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SOMETIMES WHEN YOU LOSE – YOU WIN!

The tenant defaults. The landlord terminates. The tenant is off to court, seeking relief from forfeiture. The tenant succeeds. The court grants relief, allowing the tenant back into its premises on certain terms and conditions.

Sounds like a win for the tenant - right? Well, not always. Sometimes, terms imposed by the court can be pretty onerous: paying the rent, remedying all defaults, paying the landlord's expenses and, possibly, honouring additional requirements.

A Recent Decision

In a lease dispute involving Jungle Lion Management Inc. and its landlord, the Ontario Superior Court of Justice was presented with an application for relief from forfeiture. The landlord had terminated the tenant's lease for non-payment of rent, just after the leased premises were damaged by a flood. The tenant denied that rent had not been paid, and claimed that it should be entitled to relief as, not only was it willing to pay any amounts owed, but the landlord had already allowed the tenant to repair damage caused by the flood.

Relief from Forfeiture

Relief from forfeiture is a discretionary remedy that enables a court to grant relief against penalties, failures and forfeitures, on terms that it considers just. In deciding whether to grant relief, the court considers (1) the conduct of the party seeking relief (and in particular, whether the breaches or defaults were wilful); (2) the gravity of the breaches; and (3) the disparity between the value of the property in question and the damage caused by the breaches.

Courts frequently grant relief from forfeiture to tenants, based on the 3rd part of the test. The tenant will generally be able to convince the court that there is large discrepancy between the value of its business (which it will lose if the lease termination is upheld), and the amount of rent it failed to pay.

Courts may refuse to grant relief from forfeiture where the tenant has displayed a total disregard for the covenants in the lease, has willfully breached the lease, and where the landlord cannot be completely compensated by money. The Tenant must also come to court with "clean hands". Tenants run afoul of this requirement when, for

example, they break into the leased premises after the landlord has locked them out. This is an unlawful act that may spoil the tenant's chances for relief.

While relief from forfeiture may be perceived as readily available to tenants, landlords are well advised to make their defaulting tenant go through the process. Doing so ensures that the tenant will be ordered to remedy all defaults. More importantly, even if a tenant is forgiven for its first default, if it comes knocking a second time, its chances will be reduced.

Jungle Lion: The First Flood

On August 7, 2018, during a major summer rainstorm, a downpipe pipe burst in the ceiling. The restaurant shut down due to the flood damage, which was not the fault of either party. The insurers repaired the flood damage and turned the premises over to the tenant in October 2018. For the next two months, the tenant did not diligently repair its premises and re-open for business as required by the lease. Instead it tried to assign the lease, bring in new investors, come up with a new concept and the like. Everything but get its restaurant open and operating as required by the lease.

The landlord grew impatient and in early January 2019 gave notice of default to the tenant, requiring it to re-open by January 31, 2019. The tenant sought an injunction to prevent the landlord from locking its doors. The court ruled in favour of the tenant. It held that, although the tenant had wasted 2 months, it could be forgiven. It had invested over \$3 million in the restaurant, and it promised to re-open in 2 months. The court ordered the landlord not to terminate the lease, provided the tenant began to operate by April 2, 2019. The tenant opened for business in time.

Jungle Lion: The Second Flood

In October, 2019, there were 3 separate mini-floods in the kitchen area, caused by leaking pipes which formed part of the tenant's HVAC system. Each time, the landlord reminded the tenant that it was responsible for maintaining and repairing its HVAC system. The tenant did not heed the landlord's warnings. On November 13, 2019, a pipe connected to the tenant's HVAC system, burst and

flooded the premises. Once again, the restaurant closed due to flooding.

In November, the landlord also terminated the lease for non-payment of the November rent. The landlord had delivered a notice of default on November 6. The tenant had submitted a rent cheque on November 11. The tenant seemed to have remedied its default. However, on November 18, the landlord was notified by its bank that the tenant's rent cheque had not cleared its bank, because the CRA had frozen the tenant's bank account. The landlord immediately terminated for non-payment of rent. The next day, the tenant tendered a bank draft for the full amount of rent owing. The landlord refused to accept it. This led to the application for relief from forfeiture.

Terms of Relief

The judge noted that the tenant had a less than stellar record. Since re-opening earlier in 2019, it paid rent late 8 times (out of 11 months). It had failed to repair its HVAC system, causing the second flood. Following termination, the landlord discovered an outstanding fire code violation. Financial difficulties came to light: in addition to the frozen bank account, sales reports showed that the business was declining, and the landlord received a notice from a bank advising that the tenant was in default of an equipment loan. Other creditors of the tenant knocked on the landlord's door, seeking to re-claim property. And the fire code violation led to an order. The judge commented that the tenant seemed more interested in making flood insurance claims than running its business.

The judge found that the tenant had done little to foster confidence in the landlord, or to prompt the

court to invoke an equitable remedy on its behalf. Nevertheless, the judge cited the disproportionate impact rule, noting that the tenant stood to lose its entire \$3 million investment in the premises.

In January 2020, the court granted relief from forfeiture on terms that would fully compensate the landlord for the tenant's breaches. The tenant was ordered to:

- a. remedy all breaches of the lease, including paying the November, December and January rent (totaling \$197,690);
- b. pay the landlord's legal fees of \$37,357, and expenses of \$8,563;
- c. arrange with its bank for the rent to be paid by preauthorized debit as required by the lease;
- d. put the premises in good order and first-class condition and repair in accordance with the lease; and
- e. use the premises continuously in accordance with the provisions of the lease.

If the tenant did not comply with terms a, b and c within one week, then the landlord could terminate afresh and the lease would be at an end with no further right to relief.

Tellingly, more than a week after the ruling in *Jungle Lion*, the restaurant had not re-opened because the tenant was unable to satisfy the onerous terms of the relief order.

Conclusion

Relief from forfeiture is an odd duck. Tenants may find that the cost of victory is too high. Similarly, landlords may see a loss turn into a win.

This publication is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the issues in this publication with you, in the context of your particular circumstances.



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