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TIME WAITS FOR NO LANDLORD: PART 2

When we last left the topic of the delivery of year-end reconciliations, a caution was issued to landlords and tenants whose leases specify a deadline for the additional rent reconciliation process. The decision we reported was that of the Ontario Superior Court of Justice in *1127776 Ontario Ltd. v. Deciem Inc.* That decision was appealed to the Divisional Court, where the recent ruling underscored that caution - with a caveat.

The Lower Court Decision in *Deciem*

As outlined in our February 28, 2017 News ReLease, the case concerned a 2012 lease of premises for a term of three years. The lease was to be a completely carefree net lease to the landlord. It stipulated that the landlord had 180 days from its financial year-end to deliver a year-end reconciliation statement to the tenant for additional rent. The landlord issued its demand for additional rent well after the 180 day period stipulated in the lease - and the tenant refused to pay. The motions judge in the lower Court sided with the tenant and denied the landlord's right to collect the underpayment.

The Divisional Court Ruling

The landlord appealed. It argued that the lower Court judge erred in ruling that the failure to reconcile in time wiped out the entire right to be paid what was due on reconciliation. It admitted that the landlord's failure to deliver a reconciliation statement on time was a breach of the lease, but maintained that the breach exposed the landlord to only a claim for damages (if any), suffered by the tenant. The landlord pointed to the case of *2373322 Ontario Inc. v. Nolis*, another 2017 decision of the Ontario Superior Court of Justice, where, in a similar set of facts, the Court held that the appropriate remedy for the late delivery of a claim for additional rent was damages, and was not a complete bar to the right to payment of amounts owed under the (carefree, net) lease.

In *Nolis*, additional rent was to be paid monthly based on the landlord's estimate, and the tenant's right to seek adjustment of the additional rent was triggered once the rent reconciliation statement was issued by the landlord.

In *Deciem*, by contrast, the Divisional Court noted that under the lease, not only was the landlord required to reconcile within 180 days of its financial year-end, but the lease stated that the tenant was limited to a period of six months from the end of each lease year to make a claim against the landlord for any readjustment of additional rent claimed for that year. (Although the lease contained no definition of "financial year" and "lease year", it was determined by the motions (lower Court) judge that the landlord's year-end was March 31, and each "lease year" end was July 31 (since the lease term

had commenced on August 1).) The appellate Court effectively interpreted that the regime of the reconciliation clause consisted of two pieces, one being the landlord's obligation to reconcile within 180 days of its year-end (i.e., by September 30) and the other being a cut-off on the tenant's right to claim a re-adjustment within six months from the end of each lease year (i.e., by January 31). The Court noted that, "even if the standard of review is correctness, [it] would not intervene", because the lower Court's interpretation was "consistent with the language of the lease, particularly when one takes into account the six month limitation on tenants seeking readjustment".

It appears that the appellate Court was concerned about the possibility that the landlord might claim additional rent after the 180 day period, but the tenant would be blocked from disputing the reconciliation statement if the six month period were to expire before the reconciliation statement was issued. In that scenario, the tenant would be contractually prohibited from challenging the additional rent claimed by the landlord. The appellate Court took the entire reconciliation regime as a whole and declined to pick it apart as the landlord wanted, i.e., to focus on solely the implications of late delivery of a year-end statement.

***Nolis v. Deciem*, which decision is right?**

It is noteworthy that the Court in *Nolis* did not stress the tenant's right to seek readjustment, whereas the appellate Court in *Deciem* concluded that the lower Court decision was "consistent" with the lease, "particularly" given the limits on the tenant's right to seek readjustment.

When read together, the two cases suggest that the Courts will look to see whether there is an overall unfairness in allowing a landlord to recover additional rent claimed after the deadline for delivery of a demand.

What to do?

The commercial realities of year-end reconciliations do not always allow for the prompt delivery of a statement of additional rent. Based on the ruling in *Deciem*, it can easily be seen that some landlords and some tenants will seek to take unfair advantage of each other, in terms of the timing of delivery of adjustment statements and in making or denying claims for overpayments and under payments. Fundamentally, the *Deciem* and *Nolis* cases highlight that, when drafting lease provisions on this topic, landlords and tenants should be mindful to ensure that the regime they establish promotes fairness.

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