Citation: 2024 NBKB 136
Date: July 4, 2024

COURT FILE NO: FC-149-2022

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF FREDERICTON

BETWEEN:

711 WOODSTOCK HOLDINGS INC.,

Plaintiff,

-and-

FREDERICTON MONTESSORI ACADEMY INC.,

Defendant.

Date of Hearing:	January 16, 2024
Date of Decision:	July 4, 2024
Subject Matter:	Summary Judgment; Implied Surrender of Lease
Before:	Justice Terrence J. Morrison
At:	Burton, New Brunswick
Appearances:	John Morse and Sean Corscadden for the Plaintiff
	Romain Viel and Tyler Ryan for the Defendant

DECISION

Morrison, J.

I. INTRODUCTION

[1] This is a Motion brought by 711 Woodstock Holdings Inc. ("Woodstock Holdings") for summary judgment against its former tenant, Fredericton Montessori Academy Inc. ("FMA") for outstanding rent and other charges pursuant to a lease between them. Among those other charges is a claim by Woodstock Holdings for solicitor-client costs.

II. FACTUAL BACKGROUND

[2] Woodstock Holdings leased a potion of a commercial property located at 711 Woodstock Road, Fredericton, New Brunswick (the "Premises") to FMA for the purpose of operating a private school pursuant to a lease dated as at September 15, 2017 (the "Lease"). In September 2017, FMA began operating at the premises. FMA also operated programs out of another location.

[3] In March 2020, the COVID-19 pandemic had an impact on FMA's business and it sought to consolidate all of its operations at one location. On March 13, 2020, FMA sent an email to Woodstock Holdings, indicating that due to unexpected growth in its business it required a larger space. FMA inquired about the ramifications of breaking the Lease (Record, p. 209).

[4] In response, Woodstock Holdings provided FMA with three options: (1) If FMA found a building that met their requirements, Woodstock Holdings would purchase the building and FMA could rent that building; (2) If FMA found a space that met their requirements, Woodstock Holdings would purchase the space, and the defendant could rent that space; or (3) FMA must find a tenant willing to rent the Premises at no cost to Woodstock Holdings.

[5] In reply, also on March 13, 2020, FMA indicated that it had found an alternative space that would accommodate its growing needs at an affordable price.

[6] Without notice to Woodstock Holdings, FMA abandoned the Premises in July 2020.

[7] Woodstock Holdings, with the knowledge and cooperation of FMA, made efforts to find a sub-tenant, and there is evidence that FMA made efforts on its own behalf in this regard. These efforts proved unsuccessful.

[8] Following abandonment of the Premises, FMA continued to make periodic partial rent payments, however these did not satisfy FMA's full rent obligations. In January 2022, FMA made its last payment of any kind to Woodstock Holdings.

[9] According to FMA, on February 23, 2022, FMA discovered that the Premises contained shelving, tables, chairs, boxes and office materials. Based upon the status of the Premises, FMA treated the Lease as terminated and stopped making any payments on account of

rent. The evidence of Woodstock Holdings is that between January and March 2022, it used the Premises for storage and has deducted 3 months' rent from the amount of its claims against FMA.

[10] On June 13, 2022, Woodstock Holdings commenced the within action against FMA.

[11] The Lease expired on September 14, 2022.

III. SUMMARY JUDGMENT - PRINCIPLES

[12] The legal landscape for summary judgment changed markedly with the Supreme Court of Canada decision in *Hryniak v. Mauldin*, 2014 SCC 7, wherein the Court directed a "cultural shift" in the use of summary judgment. Courts are encouraged to be bold in their application of summary judgment to expedite access to justice where matters can be fairly adjudicated without the need for a full-blown trial. The test for issuing summary judgment is simply whether there is a genuine issue requiring a trial (*O'Toole v. Peterson*, 2018 NBCA 8, at para. 68). There will be no genuine issue requiring a trial when the process allows the judge to make the necessary findings of fact and reach a fair and just determination on the merits (*Hryniak*, at para. 49). Nevertheless, there are cases where the summary judgment process does not give a judge confidence that they can find the necessary facts and apply the law based on the motion record. In such cases, summary judgment can never be a proportionate way to resolve the dispute and must be rejected (*Hryniak*, at para. 50).

[13] In *Estephan v. Dykeman et al.*, 2020 NBQB 65, I summarized the principles established by *Hryniak* and clarified by our Court of Appeal in *O'Toole v. Peterson, supra* and *Russell et al v. Northumberland Co-Operative Ltd.*, NBCA 70 as follows, at para. 14:

> In *Russell et al v* Northumberland *Co-Operative Ltd.*, 2019 NBCA 70, the Court of Appeal expanded on the import of the 2017 amendments. The key points from *O'Toole* and *Russell* can be summarized as follows:
>
> 1. The only test for *summary* judgment is whether there is a genuine issue requiring a trial;
> 2. The burden of proof is on the moving party to establish there is no genuine issue requiring a trial and it is on the balance of probabilities;
> 3. The importance of the parties putting their best foot forward and leading trump or risk losing is more significant under the new Rule 22;
> 4. The rule provides for a two-step process to determine whether there is a genuine issue requiring a trial;
> 5. In step one the judge must determine if the evidence presented reveals a genuine issue requiring a trial. If, on the filed evidence alone, the judge can fairly and justly adjudicate the dispute there will be no genuine issue requiring a trial and the judge **must** grant summary judgment;
> 6. If the judge cannot adjudicate the dispute on the filed evidence he will proceed to step two. A judge only proceeds to step two if the assessment of the filed evidence leads to the conclusion that there **may** be a genuine issue requiring a trial. The judge will then determine if a trial can be avoided by resorting to the fact-finding powers of Rules 22.04(2) and (3) (the "mini-trial");
> 7. The guiding principle is that it will always be in the interest of justice for a judge to make use of the mini-trial where possible.

[14] The fact-finding powers of the Court are enhanced by Rule 22.04(2), which provides:

> 24.02(2) In determining whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and may exercise any of the following powers for the purpose, unless it is in the interests of justice for those powers to be exercised only at a trial:
>
> (a) weighing the evidence;
> (b) evaluating the credibility of a deponent; and
> (c) drawing a reasonable inference from the evidence.

[15] Summary judgment is particularly well-suited to contractual issues where, as here, there are no significant factual controversies regarding the issue of liability and the matter can be fairly adjudicated on principles of law and contractual interpretation (*Burlock et al. v. Hay*, 2019 NBQB 141, at paras. 8-10).

IV. ANALYSIS AND DECISION

A. The Flooding Allegation

[16] In the affidavit of Laura McDonald, filed on behalf of FMA, she deposes that the Premises flooded twice prior to March 2020, requiring FMA to temporarily relocate for two weeks on each occasion. In her affidavit, Ms. McDonald suggests that the flooding informed her conclusion that the Premises were no longer suitable for FMA.

[17] There is no evidence that FMA raised any issues with the flooding at the time that the floods occurred. Furthermore, the reasons given by FMA for its decision to look for new space did not include any reference to the floods. There is a dearth of evidence surrounding the floods and their impact on FMA. In the absence of such evidence, it is impossible to determine if the floods constituted a fundamental breach of the Lease by Woodstock Holdings which would justify repudiation by FMA. Finally, the issue of the flooding was not raised in oral argument by FMA's counsel, and it was not identified by that counsel as an issue to be determined by the Court.

B. Mitigation – Canada Emergency Commercial Rent Assistance Program

[18] In response to the COVID-19 pandemic, the federal government introduced the Canada Emergency Commercial Rent Assistance Program (the "CECRA program"). The CECRA program provided for forgivable loans to commercial property owners to cover a portion of their tenants' rent, which in turn would result in a reduction of a portion of the tenant's rent. To be eligible, tenants had to meet certain eligibility requirements, including that they demonstrated that they experienced a 70% decrease in pre-COVID-19 revenues (Record, p. 177).

[19] On May 12, 2020, Ms. McDonald sent an email to Mr. Lean of Woodstock Holdings, asking that it participate in the CECRA program (Record, p. 171). Woodstock Holdings responded that details of the program had not yet been provided by the federal government. It added that "as soon as we are able to determine the eligibility criteria we will definitely be in touch". The matter then seemed to have been dropped and there is no evidence that either party pursued participation in the CECRA program.

[20] On July 28, 2021, Ms. McDonald sent an email to Mr. Lean wherein she stated in part: "… but I also want you to keep in mind that as our landlord you had a responsibility and opportunity to work with the government during the time that assistance was given due to COVID".

[21] I reject FMA's claim that Woodstock Holdings failed to mitigate its damages by not participating in the CECRA program. First, for reasons explained later in this decision,

Woodstock Holdings had no duty to mitigate its damages. Second, the matter of participation in the CECRA program was raised in a general and non-specific manner in May 2020. It was not raised again by FMA until 14 months later, and a year after it abandoned the Premises. One could be forgiven for considering the July 28, 2021 email from Ms. McDonald as self-serving. Third, there is no evidence that FMA would have met the eligibility criteria. If it had met the eligibility criteria, it was incumbent on FMA to provide that information to Woodstock Holdings. There is no evidence that it did so.

C. *Surrender By Operation of Law?*

[22] Recall that Woodstock Holdings (or an affiliated corporation) began occupying the Premises for the storage of office equipment in January of 2022. FMA claims that it was not given any notice by Woodstock Holdings that it was re-letting or taking possession of the Premises. FMA submits that by either re-letting the Premises or using the Premises for its own use, Woodstock Holdings surrendered the Lease by operation of law and is therefore not entitled to any claim for rent after January 2022.

[23] In response, Woodstock Holdings submits that it made it clear to FMA that it was insisting on enforcing the terms of the Lease, and its entering into possession of the Premises was for the benefit of FMA. In these circumstances, Woodstock Holdings submits that there was no surrender of the Lease.

[24] The leading case with respect to the remedies available to a landlord when a tenant repudiates a commercial lease is *Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd.*, [1971] SCR 562. That case involved a 15-year lease for retail space in a newly developed shopping mall. The tenant covenanted to use the space as a supermarket for the entire term of the lease. The mall was not successful and the tenant abandoned the premises. The landlord retook possession, reconfigured the space and leased it to new tenants. In *Highway Properties*, the issue was whether by re-entering the premises the landlord had taken possession such that it was precluded from recouping the shortfall on rent as between the tenant and the new lessees. At paragraph 14, Justice Laskin set out the courses of action available to a landlord on repudiation:

> 14 The developed case law has recognized three mutually exclusive courses that a landlord may take where a tenant is in fundamental breach of the lease or has repudiated it entirely, as was the case here. **(1) He may do nothing to alter the relationship of landlord and tenant, but simply insist on performance of the terms and sue for rent or damages on the footing that the lease remains in force. (2) Second, he may elect to terminate the lease, retaining of course the right to sue for rent accrued due, or for damages to the date of termination for previous breaches of covenant. (3) Third, he may advise the tenant that he proposes to re-let the property on the tenant's account and enter into possession on that basis.** Counsel for the appellant, in effect, suggests a fourth alternative, namely, that the landlord may elect to terminate the lease but with notice to the defaulting tenant that damages will be claimed on the footing of a present recovery of damages for losing the benefit of the lease over its unexpired term. One element of such damages would be, of course, the present value of the unpaid future rent for the unexpired period of the lease less the actual rental value of the premises for that period. Another element would be the loss, so far as provable, resulting from the repudiation of cl. 9. I say no more about the elements of damages here in view of what has been agreed to in that connection by the parties.[Emphasis added]

[25] As mentioned, FMA points to the fact that Woodstock Holdings did not give contemporaneous notice in January of 2022 that it was re-entering/re-letting the Premises on FMA's account. FMA submits that Woodstock Holdings retaking possession without such notice resulted in an implied surrender of the Lease by Woodstock Holdings. An implied surrender

results when a landlord, upon repudiation by the tenant, does an act inconsistent with the continued existence of the lease (*Highway Properties*, para. 17). FMA says that Woodstock Holdings re-entering without notice is inconsistent with the continued existence of the Lease.

[26] In *Weins Canada Inc. v. Ensil Corporation*, 2019 ONSC 5406, relied upon by FMA, the Court reiterated the law on implied surrender referred to in *Highway Properties* and stated that where the landlord's conduct is inconsistent with the continued existence of the lease, that conduct precludes the landlord from taking the position that the lease is still in existence. It is a form of estoppel (*Weins*, para. 41). At para. 39, the Court then commented on what the landlord can do to avoid the estoppel:

> 39 If the landlord chooses to keep the lease alive and re-rent on behalf of or for the account of the defaulting tenant, the landlord should give notice to the tenant that the re-renting is on the tenant's behalf. The notice prevents this choice of remedy by the landlord from being mistaken for the remaining choice of terminating the lease. By giving notice, the landlord is able to demonstrate that it is not terminating the lease but rather it is using the premises for rental income pursuant to the tenant's lease, which remains alive.

[27] In the recent case of *The Canada Life Assurance Company et al. v. Aphria Inc.*, 2023 ONSC 6912, the tenant signed a 10-year lease. For its own business reasons, the tenant had no further need for the premises and vacated the premises after 3 years. The tenant sent a notice of repudiation with an offer to pay rent for 4 months. The landlord responded, rejecting the tenant's repudiation and advised the tenant that it remained obligated to fulfill its covenants under the lease. The Court outlined the existing state of the law at paragraph 2:

> 2 The precedent in issue addresses whether a landlord has an obligation to take steps to mitigate or avoid losses when a tenant unilaterally attempts to bring a lease to an end. Currently, the law provides that a landlord need not accept the tenant's repudiation of the lease and may insist on the performance of the lease. The landlord may sue for rent as it becomes due and has no obligation to mitigate the loss by re-

letting the premises. The defendant is a tenant and says that, among other reasons, the precedent is out of step with the law of mitigation and ought to be revisited.

[28] In finding in favour of the landlord, the Court stated at paragraphs 37-38:

> 37 The Ontario Court of Appeal has considered *Highway Properties* in several contexts, but most addressed scenarios where the landlord did mitigate: see for example, *Toronto Housing Co. Ltd. et al. v. Postal Promotions Ltd.* (1982), 1982 CanLII 1982 (ON CA), 39 O.R. (2d) 627 (Ont. C.A.).
>
> 38 In 1997, in a short endorsement in *Almad Investments Ltd. v. Mister Leonard Holdings Ltd.*, 1996 CanLII 412 (Ont. C.A.), the Court of Appeal was unequivocal that **the duty to mitigate does not apply where a landlord continues to insist on the performance of the lease.** In an endorsement in that case, the Court commented as follows:
>
> > In this case the respondent landlord elected to do nothing to alter the relationship of landlord and tenant but simply insisted on performance of the terms of the lease and sued for rent on the footing that the lease remains in force. **In these circumstances, the decision of the Supreme Court of Canada in *Highway Properties Limited v. Kelly Douglas & Co.* [cite omitted] confirms that the landlord has no duty to mitigate.** Although the question of a duty on the landlord to mitigate has been the subject of comment, Highway Properties has not been overruled on this point. As the respondent pointed out, the appellant is still entitled to look for a new tenant and sublet the space. [Emphasis added]

[29] The question of whether the conduct of Woodstock Holdings resulted in the surrender of the Lease has two elements: (1) Was the retaking of possession in January 2022 inconsistent with the continued existence of the Lease?; (2) If so, was FMA given notice that Woodstock Holdings intended to keep the Lease alive, thereby preventing the implied surrender (more accurately, preventing the estoppel)?

(1) Inconsistent With the Continued Existence of the Lease?

[30] The Lease provides as follows at article 15.2(a) and (b):

> 15.2 Remedies
>
> If and whenever an Event of Default occurs, the Landlord shall have the following rights and remedies, exercisable immediately and without further Notice at any time while the Event of Default continues:
>
> (a) to terminate this Lease and re-enter the Premises. The Landlord may remove all Persons and property from the Premises and store such property at the expense and risk of the Tenant or sell or dispose of such property in such manner as the Landlord sees fit without Notice to the Tenant. Notwithstanding any termination of this Lease, the Landlord shall be entitled to receive Rent and all Rental Taxes up to the time of termination plus accelerated Rent as provided in this Lease and damages including, without limitation: (i) damages for the loss of Rent suffered by reason of this Lease having been prematurely terminated; (ii) costs of reclaiming, repairing and re-leasing the Premises; and (iii) legal fees and disbursements on a solicitor and client basis;
>
> (b) to enter the Premises as agent of the Tenant and to relet the Premises for whatever length of time and on such terms as the Landlord in its discretion may determine including, without limitation the right to: (i) take possession of any property of the Tenant on the Premises; (ii) store such property at the expense and risk of the Tenant; (iii) sell or otherwise dispose of such property in such manner as the Landlord sees fit; and (iv) make alterations to the Premises to facilitate the reletting. The Landlord shall receive the rent and proceeds of sale as agent of the Tenant and shall apply the proceeds of any such sale or reletting first, to the payment of any expenses incurred by the Landlord with respect to any such reletting or sale, second, to the payment of any indebtedness of the Tenant to the Landlord other than Rent and third, to the payment of Rent in arrears, with residue to be held by the Landlord and applied to payment of future Rent as it becomes due and payable. The Tenant shall remain liable for any deficiency to the Landlord.

[31] In January 2022, Woodstock Holdings took possession of the Premises. Under the above provisions of the Lease, it could either terminate the Lease or re-enter the Premises as agent for the tenant and relet the Premises. As discussed below, the evidence is that Woodstock Holdings elected the second option. Upon doing so, it had a contractual obligation to apply any rents received against that owing by FMA.

[32] The evidence of Mr. Lean is that the Premises were used by Woodstock Holdings for storage for 3 months, and 3 months' rent has been deducted from its claim. Although there is some dispute as to the length of Woodstock Holdings' use of the Premises (discussed below), in my view, Woodstock Holdings acted in accordance with the provisions of article 15.2(b) of the Lease on retaking possession of the Premises in January 2022. Accordingly, it cannot be said that its conduct was inconsistent with the continued existence of the Lease.

[33] In *Highway Properties*, the Court noted the significance of respecting contractual obligations of the lease. Justice Laskin stated that it is no longer tenable to ignore the contractual obligations of the lease, especially with regard to contractual remedies (*Highway Properties*, para. 29).

[34] In *Eddy Housing Ltd. v. C. Langlais and Sons Ltd.*, (1983) 50 NBR 2d 25, the tenant abandoned the premises before the lease expired and the landlord took possession and attempted to relet the premises. The lease contained an acceleration clause. Justice Higgins quoted the above-mentioned paragraph 29 in *Highway Properties* and found that, where a landlord re-entered in an attempt to relet the premises for its own and the tenant's benefit, the landlord can recover loss of future rent.

[35] As noted above, the Lease provided that Woodstock Holdings could take possession, apply any offset rent to the account of FMA and that FMA would remain liable for any deficiency to Woodstock Holdings. That is precisely what occurred in this case. The conduct

of Woodstock Holdings in re-entering the Premises was not inconsistent with the continuation of the Lease. It was done in accordance with the provisions of the Lease.

(2) Was Notice Given to FMA?

[36] Even if one considered Woodstock Holdings' conduct to be inconsistent with the continuation of the Lease, was FMA on notice that the retaking of possession was for FMA's benefit? There is no evidence that Woodstock Holdings gave FMA specific, contemporaneous notice that it was re-entering the Premises in January 2022. However, the Record is replete with evidence that Woodstock Holdings advised FMA that it expected FMA to uphold its obligations under the Lease and that any reletting was for the benefit of FMA. Much of this evidence is set out in paragraphs 90-91 of Woodstock Holdings' Brief on Motion and can be summarized as follows:

> On **March 13, 2020**, Woodstock Holdings contacted their commercial broker and introduced them to Laura McDonald of FMA in an attempt to facilitate re-letting the Leased Premises.(Record, p. 206)
>
> On **June 15, 2020**, Woodstock Holdings informed FMA that they were outstanding in the amount of $2,950.92. (Record, p.211)
>
> On **November 18, 2020**, Woodstock Holdings informed FMA that the Leased Premises was being listed by 711 Woodstock with commercial realtors Jim Yerxa and Mark Leblanc. (Record, p. 231)
>
> On **November 27, 2020**, Woodstock Holdings informed FMA that they were outstanding on three-month's worth of rent. FMA stated they could commit to $2,000 a month, less than half their monthly obligation. (Record, p.215)
>
> In response, on **November 27, 2020** Woodstock Holdings told FMA that $2,000 a month was not acceptable and that FMA was responsible for paying rent until a sublet was found.

(Record, p. 215)

On **February 2, 2021**, Woodstock Holdings informed FMA that they had showed the Leased Premises to 4 interested parties, but none wished to rent the space. (Record, p. 218)

On **July 27, 2021**, Woodstock Holdings contacted FMA, informing them that they had failed to pay rent since January of 2021. Woodstock Holdings further offered to list the Leased Premises with their commercial broker and clarified this was not a waiver of FMA's. FMA. (Record, p. 221)

On **November 12, 2021**, FMA informed Woodstock Holdings they would not be able to pay the full amount owing on their account and proposed paying $2500 per month but this was rejected by Woodstock Holdings. (Record, p.224)

[37] As discussed above, in *Weins Canada Inc.*, the Court noted the significance of notice to the tenant as a means of avoiding an implied surrender of the lease. However, Justice Perell stated at paragraphs 50-51:

> 50 After *Highway Properties*, through the mechanism of a notice advising the tenant of the claim for prospective damages, the landlord had a new fourth choice and a means of avoiding the legal effect of a surrender. The role of the notice should be emphasized. An aspect of the landlord's right to claim damages for prospective losses is the requirement that the landlord give timely notice of the claim. Absent this notice, the conduct of the landlord in retaking the premises **could** constitute a surrender of the lease by operation of law.
>
> 51 The requirement of giving notice has come to be known as giving a "Highway Properties" notice or giving a "Highway Properties Notice" or a "Kelly Douglas Notice". **It is not necessary to give the Kelly Douglas Notice claiming damages contemporaneously with the termination of the lease but, rather, within a reasonable time. Provided the notice is given within a reasonable time, it may even be given in the statement of claim in the action for damages.** [Emphasis added]

[38] Despite no formal notice having been given, the Court looked at all the circumstances and concluded that the tenant knew that the landlord would insist on the performance of the tenant's obligations under the lease. Justice Perell stated at paragraphs 55-56:

> 55 The demand letters and the conduct of Weins Canada made it very clear that if the rent arrears were not paid, then Weins Canada would be exercising its remedial choice of terminating the tenancy without effecting a surrender by operation of law.
>
> 56 **Rather, Ensil Corp. knew both before and after Weins Canada issued its Statement of Claim that the Landlord would be claiming the benefit of the bargain for the full term of the lease and not exercising its property law remedies.** In the circumstances of the immediate case, within a reasonable time, Weins Canada gave notice that it would be making a contract claim for damages **notwithstanding that there is no evidence that a formal Kelly Douglas Notice was given to Ensil Corp.** [Emphasis added]

[39] In *Eddy Housing*, as in the present case, there was evidence of cooperation between the landlord and tenant in trying to sublet the premises. The Court considered this evidence and rejected the tenant's argument that recovery of possession by the landlord constituted acceptance of the tenant's repudiation. At paragraph 27, it states:

> 27 The actions of the parties here are marked by cooperation to secure a re-letting of these premises. **The plaintiff's actions to clean up and fix up may only be interpreted as consistent with its intention to pursue its contractual remedies while at the same time attempting to mitigate its losses.** [Emphasis added]

[40] I take a similar view. One cannot take a "dogmatic application of surrender irrespective of intention" (*Highway Properties*, para. 20). Rather, looking at all the circumstances, it is clear that Woodstock Holdings repeatedly advised FMA that it would insist upon compliance with its obligations under the Lease regardless of reletting of the Premises. In short, if a notice was required, it was effectively given to FMA.

[41] Parenthetically, I note that article 15.2 of the Lease provides that upon default, Woodstock Holdings may immediately exercise the remedies set out therein, including re-entering of the Premises, "without further Notice".

[42] In summary, where a tenant repudiates a lease and the landlord continues to insist on performance of the lease, the landlord has no duty to mitigate. That is the case here. Also, where a landlord re-enters or relets the premises on the tenant's account, with the consent of the tenant, the lease survives and the tenant is responsible for losses to the landlord over the unexpired term of the lease, with credit to the tenant for any rental revenues from the reletting. In my view, that is what has occurred in this case. FMA, for its own business reasons, chose to abandon the Premises two years prior to the expiration of the term of the Lease. There was no termination of the Lease and Woodstock Holdings repeatedly informed FMA of its obligations under the Lease. The retaking/reletting of the Premises by Woodstock Holdings did not constitute an implied surrender of the Lease. Accordingly, subject to my comments with respect to the quantum of damages set out below, Woodstock Holdings' motion for summary judgment is granted.

D. *Remedies Available to the Landlord*

(1) Unpaid Rent

[43] The parties agree that as at December 31, 2021, the balance outstanding for unpaid rent was $22,334.45. No subsequent rent was paid by FMA. Woodstock Holdings therefore claims for unpaid rent to the end of the term of the Lease in the amount of $54,558.86, calculated as follows:

Outstanding rent as of December 31, 2021 - $32,334.45

Rent to unexpired term - $45,095.20

Less accounting credits - ($5,963.14)

Less 3 months' rent due to occupation by Woodstock Holdings – ($16,910.73)

Total - $54,558.86.

[44] FMA agrees with the calculations but for submits that no rent was payable after January 1, 2022. It does so for two reasons. First, that Woodstock Holdings surrendered the Lease when it reoccupied in January 2022. Second, that Woodstock Holdings extended its occupation beyond March 2022 to the end of the Lease, and FMA should therefore be credited for that occupation rent to the end of the term.

[45] I have rejected the first of FMA's arguments: There was no surrender of the Lease by Woodstock Holdings when it retook possession of the Premises in January 2022.

[46] With respect to the second argument, the evidence of Ms. McDonald on behalf of FMA is that in February 2022 it discovered that office furniture was being stored at the Premises and it believed that Woodstock Holdings had rented it to a tenant or was using it for its own purposes and therefore FMA stopped making any further payments. Woodstock Holdings does not deny that it retook possession of the Premises. In his affidavit sworn to on November 1, 2023, Mr. Lean deposes that between January 2022 and March 2022 Woodstock Holdings used the Premises for storage and has deducted 3 months' rent from its claim pursuant to article 15.2(b) of the Lease.

[47] In her affidavit sworn on January 10, 2024, Ms. McDonald deposes as follows, at paragraph 19:

> 19. On June 3, 2022, I returned to the Premises and confirmed that it remained full of what appeared to be office furniture. Attached and marked as Exhibit "G" is a copy of a photograph taken of the Premises – we don't have a picture.

[48] The photograph attached as Exhibit G appears to depict a portion of the Premises depicted in the series of 15 photos attached as Exhibit F. It is impossible to determine from Exhibit G whether it depicts only a portion of the Premises or if it is representative of the entire space.

[49] Other than that referred to above, there is no evidence that the items depicted in Exhibit G remained on the Premises subsequent to the date that the photograph was taken. In his responding affidavit sworn to on January 11, 2024, Mr. Lean does not address Ms. McDonald's evidence regarding what she observed in her June 2022 visit to the Premises.

[50] Given the evidence noted above, it is not possible to determine from the Record whether, in fact, Woodstock Holdings continued to occupy the Premises after March 2022, and if so, for how long thereafter. Therefore, it is impossible to confidently determine whether or not FMA is entitled to a further credit by way of a reduction in rent for that occupation, or how much. For that reason, and the others mentioned below, there is a genuine issue with respect to the amount to which the plaintiff is entitled. Rule 22.04 (4) provides that the court may direct a trial on damages if it is satisfied that the only genuine issue is the amount to which the moving party is entitled. For the reasons outlined herein, I am satisfied that FMA is liable to Woodstock Holdings pursuant to the Lease for the heads of damage claimed by Woodstock Holdings. However, the question of the amount of additional occupation rent credit , if any, to which FMA may be entitled

cannot be determined on the Record. Accordingly, I direct a trial on the issue of damages on that issue and the others issues identified below.

(2) Costs of Remedying Default and Administration Fee

[51] Article 15.2(d) of the Lease entitles Woodstock Holdings to recover all damages, costs and expenses incurred as a result of a default. In that regard, Woodstock Holdings is claiming the sum of $11,299.00 for expenses it incurred in re-configuring and renovating the Premises for lease to a new tenant. The evidence with respect to these costs is found at paragraph 17 of Mr. Lean's affidavit (Record, p.8).

[52] The evidence is sparse. It consists entirely of receipts for work from contractors, attached as Exhibits H-M. The receipts contain little detail. There is no evidence in the body of Mr. Lean's affidavit explaining that the expenses claimed were the result of FMA's default. Mr. Lean's affidavit ought to have included some evidence that the expenses incurred were necessary and as a result of FMA's early departure.

[53] Parties to a motion for summary judgment, particularly the party seeking the relief, have an evidentiary obligation to put their best foot forward. Normally, I would consider denying Woodstock Holdings' claim for these expenses given the evidentiary deficiencies I just noted. However, since I have determined that a trial on the issue of damages is required with respect to FMA's claim for additional rent credit, it seems only fair to permit Woodstock Holdings to submit further evidence with respect to the remediation expenses.

[54] Under the terms of the Lease (article 15.2(c)), Woodstock Holdings is entitled to recover a 15% administration fee on the amount claimed for expenses recovered in remedying a default. However, since I cannot determine what, if any, expenses are recoverable under this head, I cannot determine the amount of the 15% administration fee. This item, too, must be dealt with in the trial on damages.

[55] Although not challenged by counsel for FMA, I agree with the submission of Woodstock Holdings' counsel that the administration fee is reasonable and a genuine pre-estimate of damages and is therefore enforceable.

(3) Interest at Prime Plus 5%

[56] Under the terms of the Lease (Article 15.2(c)), upon default, Woodstock Holdings is entitled to recover interest at the "Default Rate" defined as "prime rate" plus 5%. The "prime rate" is defined as the prime rate announced from time to time by "the Canadian Chartered Bank chosen by the landlord". In this case, the chosen bank is the Royal Bank of Canada ("RBC"). However, there is no evidence in the record as to what RBC's prime rate was at any given time during the period that FMA was in default under the Lease. In the absence of such evidence, it is impossible for me to determine the applicable contract rate of interest to be applied.

[57] Again, this raises a genuine issue as to the amount to which the plaintiff is entitled. It must be addressed in the trial on damages that I have directed.

(4) Solicitor-Client Costs

[58] Article 15.4 of the Lease provides that Woodstock Holdings is entitled to recover costs on a solicitor-client basis for expenses and costs incurred in enforcing the Lease. It provides as follows:

> 15.4 Interest and Costs
>
> The Tenant shall pay to the Landlord upon demand: (a) interest at the Default Rate on all Rent required to be paid hereunder from the due date for payment until fully paid and satisfied; and (b) the Landlord's then current reasonable administration charge for each Notice of default given by the Landlord to the Tenant under this Lease. **The Tenant shall pay and indemnify the Landlord against damages, costs and expenses (including, without limitation, all legal fees on a solicitor and client basis) incurred in enforcing the terms of this Lease,** or with respect to any matter or thing which is the obligation of the Tenant under this Lease, or in respect of which the Tenant has agreed to insure or to indemnify the Landlord. [Emphasis added]

[59] While there is some conflicting jurisprudence, the predominant view is that, where the wording of the provision is clear that solicitor-client costs are intended, the provision should be enforced (*Empire Life Insurance Company v. Krystal Holdings Inc.*, 2009 CanLII 11217, at paras. 13-15). In *Stratton Electric Limited v. Guarantee Company of North America*, 2007 CanLII 2654 (ON SC), the Court stated at paras 10-13:

> 10 GCNA says that it must have the costs contracted for: see *Collins*, where the court relied on a B. C. decision that where costs as between solicitor and client were payable *ex contractu*, they could not be denied.
>
> 11 However, the right to have the scale of costs stipulated for in the Agreement does not immunize the quantum from examination by the court. In *Delcourt* the court said:
>
> > Similarly, it seems to me that the court has no right, where there is a contract to pay costs on a solicitor-and-client basis, to do more than to have the costs taxed, to make sure that the amount paid by the mortgagee to his solicitor or the amount of the indebtedness

> incurred by the mortgagee to his solicitor is no greater than an amount properly recoverable by way of costs between solicitor and client.

12 In *Orkin*, the author writes:

> A contractual right to costs on the solicitor-and-client scale should generally be ordered where a mortgagee is obliged to defend its security. However, the right is always subject to the court's discretion and costs on the lower scale may be ordered.

and:

> While contractual provisions are a factor to be considered when awarding costs, the court may also take into account the conduct of the parties and award costs on a lesser scale.

13 **Considering these authorities, it appears to me that a contractual provision for the recovery of costs on a specified scale ought to be enforced unless there are special circumstances, such as improper conduct by the claiming party, which persuade the court to order otherwise.** Where there are no such circumstances, the court nevertheless has the obligation to police the amount claimed, to ensure that it is no more than is appropriate and properly recoverable. [Emphasis added]

[60] In my view, article 15.4 of the Lease is clear and unambiguous that FMA is required to pay Woodstock Holdings all costs incurred in enforcing the Lease on a solicitor-client basis. Accordingly, FMA shall pay costs to Woodstock Holdings on a solicitor-client basis in an amount to be assessed by the taxation officer. This assessment should be deferred until the completion of the trial on damages and the final disposition of this motion for summary judgment.

V. CONCLUSION

[61] There was no implied surrender of the Lease by Woodstock Holdings when it took possession of the Premises in January 2022. Accordingly, FMA remained responsible to fulfill its

obligations under the Lease including payment of rent for the unexpired term of the Lease. I am satisfied that that FMA is liable to Woodstock Holdings pursuant to the Lease for the heads of damage claimed by Woodstock Holdings. Accordingly, summary judgment is granted to Woodstock Holdings on the issue of liability.

[62] There remains, however, a genuine issue with respect to the amount to which Woodstock Holdings is entitled. I direct a trial on the issue of damages which shall address the following:

(a) whether Woodstock Holdings remained in occupation of the Premises beyond March 30, 2022 and, if so, whether that occupation entitles FMA to further rent credit and the amount of same;

(b) Woodstock Holdings' entitlement to the claimed costs of remedying the default and calculation of the 15% Administration Fee; and

(c) determination of the Default Rate of interest, specifically, the prime rate applicable during the relevant period.

[63] Woodstock Holdings is entitled to recover costs on a solicitor-client basis in accordance with the provisions of the Lease to be assessed by the taxation officer. This assessment is deferred until the completion of the trial on damages and final determination of the motion.

Terrence J. Morrison,
J.C.K.B.