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MITIGATION AFTER TERMINATION, NOT BEFORE

The Ontario Superior Court of Justice recently confirmed some well-settled law: if a landlord chooses to keep the lease alive despite the tenant's default, it need not make efforts to mitigate its losses.

In *Daniels CCW Corporation v. Shevchuk*, the tenant and indemnifier argued that the landlord's mitigation duty arose *before* the landlord provided the tenant with a notice of termination. However, the Court gave no support to this argument.

The Facts

Beginning in October of 2020, the Tenant continuously failed to pay rent. Nine months after the initial default, in July of 2021, the landlord issued a notice of default. The landlord did so again in November of 2021. In December of 2021, the indemnifier advised the landlord that the tenant's business would not survive the impact of the COVID-19 pandemic, and that the landlord should simply terminate the lease. The landlord decided not to terminate the lease at that time. In February of 2022, the landlord delivered another notice of default. This time, when the tenant failed to cure the default, the landlord re-entered the premises and terminated the lease. Its notice of default reserved the right to claim damages against the tenant for the lost future rent. The termination of the lease occurred nearly sixteen months after the tenant's initial non-payment.

After the termination of the lease, the landlord took steps to re-rent the premises. Eventually, the landlord entered into an agreement to lease the premises for

ten years commencing August 30, 2023, for rents greater than those payable under the original lease. Approximately eighteen months elapsed from the date of termination of the original lease to the commencement of the new lease. The landlord sued the tenant for the arrears and the lost future rent, crediting against the lost future rent the amount of the increased rents under the replacement lease. It brought a motion for summary judgment.

The Ruling

The tenant did not dispute that it owed the landlord arrears of rent up to the date of termination; however, it argued that the arrears should have been reduced. The tenant maintained that by waiting to terminate the lease for sixteen months after it first failed to pay rent, the landlord failed to make reasonable efforts to mitigate its losses.

The Court provided a summary of the various remedies available to a landlord when a tenant defaults:

- 1) sue or distrain for the arrears of rent;
- 2) re-take possession of the premises and terminate the lease;
- 3) re-enter the premises on behalf of the defaulting tenant; and
- 4) terminate the lease, giving notice to the tenant of a claim for prospective damages.

The Court noted Canadian caselaw has consistently held that a landlord's choices are mutually exclusive and there is no duty to mitigate if a landlord chooses to keep the lease alive. In making this determination, the Court followed well-settled law, including *Highway Properties Ltd. v. Kelly, Douglas and Co.*, a Supreme Court of Canada decision rendered over fifty years ago, as well as *Anthem Crestpoint Tillicum Holdings Ltd. v. Hudson's Bay Company ULC Compagnie de la Baie D'Hudson SRI*, a recent British Columbia Court of Appeal decision which tested *Highway Properties*. In *Anthem*, the Court concluded that there is no duty on a landlord to mitigate its losses when the lease is kept alive, and that there was also no reason to deviate from the principle that had been accepted and applied by Canadian courts for many years.

The Court further noted that a landlord's mitigation efforts need not be perfect, as mitigation is measured against a standard of reasonableness. The onus is on the tenant to provide evidence that the landlord's efforts were not reasonable, or that the re-leasing

was improvident or untimely. As there was no evidence to this effect, the Court found the landlord made reasonable efforts to mitigate, and had, in fact, mitigated a substantial portion of the loss of future rentals.

Additionally, the Court confirmed another well-established principle: a landlord must give credit for the success of its mitigation. In the case at bar, the landlord credited the defaulting tenant with the increase in rents it would receive from the new tenant over the rent payable by the defaulting tenant, for the period that would have been the remainder of the term of the defaulting tenant's lease. As a result of this obligation to account, it is noteworthy that the credit itself becomes an important element in calculating a landlord's damages.

Takeaways

This case serves as a reminder that a landlord is under no obligation to terminate a lease upon a tenant's default. If and when the landlord terminates the lease, it has a duty to mitigate its damages in accordance with ordinary common law principles. But not earlier.

ANNOUNCEMENT

Daoust Vukovich LLP is pleased to welcome **LATISHA COHEN** to the firm as an Associate Lawyer. Latisha's practice is focused on litigation and dispute resolution.

Latisha obtained her law degree from Osgoode Hall Law School, and was called to the Ontario bar in 2019. Latisha is also a graduate of the University of Toronto, gaining a B.A. (Honours).

Latisha can be reached directly at 416-304-9119 and at lcohen@dv-law.com.

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