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Court Lifts Writ to Allow Sale of Condo Units

In a recent Ontario decision, the court agreed to lift a valid writ of execution that was preventing the sale of three units in a new condominium development from closing.

On one side of the dispute was the developer/owner of the property, "90 George Street Limited", together with 160420 Canada Inc., which had mortgages covering all unsold condominium and commercial units located on it. On the other side was Donley Investments Ltd. ("Donley"), which had filed a writ of execution on the property owned by 90 George after obtaining a $400,000 judgment against that company in 2010. Donley's writ covered three units on the property that had imminent closing dates under valid agreements of purchase and sale. The underlying judgment was being appealed by 90 George, and was still pending.

However, the property was also subject to other third-party encumbrances in the form of mortgages, tax arrears, and other securities totalling $28.5 million, all of which predated Donley's judgment and took priority over the writ of execution that it had obtained.

Donley refused to give its consent to lift the writ to allow the sales of the three condominium units to close. It claimed that if the writ was lifted, there would be no post-closing funds remaining to satisfy its $400,000 judgment because any sale proceeds – amounting to approximately $3.9 million – would by law go first to the mortgagees and others in priority to Donley. Eventually one of the mortgagees, 160420 Canada Inc., applied to the court for a declaration requiring Donley's writ to be lifted to allow for the sale of the three units.

At trial, Donley's objections to lifting the writ were mainly procedural: it claimed that under the Rules of Civil Procedure, the only persons entitled to remove or withdraw a writ are: 1) the person who filed it; 2) the Sheriff; or 3) the debtor. In this case, the application was being brought not by 90 George, but rather by a *mortgagee*, whose rights to request a writ to be lifted arise only as part of exercising a Notice of Power of Sale under the *Mortgages Act* (which was not the situation here). Nor was there an order of discharge or certificate of full performance in place, as required by the Rules. In other words, Donley claimed that in these particular circumstances the court had no statutory authority to lift the writ because the necessary prerequisites had not been met.

Donley also disputed the court's inherent power to lift the writ based on unfairness or prejudice, and claimed that – even if such power existed – this was not an appropriate situation in which to exercise it in any event. (Indeed, Donley argued that as amongst the parties, it alone was the entity to suffer prejudice, because Donley had followed the Rules by first obtaining the $400,000 judgment against 90 George in due course, then filing the writ, and then putting off any further action on the writ while awaiting 90 George's appeal).

After considering the parties' arguments, the court disagreed with Donley's position. First, it confirmed that the interests of the mortgagees such as 160420 Canada Inc. clearly had priority over Donley's writ. Next, the court concluded that it did have jurisdiction to lift the writ in the right circumstances, in light of the principles of fairness and equity.

Evaluating the parties' situations practically and factually, the court noted that by allowing the unit sales to remain blocked because of the writ, there would be actual prejudice occasioned not so much to Donley, but more predominantly to 90 George, to the mortgagees, and to the three buyers of the units (since their sales could not close). Also, the taxes and condo fees could not be paid off, and the significant outstanding debt which sat in priority to Donley's writ would continue to grow.

Most importantly, the court commented on Donley's admitted motive in forcing the matter to court, which was to put pressure on 90 George and the mortgagees to make a deal to resolve the outstanding issues, pending the stay of the writ and the hearing of the underlying appeal. However, it was not in the interests of justice to allow Donley to stall, put pressure on the other parties, and prevent commerce from occurring in the condominium development. Nor was the court in a position to favour Donley over the other parties merely to enhance Donley's bargaining power. It said:

"The attempt to restrain the vendor from selling vacant units which is the only means by which the vendor's debts can be paid and when the writ holder has no entitlement to proceeds of sale due to the priority of other lien claimants, is inconceivable."

In the end, the court concluded that it was in 90 George's best interests to be able to sell the vacant condo units in a timely manner, so that creditors and other writ holders did not suffer ongoing prejudice. Accordingly, the court granted the declaration lifting the writ, but stipulated that sale proceeds were not to be paid to 90 George or to any party that did not have priority over Donley. Moreover, Donley was also entitled to an advance summary of the proposed payout of the sale proceeds for each unit, until such time as the writ was no longer valid. See: *160420 Canada Inc. v. Donley Investments Ltd*., 2011 (ONSC).

Commercial Tenant's Lease Extended by Third Party

A recent court case involved the question of whether an option to extend a commercial lease could be exercised by someone *other than* the actual tenant.

The tenant, Firkin Pubs ("Firkin"), leased the

famous "Flatiron Building" in downtown Toronto from the owner/landlord. The term was for 10 years starting in 2001, with a renewal option to extend the lease for two 5-year terms. Firkin then arranged for a franchisee to operate a restaurant and bar on the premises under the name "The Flatiron & Firkin" ("Franchisee").

Just as the term of the lease was about to expire, a representative of The Firkin Group of Pubs (the name under which Firkin operated) wrote to the landlord purporting to exercise the option to extend the lease for another 5 years. Firkin then received a letter and invoice from the landlord, asking for a stipulated amount of "additional rent" under the lease. Firkin disputed the landlord's calculations but paid under protest, expecting that parties would come to terms. Firkin allowed its Franchisee to continue operating on the premises.

However, the landlord eventually took the position that Firkin had not validly exercised the option to extend at all, because: 1) the notice to extend did not come from the actual tenant, which was Firkin; 2) Firkin was in arrears of rent when the renewal notice was delivered; and 3) Firkin had parted with possession of the Flatiron building (in order to allow the Franchisee to operate the bar/restaurant on-site) without the landlord's consent and contrary to the lease terms.

The matter went to court for resolution. Firstly, the court found that the notice to extend the lease was valid, even though technically it was not exercised by Firkin itself but rather by The Firkin Group of Pubs. After commenting that the landlord's insistence on strict compliance with the lease was a rather late-breaking development, the court went on to find that the lease was silent on the method by which the option to extend was to be exercised. It required only that "actual notice" be given; here, "The Firkin Group of Pubs" was effectively Firkin's agent and could exercise the option on Firkin's behalf.

Secondly, the court held that the landlord's complaint that Firkin was in arrears of rent was also groundless. The lease terms specifically required an "Event of Default" to occur before the lease was considered in breach; that term was defined to be any breach or default that was not remedied by Firkin after receiving written notice of it from the landlord. In this case, the landlord failed to give Firkin that written notice, and gave only a late demand for additional rent after the term had expired, which Firkin paid immediately subject to its objections as to the exact mount.

Finally, the court found that at the time the option to extend was purportedly exercised, the landlord knew it was the Franchisee rather than Firkin which was in possession of the Flatiron building, and had effectively given its consent. For one thing, the landlord had received a copy of the franchise agreement between Firkin and the Franchisee, and had also written directly to the Franchisee to offer that if Firkin ever defaulted on the lease, then the Franchisee could take over, subject to certain financial conditions. Moreover, according to the court, Firkin did not legally give up legal possession merely because it allowed the Franchisee to operate the restaurant and bar on the premises. This is because the franchise agreement did not grant the Franchisee the right to *exclusive* possession; instead, Firkin maintained *legal* possession of the premises at all times, and had full access to it throughout. Also, Firkin continued to deal directly with the landlord on operational issues and to negotiate the extension of the lease.

In the end, the court found that Firkin had validly exercised the option to extend, so that the lease was renewed for a further five years. See: *Firkin Pubs Metro Inc. v. Flatiron Equities Limited*, 2011 (ONSC).

Recap of Landlord's Rights upon Rent Default by Tenant

A pair of recent Ontario court decisions provide a brief refresher on some of the rights and obligations of commercial landlords, in the event the tenant defaults on the obligation to pay rent.

Malka v. Vasiliadis was a straightforward case involving a commercial lease for a property on which the tenant operated retail premises. Rent was $3,000, payable on the first of the month to the landlord's office, which was conveniently located right next door to the property. About two years into the lease, the tenant became unable to pay the rent on time. The landlord agreed to extend the deadline until February 19th; however, while the tenant managed to come up with the rent money, he missed the deadline by three days. Accordingly the landlord terminated the lease, and entered into a new one with a third party.

The tenant – who incidentally waited until almost the very last day of the 6-year limitation period deadline – sued the landlord for damages for wrongful termination and breach of the lease, trespass, conversion, and for illegal and excessive distress of his property.

The tenant's action was dismissed, mainly because the court found the tenant's credibility to be entirely lacking. Nonetheless in the context of doing so, and after considering a number of well-established case authorities, the court listed the landlord's choices upon default to be as follows:

The law is clear that when a tenant defaults in the obligation to pay rent, the landlord has two mutually exclusive legal remedies, and must elect which remedy to pursue. The landlord can elect to enter the premises and distrain the goods owned by the tenant for purposes of satisfying the debt owed by way of rent, but with a view to continuing the lease. Alternatively, the landlord can elect to re-take possession of the premises and terminate the lease, and potentially pursue other additional remedies.

The second case, called *Andriano v. Napa Valley Plaza Inc*, deals with the next step: Once a landlord has lawfully exercised one of those options, namely the right to take possession of the premises and terminate the lease, what are a landlord's obligations respecting the tenant's inventory, records, and other items? The facts in *Andriano* involved a tenant who ran a restaurant on the leased premises and defaulted on rent. The landlord took possession, terminated the lease, notified the tenant that he had failed to remove his equipment and goods (including some perishables), and indicated that if the goods were not removed promptly, they would be disposed of. Almost three months passed, and the tenant never took steps to remove the goods, so the landlord disposed of them by giving anything still of value to charity, and putting the rest in the dumpster.

The tenant unsuccessfully sued the landlord for trespass and "breach of bailment". In the course of granting the landlord's summary judgment motion, the court reviewed the relevant authorities and clarified that a bailment had to be "voluntary" and could not simply be "foisted on the bailee". Moreover, the landlord as an "involuntary bailee" is entitled to properly dispose of a tenant's goods at the conclusion of a lease: (1) with a court order; (2) with the tenant's consent; or (3) upon providing "reasonable notice to the tenant that the goods will be disposed of if not removed".

These cases are good reminders that landlords not only have rights upon a tenant's rent default, but they have legal obligations too. See *Malka v. Vasiliadis*, 2011 (ONSC); See *Andriano v. Napa Valley Plaza Inc.*, 2010 (ONSC).