraisal and sale, and shall hold the overplus, if any for the owner's use and pay it over to the owner on demand.
- [61] Further, s.55(1) stipulates that a distrainor who takes an excessive distress, or takes a distress wrongfully, is liable in damages to the owner of the goods or chattels distrained. Finally, s. 66 (1) gives authority to a judge to determine disputes as to the right to distrain and the amount claimed by the landlord, or the tenant claims to set off against the rent a debt that the landlord disputes.
- [62] The court explained distress in *1526183 Ontario Ltd. v. Grant Equipment Corp.*, 2010 ONSC 928 at para. 37, as cited in *1694879 Ontario Inc. v. Krilavicius*, 2017 ONSC 2396 at para. 101,

Section 43 of the *Commercial Tenancies Act* provides that distress is to be reasonable. Section 55 of the Act provides that a landlord who takes an excessive distress, or takes a distress wrongfully, is liable in damages to the owner of the goods distrained. For a distress to be reasonable, the landlord must not seize and sell more goods than are reasonably necessary to satisfy the rent arrears. Where the distress is illegal, the tenant may recover from the landlord full general damages, including damages for loss of business. Where the distress is excessive, the damages will normally be special damages, as an irregularity, under s. 54 of the Act. However, where the wrongful distress is very excessive and the landlord's conduct has been oppressive, the distress may be found to be illegal and subject to a claim for general and special damages. Punitive or exemplary

damages have also been awarded against a landlord where its exercise of distress was oppressive and there have been aggravating circumstances. (See: Posen “The Tenant’s Remedies for Wrongful Distress”, pp. 134-137, in Haber ed. *Distress, A Commercial Landlord’s Remedy* (Aura, Ont. Canada Law Book 2001).

[63] In *Rawlins v. Monsour et al.*, [1978] 20 O.R. (2d) 705 (C.A.) at paras. 3 and 4, the Ontario Court of Appeal was of the view that the distress was not only excessive but also wrongful and illegal inasmuch as the bailiff closed up the commercial premises of the plaintiffs’ sporting goods store, and the landlord, in effect, exercised the right of re-entry. The Ontario Court of Appeal was satisfied that the distress was not merely irregular and excessive, but that it was void *ab initio* as an illegal distress, and the tenants were entitled to recover full damages.

[64] In *YK Human Resource Cop. v. Dinco Holdings Inc.*, 8 P.P.S.A.C. (3d) 287, the court held at paras. 3 and 4,

The landlord can inventory and tag the tenant’s goods and leave them in the tenant’s possession or remove them and put them in storage. However, either option requires proper notice to the tenant. This includes, at a minimum, notice of the reason for the distress, the amount of outstanding arrears, an inventory of goods and the time and place of the intended sale. A true copy of the notice should be served on the tenant and posted in a conspicuous place on the premises (citations omitted).

There is no evidence of any such notice being give to the plaintiff in this case. He received no list of inventory, no appraisal, and no proper information regarding the impending sale of his goods and chattels. Moreover, the defendant wrongfully disposed of his good and chattels after the lease expired without accounting for the proceeds of sale.

In the circumstances, the court found the distress and disposition of the plaintiff’s goods and chattels to be wrongful and not in compliance with the requirements of the *Commercial Tenancies Act*.

[65] In the immediate case, I find that the distress was irregular and excessive and the disposition of Mr. Cheng’s goods in the store was not in compliance with the requirements of the *Commercial Tenancies Act*. The Plaintiff concedes that there was no auction and there was no proper inventory. The evidence also indicates that there was no appraisal of the goods. The Plaintiff failed to comply with the requirements of the *Commercial Tenancies Act*, s.53. Mr. Cheng is entitled to special damages for the irregularities pursuant to ss. 54 and 55.

[66] The Waiver of Exemption from Distress set out in section 21 of the Lease does not assist the Plaintiff in avoiding damages for non-compliance.

[67] Mr. Cheng claims that the value of the inventory in the store was approximately \$120,000 to \$150,000. The Plaintiff states that when he was operating a store successfully, he carried approximately \$100,000 to \$125,000 in inventory because he was turning over about \$35,000 in sales. The Plaintiff doubts that Mr. Cheng carried that much inventory given his sales. Mr. Cheng submitted an inventory that was completed for his current store which

is 1,000 square feet. The inventory indicates that there is \$81,000 of goods for his current store. Mr. Cheng argues that the store leased from the Plaintiff was 1,700 square feet, much greater than the size of his current store, so \$120,000 was a conservative estimate of the inventory in the store. The Plaintiff argues that the value of \$81,000 in 2014 was \$64,299.50 according to the Bank of Canada website. Mr. Cheng does not object to that calculation.

- [68] Mr. Cheng produced CCTV footage of the store showing the Plaintiff and another individual removing items. The Plaintiff explains that he moved produce because it was starting to rot and some of the produce was put in the rear walk-in cooler to preserve it. The Plaintiff states that the produce was not part of the distress, and he was advised by the bailiff to dispose of it. The Plaintiff submits that he did not see \$70,000 worth of merchandise and that he was advised by the bailiff that it was not worth sending someone to take an inventory.
- [69] Ms. Jian Lei, spouse of Mr. Cheng, states in her Affidavit affirmed on July 27, 2023, that there were at least 200 different types of products when the store was open. She submits a picture of the front of the store shortly before they left. The picture shows cigarettes, candy, gum, containers of ice cream, cereal, hygiene products, Tylenol, and pain relief medication for children. She submits that the picture represents about a sixth of the entire store. She estimates that there was at least \$30,000 of cigarettes, \$2,000 worth of coffee, \$400 of oil, \$240 of spaghetti, and cheese in the amount of \$400.
- [70] The Plaintiff produced a summary of liquidation sales, noting sales on April 28, 2014 in the amounts of \$63.00 and \$1,450.82. The first sale was for a case for apples, toilet paper and Dettol mouthwash. The second liquidation sale invoice dated April 28, 2014, indicates that numerous items including cigarettes were sold to Markett Convenience Store for approximately \$1,450.82. The Plaintiff denied repeatedly at trial that he sold any cigarettes and then retracted his position when he reviewed the invoice.
- [71] Notably, the invoice did not show any cheese and spaghetti as identified by Ms. Lei included in the items sold. The Plaintiff explains that perishables and produce were thrown away, and expired items were also thrown away. The evidence did not include a list of the items thrown away.
- [72] I accept the evidence of Mr. Cheng that the value of the inventory in the store amounted to more than \$1,450.82 and that the inventory was valued at approximately \$120,000. I also accept the evidence of the Plaintiff that the produce and perishables had to be thrown away. The evidence also indicates that the Plaintiff relied on the bailiff for the distress process. I assess damages in the amount of \$81,000 which in today's dollars is equivalent to \$65,000 in 2014. Mr. Cheng produced a credible sample inventory of \$81,000 that a smaller store would carry. The Plaintiff testified that he did not see \$70,000 in inventory in 2014 and \$65,000 is less than that amount. Also, the amount of \$81,000 is much less than the amount of \$100,000 which the Plaintiff submits that a store would carry in inventory.

- [73] I took into account that Mr. Cheng was locked out of the store during the distress and never permitted re-entry even after he paid the bailiff's costs. Only his wife was permitted re-entry. Mr. Cheng was further denied the opportunity to carry on business until the end of the Lease.
- [74] I did not factor the conduct of the Plaintiff relating to the theft in the assessment of damages. However, the fact that the Plaintiff states clearly in the video heard in court that he does not know who the thief is but later reports Mr. Cheng as the thief to the police and testifies at trial that he recognized the thief as Mr. Cheng, undermines the Plaintiff's credibility in the proceedings.

Disposition and Costs

- [75] Based on the above findings of fact, I calculate Mr. Cheng's indebtedness to the Plaintiff as the sum of \$19,118.41 plus interest at 9% per annum. The Plaintiff is estopped from claiming the full amount of the additional rent alleged to be owed. It would be unfair, unjust, and inequitable for the Plaintiff to recover that full amount.
- [76] The Plaintiff shall pay Mr. Cheng damages in the amount of \$81,000 for the distress exercised against Mr. Cheng. The distress was irregular and excessive, and not in compliance with the *Commercial Tenancies Act*.
- [77] The parties may set-off the amounts awarded against the amounts owing to each other. Accordingly, the Plaintiff is liable to pay Mr. Cheng the amount of \$44,627.95.
- [78] If there is a calculation issue, the parties may arrange a time to appear before me.
- [79] Given the divided success of the parties, I am not inclined to award costs to either party. The parties may make written submissions on costs of up to five pages in length, double-spaced, within 30 days.

Justice J.S. Shin Doi

Released: August 27, 2024

CITATION: Longo v. Yu Cheng, 2024 ONSC 4724
COURT FILE NO.: CV-14-510545
DATE: 20240827

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Joseph Longo

Plaintiff

– and –

Henry Yu Cheng and 1791325 Ontario Ltd. c.o.b. as
Daily Fresh Food Market

Defendants

REASONS FOR JUDGMENT

JUSTICE JULIA S. SHIN DOI

Released: August 27, 2024