CITATION NO.: CCPS Land Development Ltd. v. Capital Sewers Services Inc. 2024 ONSC 6099
COURT FILE NO.: CV-22-78280
DATE: November 1, 2024

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: CCPS Land Development Ltd., Plaintiff

-and-

Capital Sewer Services Inc., Defendant

BEFORE: MacNeil J.

COUNSEL: *I. Holloway* – Lawyer for the Plaintiff

Y. Xia – Lawyer for the Defendant

HEARD: May 1, 2024 (via Zoom videoconference)

REASONS FOR DECISION

[1] The plaintiff, CCPS Land Development Ltd. ("CCPS"), has commenced an action against the defendant, Capital Sewer Services Inc. ("Capital Sewer"), seeking damages for loss of rental income, the cost of repairs and other damages related to the defendant's alleged breach of a commercial lease entered into by the parties.

[2] The plaintiff made the within motion for the following relief:

(a) summary judgment, allowing the plaintiff's claim and dismissing the defendant's counterclaim;
(b) in the alternative, an order striking the statement of defence and counterclaim of the defendant; and
(c) in the further alternative, an order compelling production of particulars set out in a demand for particulars filed April 29, 2022, a discovery plan, and attendance of the defendant at an examination for discovery

[3] Capital Sewer defended the action and issued a counterclaim against CCPS for unpaid invoices owing by CCPS and/or Uniflo Drain Services ("Uniflo") for usage of Capital Sewer's facility, equipment, and labour; for damages in respect of the transfer of a waste disposal system; and for contribution and indemnity in respect of any amounts found owing by it to the plaintiff in the main action.

[4] Pleadings have closed but no discoveries have yet taken place.

[5] The parties each served supporting affidavits sworn by their respective principals. Transcripts of cross-examinations on said affidavits were filed.

BACKGROUND

[6] Gary Bates ("Bates") was the President and sole director and officer of the plaintiff, CCPS, at the material times. CCPS is the owner and landlord of the Premises.

[7] David Beswick ("Beswick") is the President and controlling owner of the defendant, Capital Sewer, through his company Capital Infrastructure Group Inc. ("Capital Infrastructure"). Capital Sewer was owned and controlled by Bates through his holding company, G.J. Bates Holdings Inc., until October 31, 2015. On or about that date, Bates transferred his shareholding interest to Capital Infrastructure, which is now the parent company of Capital Sewer ("the Ownership Transfer").

[8] The plaintiff entered into a written commercial lease agreement with the defendant on October 1, 2013 for the premises located at 389 Kenora Avenue (the "Premises") ("the Lease"). The term of the Lease was five (5) years commencing October 1, 2013 and expiring on September 30, 2018. On December 6, 2018, the parties entered into a lease amending agreement which extended the Lease from September 30, 2018 to December 31, 2019, and increased the rent; it also stated that, except as otherwise expressly provided in the amending agreement, all of the terms and conditions of the Lease remained unchanged and in full force and effect. The plaintiff and the defendant verbally agreed to extend the term of the Lease agreement by two additional months, from December 31, 2019, to February 28, 2020. No further lease extensions were agreed to.

[9] Prior to or at the time of the Ownership Transfer, Uniflo was controlled by Bates. Uniflo began using part of the Premises immediately following the Ownership Transfer. The defendant alleges that, as of April 1, 2019, the space occupied by Uniflo increased to 1/3 of the Premises and the Lease was amended, in writing, to reduce the defendant's monthly rent by $6,000 as a result. The defendant alleges that the plaintiff carried on the business of and operated as Uniflo and, as a result, was in fact the subtenant of the Premises from October 2015 to February 2020.

[10] The defendant alleges that, beginning in April 2019, Uniflo had full access to the Premises and used various facilities on the property, including the staff rooms, lunchrooms, bathrooms, offices, changeroom and parking spaces. Uniflo also used the waste disposal facility ("the Dump") operated by the defendant for dumping sewage waste.

[11] The plaintiff alleges that the defendant did not vacate the Premises by February 28, 2020; rather, it ceased to occupy the Premises on April 6, 2020, After the expiry of the Lease, the defendant was still storing at least 755 litres of recyclable waste oil and two large containers of styrene resin on

the Premises. On March 23, 2020, the defendant (by its agent Safety Kleen Canada Inc.) removed the recyclable waste oil from the Premises. However, the defendant made no serious attempt to remove the styrene resin. As a result of the defendant's failure to remove the styrene resin, the plaintiff was forced to engage an environmental contractor to do so. Due to the combined factors of the COVID-19 pandemic and the sheer weight of the styrene resin containers, the environmental contractor could not remove them until October 15, 2020.

[12] The defendant alleges that it vacated the Premises by February 28, 2020 and that, after it had so vacated, Bates and Beswick completed a walk-through of the property at the end of February 2020 and that, during the walk-through, Bates did not raise any issues in respect of the condition of the Premises nor did he request that the defendant repair any damage. (The plaintiff disputes that there was a walk-through as alleged by the defendant.)

[13] The plaintiff alleges that it sent emails to the defendant from March 6 to March 30, 2020, advising: that the defendant was overholding; directing that the defendant perform repair to Premises; and directing the defendant to remove hazardous substances from the Premises. Such notices were ignored by the defendant. As a result, the plaintiff was compelled to perform the repairs, clean up and removal of the hazardous substances.

[14] The defendant disputes that it received effective notice from the plaintiff in respect of any repairs that the defendant was to complete. Rather, a spreadsheet setting out the costs of repairs for the Premises was provided only after repairs had been completed by the plaintiff. The defendant requested supporting documents to review but the invoices were not sent to the defendant until almost two years following the expiry of the Lease. The defendant submits that insufficient evidence has been provided by the plaintiff to conclude that the purported damage claimed was caused by Capital Sewer or its representatives.

[15] The defendant argues that the alleged damage to the Premises is actually normal wear and tear that the plaintiff is obligated to repair under the Lease. While the plaintiff alleges that the Premises had been regularly and properly maintained, there was no documentary evidence provided to support this. The defendant asserts that the need for replacing certain items at the Premises was due to the plaintiff's failure to maintain the property on a regular basis, and that certain of the repairs were an enhancement to the Premises and not repairs for which the defendant can be held responsible.

[16] The plaintiff claims that, on March 9, 2020, it received an offer to lease the Premises from a company by the name of Cup O House Ltd. It was a term of this offer to lease that the tenant would have possession by April 1, 2020. The plaintiff could not accept Cup O House Ltd.'s offer to lease because the defendant was still occupying the Premises. The plaintiff was not able to re-lease the Premises until November 1, 2020. It could not find a new tenant until May of 2021; and did not start leasing the Premises until June 2021.

[17] The defendant's position is that the plaintiff failed to repair the Premises within a reasonable period of time. The defendant also argues that the plaintiff had agreed to Capital Sewer removing certain of the hazardous substances after February 28, 2020, namely, the recyclable waste oil, and that this was removed from the Premises on March 23, 2020; CCPS did not raise any issue with this short delay until the action was commenced. The defendant contends that it was unable to remove the other hazardous substance, being the styrene resin, prior to vacating the Premises because Bates delayed in providing the defendant with the password for accessing the Hazardous Waste Information Network until March 3, 2020. On its own, the plaintiff removed the styrene resin on October 15, 2020.

[18] The defendant argues that a further factor that should be taken into consideration is that the plaintiff's ability to lease the Premises was significantly impacted by the COVID-19 pandemic.

The Lease

[19] There is no dispute between the parties as to the terms of the Lease. The relevant provisions are set out in the following paragraphs.

[20] Article 3.2 of the Lease, which reads as follows:

> The Tenant shall, on the last day of the Term, or upon the sooner termination of the Term, peaceably and quietly surrender and deliver vacant possession of the Premises to the Landlord in the condition and state of repair that they were required to be maintained during the Term or as the Landlord may otherwise require in accordance with section 13.1. If the Tenant fails to comply with the foregoing or its obligations under section 13.1, the Tenant shall at the option of the Landlord be deemed to be an overholding monthly tenant for so long as it may reasonably take to complete the required repairs, removal, restoration or clean-up (the "Overholding Period"). During the Overholding Period, the Tenant shall pay the Rent required by section 3.4 to be paid by an overholding tenant who is overholding without the consent of the Landlord (the "Overholding Rent"), notwithstanding the fact that the Tenant may have vacated the Premises. …

[21] Article 13.1(a) of the Lease which provides, in part, that:

> All Alterations made to the Premises by the Tenant, or made by the Landlord on the Tenant's behalf, whether before or after the Commencement Date … shall become the property of the Landlord immediately upon their installation in the Premises and without compensation to the Tenant. No plumbing, heating, ventilation, air-conditioning or lighting equipment, wiring or electric panels and services, other building services or Leasehold Improvements … shall be removed

from the Premises, except in accordance with section 7.4 and except that the Tenant:

(i) may, at the end of the Term, if not in default, remove its trade fixtures;

(ii) shall, at the end of the Term, remove such of the Leasehold Improvements … in the Premises as the Landlord advises the Tenant in writing (either before or after the expiration of the Term) that it requires to be removed. …;

…

(iv) shall, at the end of the Term, remove from the Premises all of its (whether owned or leased) equipment, inventory, furniture and other personal property not affixed to the Premises; and

…

all such items being removed being called a "Removable Item" or "Removable Items". The Tenant shall, in the case of every removal of a Removable Item, either during or at the end of the Term, make good any damage caused to the Premises or the Building by the installation and removal of any Removable Item, all at the Tenant's sole cost and expense. The Tenant shall also, if required by the Landlord (either before or after the expiration of the Term), restore the Premises to the condition in which they existed on the earlier of the date on which the Landlord provided the Tenant with possession of the Premises and the Commencement Date, reasonable wear and tear excepted (not inconsistent with the maintenance of the Premises as a first class industrial building), including the restoration of such standard fixtures as may have been installed by the Landlord and which were removed or altered by the Tenant.

[22] Article 13.1(c) of the Lease provides, in part, that:

At the end of the Term, the Tenant shall remove from the Premises, at its sole cost and expense, all Hazardous Substances which may have been placed on or brought onto or into the Premises during the Term. The Tenant shall make good any damage caused to the Premises or the Building by the removal of such Hazardous Substances at its sole cost and expense. Notwithstanding section 13.1(b), in no event shall any Hazardous Substances left on the Premises by the Tenant be considered the Landlord's property, except to the extent that the

> Landlord was responsible for any Hazardous Substances being located on the Premise and an environmental study be performed by a third party.

[23] Article 3.3 sets out the provisions dealing with overholding by the tenant. It provides, in sub-Article (d)(ii), that the tenant is required to pay twice the minimum rent as a consequence of overholding unless the landlord has otherwise agreed in writing.

[24] Article 7.1 of the Lease addresses repairs. By 7.1(a), the tenant is obligated to, subject to sections 7.1(b), 7.4 and 15.1, among other things, "… at its sole cost and expense, keep and maintain the Premises and every part thereof in good order, first-class condition and repair… as would a prudent owner". By 7.1(c), if any repairs and replacements that are the responsibility of the landlord to make "… are necessitated as a result of the wilful or negligent act of the Tenant or the Tenant's Employees, the Tenant shall be responsible for the full cost of the repairs and replacements (together with the Landlord's administrative fee of 20% of such costs) (collectively, the "Repair Costs")."

[25] Article 7.2 of the Lease deals with repairs on notice. It reads:

> The Tenant shall commence to repair upon 15 days notice in writing from the Landlord … but the Landlord's failure to give notice shall not relieve the Tenant from its obligation to repair. If, after receiving such notice, the Tenant refuses or neglects to perform the repairs required by section 7.1 to the reasonable satisfaction of the Landlord, the Landlord may, but shall not be obligated to, make such repairs without liability to the Tenant for any loss or damage that may accrue to the Tenant's merchandise, fixtures or other property or to the Tenant's business by reason thereof and upon completion thereof, the Tenant shall pay, as Additional Rent, the Landlord's costs for making any such repairs plus a sum equal to 20% thereof for overhead.

[26] Article 6.1 of the Lease obligates the tenant to pay all utility charges incurred during the term of the Term.

[27] Article 9.00 of the Lease addresses the tenant's obligations with respect to environmental matters generally, and hazardous substances specifically.

[28] Article 17.2 of the Lease provides that, if the assistance of legal counsel is required to, among other things, recover rent or because of a breach of any of the tenant's covenants, "…the Tenant shall pay to the Landlord all expenses incurred therefor, including solicitor fees on a solicitor and his client basis."

[29] Article 17.10 provides the plaintiff, as the landlord, the right to perform the defendant's covenants under the Lease upon giving prior written notice. It reads:

> If the Tenant fails to comply with any of the Tenant's Covenants (the "Unperformed Covenants") and such failure continues after the Landlord has given the Tenant prior written notice of such failure and the cure period set out in such notice has expired, then the Landlord may, at its option, and without waiving or releasing the Tenant from the strict performance of the Tenant's Covenants, perform such of the Unperformed Covenants as the Landlord considers desirable in such manner and to such extent as the Landlord considers desirable and in doing so may pay any necessary and incidental costs and expenses. All amounts paid by the Landlord in exercising its rights in this section, plus an administrative fee equal to 20% of the amounts so paid by the Landlord, together with interest thereon at the rate provided for in section 4.6 calculated from the date of the making of the payment by the Landlord, shall be deemed Additional Rent and shall be paid by the Tenant within 5 Business Days of demand being made on the Tenant for the payment of same.

Procedural history

[30] The plaintiff commenced the action on March 8, 2022. The defendant's statement of defence and counterclaim was filed on April 11, 2022. The plaintiff delivered its reply and defence to counterclaim on October 25, 2022.

[31] On April 29, 2022, the plaintiff served the defendant with a demand for particulars but did not receive a response to same. On June 5, 2022, the plaintiff followed up with the defendant. Ten days later, on June 15th, the defendant's counsel emailed: "Apologies; have meant to get back to you on this for a while now. Will get a response out this week." The defendant never provided particulars or a further response.

[32] On October 8, 2022, the plaintiff provided the defendant with a proposed discovery plan. The plaintiff received no response to that plan. On November 28, 2022, counsel for the plaintiff followed up with the defendant's counsel stating that if the parties do not agree on a discovery plan by December 2, 2022, the plaintiff will unilaterally serve a notice of examination. On December 2, 2022, the defendant's counsel wrote an email stating, "… I'll get you my comments on the discovery plan on Monday [December 5, 2022]." Despite this, the plaintiff never received any further communications from counsel for the defendant with respect to the proposed discovery plan. As a result, in accordance with the plaintiff's counsel's earlier communication, on December 16, 2022, the plaintiff served the defendant with a notice of examination to conduct an examination for discovery on January 20, 2023.

[33] On January 16, 2023 (four days before discovery), counsel for the defendant raised the issue of a potential conflict of interest on the part of the plaintiff's counsel, because its law firm still appeared as the lawyer of record for Capital Sewer in a different legal proceeding commenced against the City of Niagara in November 2017; and advised that the defendant would not be delivering its affidavit of documents or producing a representative for discovery pending the resolution of the conflict of interest issue.

[34] On January 17, 2023, counsel for the plaintiff denied any such conflict of interest. He further communicated that he intended to proceed with the discovery. The next day, January 18th, counsel for the defendant responded to the plaintiff's counsel advising, among other things, that he did not yet have confirmation that there is no claim between Capital Sewer and the City of Niagara and that he hoped to have instructions the following week without the necessity of appointing new counsel. He further advised that the defendant's affidavit of documents "is prepared … but I will hold off on serving it (and on producing my client's representative for discovery) until the conflict issue is resolved." The defendant has not served an affidavit of documents in the within proceeding.

[35] Despite being served with the notice of examination, the defendant's representative, Beswick, did not attend for the examination for discovery. A certificate of non-attendance was issued.

[36] The plaintiff submits that the defendant never directly advised that the issue of the potential conflict of interest was being dropped. Instead, the plaintiff alleges that it learned the defendant was abandoning the conflict issue upon receiving the defendant's "Aide Memoire", dated October 11, 2023, filed to oppose the plaintiff attempting to schedule the within motion. (It is noted that the Aide Memoire contains a copy of correspondence, dated October 2, 2023, sent from the defendant's counsel to the plaintiff's counsel, wherein it states: "In early March this year, Mr. Kopach advised Mr. Holloway that our client's position was to proceed notwithstanding the issue of the potential conflict of interest. Since then, no communication has occurred between the parties …)

[37] The plaintiff alleges that the defendant refused to cooperate with the plaintiff to set a date for the within motion. As a result, there was a contested hearing to schedule it. The plaintiff was successful and the court ordered that the defendant pay $850.00 in costs.

ISSUES

[38] The following are the issues to be determined on this motion:

(a) Is summary judgment allowing the plaintiff's claim and dismissing the defendant's counterclaim appropriate in the circumstances?

(b) Should the defendant's statement of defence and counterclaim be struck?

(c) Should an order be made compelling particulars, a discovery plan, and attendance of the defendant at an examination for discovery?

ANALYSIS

(a) Is summary judgment allowing the plaintiff's claim and dismissing the defendant's counterclaim appropriate in the circumstances?

[39] The parties do not dispute the summary judgment legal principles.

[40] Pursuant to Rule 20.04(2)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, the court shall grant summary judgment if it is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.

[41] Rule 20.04(2.1) sets out the court's powers in determining whether there is a genuine issue requiring a trial. It provides that the court shall consider the evidence submitted the parties and, where the determination is being made by a judge, the following powers can be exercised for this purpose, unless it is in the interest of justice for such powers to be exercised only at a trial: (i) weighing the evidence, (ii) evaluating the credibility of a deponent, and (iii) drawing any reasonable inference from the evidence.

[42] In *Pastink et al. v. 1190393 Ontario Limited et al.*, 2023 ONSC 6037, at para. 6, Fowler Byrne J. identified the following summary judgment principles, which I accept and adopt:

a. There will not be a genuine issue requiring a trial if I am able to reach a fair and just determination on the merits of the motion. This will be the case when I can make the necessary findings of fact, apply the law to those facts, and this is a proportionate and more expeditious means to achieve a just result: *Hryniak*, at para. 49;

b. I should first determine if there is a genuine issue requiring a trial based only on the evidence before me, without resorting to my enhanced fact-finding powers as set out in r.20.04(2.1). If, after this step, it appears that there is a genuine issue requiring a trial, I should then determine if a trial can be avoided utilizing my powers under r.20.04(2.1) and (2.2). Again, this is as long as their use is not against the interests of justice. Their use will not be contrary to the interests of justice if they lead to a fair and just result, and serve the goals of timeliness, affordability, and proportionality, in light of the litigation as a whole: *Hryniak*, at para. 66;

c. The moving party bears the onus of showing that there is no genuine issue requiring a trial. It cannot rely on mere allegations or pleadings. When it has satisfied the court that there is no genuine issue requiring a trial, the burden shifts to the responding party to

prove that their defence has a real chance of success. The responding party cannot rely on allegations or denial. They must set out, in affidavit material or other evidence, specific facts showing there is a genuine issue requiring a trial: *New Solutions Extrusion Corporation v. Gauthier*, 2010 ONSC 1037, at para.12, aff'd 2010 ONCA 348;

d. A party must put their best foot forward on a motion for summary judgment with respect to the existence or non-existence of material issues to be tried: *Broadgrain Commodities Inc. v. Continental Casualty Company (CNA Canada)*, 2018 ONCA 438, at para. 7; *New Solutions*, at para. 12; *Sweda Farms v. Egg Farmers of Ontario*, 2014 ONSC 1200, at para. 32, affirmed 2014 ONCA 878, leave to appeal refused, 2015 CanLII 5860 (S.C.C); and

e. The court is entitled to assume that the record contains all the evidence which the parties will present if there was a trial: *New Solutions*, at para. 12; *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372, at para. 11; *Broadgrain* at para. 7.

Position of CCPS

[43] It is CCPS's position that there is no genuine issue requiring a trial. This is a straight-forward claim for damages due to the defendant's failure to comply with the terms of a signed lease. The process for calculating damages is set out in the Lease. While an assessment of credibility is needed, this can be done without calling any further *viva voce* evidence. While not all of the facts can be resolved on the current record, more evidence is not needed in order to determine the core issues on the merits. The defendant needed to put its best foot forward which it failed to do.

[44] With respect to the summary judgment, the plaintiff submits that the lease terms are clear; the evidence that the defendant has breached is clear; and the calculation of damages is straightforward. Insofar as there is a material conflict in the evidence, the plaintiff argues that such conflict ought to be resolved against the defendant based upon an assessment of credibility with the court's expanded summary judgment powers.

[45] The terms of the Lease are in writing and are not ambiguous. There is no disagreement between the parties as to the terms. An oral extension of the Lease for two months was granted by the plaintiff from December 2019 to February 2020. By February 28, 2020, the defendant was to have vacated the premises. The Lease was clear that vacate did not just mean no longer operating its business. It meant that the Premises was cleaned up, repaired, and in first class condition. The defendant was to have removed its possessions and removed any hazardous waste. The Lease was also clear that, when even one of these requirements was not satisfied, then the tenant was deemed to be overholding, and twice the rent and additional rent and interest were required to be paid for as

long as the overholding continued. The Lease was clear that, insofar as the landlord must do any items, the tenant bears the cost and must also pay the applicable administration fees and interest.

[46] It is the plaintiff's position that, where there is conflicting evidence between the parties, a negative assessment should be made against the defendant. There were a number of examples given by the plaintiff where the defendant's witness, Beswick, was inconsistent in his evidence on materials facts and unreasonable in refusing to concede points in his cross-examination. The plaintiff submits that Beswick is not credible and the evidence of the plaintiff's witness, Bates, should be preferred.

[47] The plaintiff argues that most of the issues that the defendant contends support the need for a trial are not relevant to the material issues that need to be determined. For instance, while a subtenant, Uniflo, was also occupying the Premises, the Lease was between CCPS and Capital Sewer only and there is no evidence that Uniflo did any of the damage which required repair. In any event, the Lease expressly provided that the defendant, as the tenant, is responsible to pay for all of the repairs. The defendant's recourse was to pursue Uniflo if it believed that it caused the damage, and the defendant has not done so.

Position of Capital Sewer

[48] It is Capital Sewer's position that no summary judgment can be made in this action and that this motion is premature since no discoveries have yet occurred. While the terms of the Lease are not disputed, there are still a number of important issues that are in dispute. For instance, what was the unwritten agreement between CCPS and the subtenant, Uniflo, which the defendant argues was a related part of the plaintiff's business; what was the state of the Premises before the Lease and what constitutes normal "wear and tear"; do any of the repairs made by the plaintiff to the Premises constitute "betterment" as opposed to being necessary (i.e., replacement of the garage doors, sprinklers, and sinks).

[49] The defendant submits that a March 6, 2020 email was the first time the plaintiff required repairs and this was only because the defendant was demanding payments from Uniflo. As well, the parties had agreed to a slight delay in the defendant vacating the Premises. The court is unable to make the necessary determinations of credibility based only on the affidavit evidence and cross-examinations thereof. *Viva voce* evidence at trial is required. Important records are not before the court because discovery has not occurred yet.

[50] With respect to the defendant's counterclaim, it relates to invoices that the defendant issued to Uniflo, to the attention of Bates, for use of the Dump and the defendant's skid steer and labour during the months January, February and March 2020, totaling $10,049.32, which remain unpaid. In the eyes of the defendant, Uniflo is part of CCPS and, accordingly, there is no need for a third-party claim.

Discussion

[51] Based on the issues and the evidence before the court, I am persuaded that there is a genuine issue requiring a trial in this case.

[52] In my view, there are a number of findings relevant to the determination of this action that cannot be decided only on the affidavit and cross-examination evidence currently before the court, including:

(a) Did plaintiff waive the February 28, 2020 expiry deadline and consent to some overstay period by the defendant? The March 6, 2020 email from Bates to Laurence Leung of Capital Sewer ("Leung"), copying Beswick, states: "The rent at Kenora hasn't been paid this month can you please look after it. I know you guys are moving out but there is still a lot to move and a number of repairs to be made to the building by the end of the month. …"

(b) What date did the defendant ultimately vacate the property?

(c) What was the state of the Premises when the defendant vacated?

(d) Was the plaintiff required to give notice to the defendant of repairs the defendant was required to complete (see Article 7.2)? And, if so, was sufficient notice given?

(e) Was the plaintiff required to first give the defendant an opportunity to perform any of the repairs (see Article 7.2)?

(f) Was the plaintiff required to give notice to the defendant to "restore the Premises to the condition in which they existed on the earlier of the date on which the Landlord provided the Tenant with possession of the Premises and the Commencement Date, reasonable wear and tear excepted (not inconsistent with the maintenance of the Premises as a first class industrial building)" (see Article 13.1(a))? And, if so, was sufficient notice given?

(g) What was the reasonable amount of time to take to complete the required repairs, removal, restoration or clean-up of the Premises (see Article 3.2)?

(h) Do any of the repairs claimed by the plaintiff constitute "reasonable wear and tear to the Premises" (see Article 7.1(a)(b))?

(i) Do any of the repairs claimed by the plaintiff constitute "betterments" or "improvements" (e.g., sinks, irrigation system to the front yard)?

(j) Given that Article 9.2(e) of the Lease provides that the defendant shall remove from the Premises all hazardous substances "upon the expiry of the Term", was some reasonable time to be granted for the defendant to satisfy its obligation in this regard?

(k) Is Uniflo related to the plaintiff such that CCPS may have responsibility to pay the invoices submitted to Uniflo by the defendant, as per the counterclaim? The March 6, 2020 email from Bates to Leung states: "… I just signed your two cheques for the dump would you like me to drop them in the mail?" The email is signed "Gary Bates, President, G Bates Plumbing, Uniflo Drain Service, Bates Group Inc."

(l) What is the obligation, if any, of Uniflo for any damage and/or repairs needed to the Premises and can the plaintiff be held responsible for same?

(m) Did the plaintiff continue to use the Dump after the defendant left?

(n) Was maintenance and repair of the crane the responsibility of the defendant?

(o) As it relates to mitigation, did the plaintiff complete the repairs and remove the hazardous waste within a reasonable period of time?

(p) Were the Premises regularly maintained by the plaintiff?

(q) Is there any significance to the plaintiff listing the Premises for sale/lease in March 2020 and then, again, in July 2020?

(r) Was Cup O House Ltd.'s offer to lease the Premises a firm offer? Why was the lease not entered into?

(s) What was the impact of the COVID-19 pandemic on either of the parties' mitigation efforts? Does Article 18.2, "Impossibility", apply in those circumstances?

(t) Where is the proof of payment of the subject repair invoices?

[53] I do not agree with the plaintiff's characterization of this motion as a simple payment to be made on outstanding invoices. I find that the defendant has raised valid concerns about which repairs fall within the defendant's responsibility, and whether the defendant's obligation to repair was in fact triggered in the circumstances. There is also the issue of whether or not the plaintiff is responsible in any way for the conduct of Uniflo and, if so, whether any conduct by Uniflo impacts on the damages claimed. More particularized evidence respecting the damages claimed by both parties is needed by way of oral evidence at trial. In addition, more particularized evidence relating to each of the parties' mitigation efforts is required. While cross-examinations were held on the filed affidavits, a review of the transcripts is not sufficient to determine credibility.

[54] With respect to the overholding claim, there is a potential question raised by the March 6, 2020 email from Bates whether there was a conditional waiver by the actions of the plaintiff.

[55] Summary judgment will provide a fair and just adjudication when the procedure "gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to

resolve the dispute": see *Hryniak*, at para. 50. A judge must be confident that he or she can fairly resolve the dispute: see *Hryniak*, at para. 57. In *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450, at para. 44, the Court of Appeal discussed the difficulty faced by a summary judgment motion judge in trying to make findings of fact where credibility is a central issue:

> What happened here illustrates one of the problems that can arise with a staged summary judgment process in an action where credibility is important. Evidence by affidavit, prepared by a party's legal counsel, which may include voluminous exhibits, can obscure the affiant's authentic voice. This makes the motion judge's task of assessing credibility and reliability especially difficult in a summary judgment and mini-trial context. Great care must be taken by the motion judge to ensure that decontextualized affidavit and transcript evidence does not become the means by which substantive unfairness enters, in a way that would not likely occur in a full trial where the trial judge sees and hears it all.

[56] In this case, performance under the agreement cannot properly be determined in a summary manner.

[57] I am required by *Hryniak* and Rule 20 to consider whether using the court's expanded fact-finding powers on a summary judgment motion would allow me to fairly resolve the issues in this case. In my view, there is no discrete issue that could be determined on a mini-trial that would resolve the proceeding. In the circumstances, I find that using the fact-finding powers will not shorten or reduce the resources or time needed to determine this matter compared to a trial. Accordingly, I decline to exercise my discretion to do so.

[58] I find that a fulsome record of evidence and cross-examination of the facts and issues is required to make dispositive findings, and this can only be achieved by way of a trial.

[59] In this case, I find that there is a genuine issue for trial with respect to the agreement and relationship between the parties, and the performance of each party under the agreement. These are not issues that can be resolved on the basis of the affidavit evidence before me given the clear conflict in that evidence.

[60] Based on the record before me, I am unable to make the necessary findings of fact and apply the law to those facts. As a result, a fair and just adjudication of the case on its merits cannot be achieved on this summary judgment motion.

(b) Should the defendant's statement of defence and counterclaim be struck?

[61] Rule 34.15(1)(b) of the *Rules of Civil Procedure* provides that, where a person fails to attend at the time and place fixed for an examination in a notice of examination served, the court may, where the person is to be examined on behalf of a party, dismiss the party's proceeding or strike out the party's defence.

[62] A dismissal under this rule is rarely made and, typically, the party's representative is ordered to re-attend. The court does not apply a "zero tolerance approach" unless the party's non-compliance is contumelious or where actual prejudice can be demonstrated: *Gomommy Software.com Inc. v. Blackmont Capital Inc.*, 2014 ONSC 2478 (Div. Ct.), at para. 2.

Position of CCPS

[63] The plaintiff seeks sanctions against the defendant up to and including striking its pleading for allegedly uncooperative and inappropriate conduct throughout the litigation thus far. The defendant has not served an affidavit of documents to date, sworn or unsworn. The defendant has not responded to the demand for particulars served by the plaintiff. Although requested on a number of occasions, the defendant did not agree to or discuss the discovery plan proposed by the plaintiff. Finally, the representative of the defendant, David Bewsick, failed to attend to be examined for discovery despite being duly served with a notice of examination. The defendant's unsupported claim that the defendant's lawyer was in a conflict of interest supports a pattern of delay on the part of the defendant.

[64] Considering the defendant's conduct to date and based upon a general assessment of the merits of the defence, the plaintiff submits that this would be an appropriate case to strike the defendant's statement of defence and counterclaim. The plaintiff relies on *Northstone Homes Ltd. v. Wu*, 2021 ONSC 5173, wherein the court struck the Defendant's counterclaim and awarded substantial indemnity costs for failing to cooperate with the plaintiff.

Position of Capital Sewer

[65] The defendant submits that the non-attendance of its representative at the examination for discovery was due to an apparent conflict of interest. Correspondence was exchanged. In early March 2023, the defendant's counsel advised counsel for the plaintiff that he had been instructed to proceed with this litigation. Since that time up to service of the within motion, there were no further discussions between the parties about rescheduling discovery. The plaintiff's counsel did not reach out to reschedule the examination of Beswick nor did it bring a motion to reschedule. Since Mr. Holloway remained lawyer of record for Capital Sewer, the potential for conflict existed. It was an unexpected event. There is no basis to strike Capital Sewer's pleadings and the matter should be permitted to proceed to oral discoveries. The defendant relies on *1196158 Ontario Inc. v. 6274013*

Canada Ltd., 2012 ONCA 544, at para. 19, wherein the Court of Appeal held that some latitude should be allowed for technical non-compliance due to unexpected and unusual contingencies that make it difficult for a party to comply with procedural rules.

Discussion

[66] In *Northstone*, the defendant had failed to comply with court orders, failed to disclose relevant documents, and refused to answer relevant discovery questions. Further, the defendant in that case filed no responding materials to the motion to strike its pleadings and for judgment on the claim, it provided no position on the motion, and did not ultimately appear. The court struck the set-off defence and counterclaim but permitted the defendant to comply with the order to serve his affidavit trial evidence and have a limited role at the trial of the action. The court held that the defendant had failed to pursue his set-off defence and counterclaim in any meaningful way. He had not complied with disclosure obligations, refused relevant discovery questions on discovery, and provided no indication of when, if at all, he intends to provide evidence supporting his positions on deficiencies, incomplete work, and other claims. The court held that the trial was effectively commenced with delivery of Northstone's trial evidence and, in such circumstances, there could not be an orderly or fair adjudication of the defendant's set-off defence or counterclaim. Accordingly, it was appropriate that the pleadings be struck.

[67] I find that the case before me is very different than that in *Northstone*. Here, while the delays no doubt have been frustrating for the plaintiff, the defendant has not demonstrated an indifference or intention not to further engage in this proceeding or defend the action, as was found in *Northstone*. If the plaintiff required particulars in order to respond to the counterclaim, a motion for particulars under Rule 25.10 of the *Rules of Civil Procedure* was available to it with costs sought against the defendant. I am also satisfied that the potential conflict of interest was an unusual circumstance that the defendant was entitled to raise. I am unable to determine from the record whether the plaintiff actually received notice from the defendant's counsel in March 2023 that the conflict of interest was no longer being pursued. If such information was communicated, then both parties ought to have engaged at that time in discussions to move this matter along.

[68] In the circumstances, I conclude that striking the defendant's defence, a "draconian remedy", is not warranted. Rather, it is in the interest of justice for the action and counterclaim to be determined on their merits. The defendant should be provided an opportunity to cure its default by an order directing the parties to proceed to discovery.

(c) Should an order be made compelling particulars, a discovery plan, and attendance of the defendant at an examination for discovery?

[69] Rule 29.1.03 of the *Rules of Civil Procedure* provides that the parties to an action shall agree to a discovery plan, in writing, in accordance with that rule before the earlier of 60 days after the

close of pleadings or such longer period as the parties may agree to and attempting to obtain the evidence. Pursuant to Rule 29.1.05(2), if the parties fail to agree to a discovery plan, the court may order that examinations for discovery be conducted according to a schedule and terms that are just.

[70] Both parties made submissions to the effect that, if the summary judgment motion was dismissed, a timetable should be set.

[71] I have reviewed the proposed discovery plan that was sent to the defendant's counsel on behalf of the plaintiff. It was very general in nature and provided that the intended scope of documentary evidence would be the parties' affidavit of documents; and set out dates by which the parties would exchange their affidavits of documents, attend oral discoveries, and provide answers to undertakings.

[72] I have also reviewed the plaintiff's demand for particulars, dated April 28, 2022, and the plaintiff's Reply and Defence to Counterclaim, dated October 25, 2022, both served on the defendant. I find that the particulars requested were ultimately not necessary to enable the plaintiff to plead to the counterclaim. As a result, I decline to order particulars of the defendant's counterclaim allegations at this point.

[73] Accordingly, I order that the following timetable shall apply:

(i) The defendant shall serve its affidavit of documents within 30 days after the release of this decision.

(ii) Examinations for discovery shall be completed within 60 days after the service of the defendant's affidavit of documents.

(iii) Answers to undertakings shall be completed for both parties within 60 days following the completion of the examinations for discovery.

(iv) Motions related to undertakings and refusals, if any, shall be made within 30 days following the delivery of the answers to undertakings.

(v) This timetable can be varied by written agreement of the parties.

(vi) If the defendant's representative fails to attend their examination for discovery without reasonable excuse, the plaintiff may move on notice to have the defendant's defence struck and counterclaim dismissed.

[74] While the proposed discovery plan also referred to the possibility of mediation, I will not make an order in that regard. Certainly, the parties can agree to mediation if they wish.

COSTS

Position of CCPS

[75] The plaintiff seeks costs on a full indemnity basis. It relies on jurisprudence where, whether in respect of discrete procedural steps or more generally, the court has awarded elevated costs against uncooperative litigants: see *Rooke v. Deloitte*, 2023 ONSC 1046; *Gandhi v. Migahed*, 2020 ONSC 7791; *Van-Rob Inc. v. Rapid Metals LLC*, 2016 ONSC 2242; *Lambert v. Maracle*, 2020 ONSC 1282; and *Bulk Estate v. Canasia Power Corp.*, 2014 ONSC 4042 (aff'd on appeal at 2015 ONCA 352).

Position of Capital Sewer

[76] The defendant submits that its conduct has not been of a "reprehensible, scandalous or outrageous" nature warranting an awarding of elevated costs to the plaintiff. The plaintiff chose to bring its summary judgement motion instead of proceeding with discoveries. The plaintiff did not make a motion under Rule 25.10 for an order that particulars be delivered. The particulars sought by the plaintiff were within the plaintiff's knowledge and, in any event, were not needed since the plaintiff was able to serve its reply and defence to counterclaim without them. Rule 20.01(1) does not require that an affidavit of documents be served before a summary judgment motion. The defendant submits that it met the timetable that was ordered by the court for the summary judgment motion.

Discussion

[77] In *Net Connect Installation Inc. v. Mobile Zone Inc.*, 2017 ONCA 766, at para. 8, the Court of Appeal held:

> An award of costs on an elevated scale is justified in only very narrow circumstances – where an offer to settle is engaged or where the losing party has engaged in behaviour worthy of sanction: *Davies v. Clarington (Municipality)* (2009), 2009 ONCA 722 (CanLII), 100 O.R. (3d) 66 (C.A.) at para. 28. Substantial indemnity costs is the elevated scale of costs normally resorted to when the court wishes to express its disapproval of the conduct of a party to the litigation. It follows that conduct worthy of sanction would have to be especially egregious to justify the highest scale of full indemnity costs.

[78] While I have not granted summary judgment or struck the defendant's pleadings, the plaintiff has been partially successful on this motion so it is entitled to some costs. In my view, there was no conduct by the defendant that warrants elevated costs.

[79] The Costs Outline submitted by the plaintiff relates to the entirety of the action in light of its request for summary judgment. It is not clear what portion of those costs relate to the timetable

portion of the motion upon which the plaintiff was ultimately successful. I also take into consideration the fact that the motion may not have been necessary if the parties had engaged in better communication.

[80] In the circumstances, I find that a fair, reasonable and proportionate amount of costs payable by the defendant to the plaintiff in respect of this motion is $6,000.00, on a partial indemnity basis, all inclusive, payable within thirty (30) days.

DISPOSITION

[81] For the foregoing reasons, the motion for summary judgment and a striking of the defendant's pleadings is dismissed.

[82] The parties are hereby ordered to comply with the timetable set out above in paragraph 73.

[83] The defendant is ordered to pay costs to the plaintiff of this motion fixed in the amount of $6,000.00, payable within 30 days.

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MacNEIL J.

Released: November 1, 2024