

Case Name:
**1546273 Ontario Inc. (c.o.b. Margerita's Pizza & Pasta
Restaurant) v. Rosestone Developments Ltd.**

Between
**1546273 Ontario Inc. c.o.b. as Margerita's Pizza & Pasta
Restaurant, applicant, and
Rosestone Developments Limited, respondent**

[2006] O.J. No. 427

[2006] O.T.C. 104

145 A.C.W.S. (3d) 924

Court File No. 06-CL-6247

Ontario Superior Court of Justice

G.B. Morawetz J.

Heard: January 31, 2006.
Judgment: February 3, 2006.

(18 paras.)

Landlord and tenant law -- Termination -- Forfeiture and re-entry -- Relief against forfeiture -- Application by the tenant for relief against forfeiture -- Application allowed -- Although the tenant did breach the terms of the lease, he continued to pay rent -- Further, the landlord was inflexible in responding to the tenant's concerns -- The tenant was permitted to re-enter the premises if he remedied the breaches.

Application by the tenant for an injunction which would allow the tenant to re-enter the premises -- The landlord stated that the tenant repeatedly breached the lease and therefore, the landlord sealed the tenant's premises -- The landlord claimed that the tenant had not provided proof of insurance, maintained regular pest control, steam cleaned the premises, entered into a maintenance contract pertaining to the HVAC system, and failed to properly place the garbage in the exterior of the premises -- HELD: Application allowed -- The breaches occurred as the landlord claimed -- Reasonable notice was provided in the form of correspondence -- Further, the landlord's

acceptance of rent following the breaches did not constitute a waiver of the preceding breaches -- However, it was significant that the tenant was in compliance with the covenant to pay the rent -- In addition, the landlord was inflexible in responding to some of the tenant's concerns -- Relief against forfeiture was a discretionary remedy -- The tenant was provided with relief from forfeiture by having immediate access to the premises -- In return, the tenant had to maintain rent; provide evidence that proper insurance had been obtained; provide an adequate proposal to address the garbage issue; and provide evidence that the tenant was in compliance with provisions of the lease pertaining to pest control, steam cleaning and HVAC maintenance.

Statutes, Regulations and Rules Cited:

Commercial Tenancies Act, s. 20

Ontario Rules of Civil Procedure, Rule 57

Counsel:

Michael W. Czuma, for the applicant.

Paul H. Starkman, for the respondent.

1 G.B. MORAWETZ J.: -- The matters at issue in this dispute are not new. This landlord/tenant relationship was the subject of Court Orders in August 2004 and December 2004. Certain matters were also dealt with by Order of Echlin J. dated February 8, 2005. The trial of an issue, directed by Echlin J. is now scheduled to be heard in April 2006. Over time, additional issues were added to the list of disputed items, as evidenced by correspondence exchanged between the parties from August 2005 to the present.

2 The matter has now come back to court as a result of certain actions taken by the respondent landlord on January 20, 2006. The landlord, citing numerous breaches of the lease by the applicant tenant, took steps to enter and seal the tenant's restaurant premises. The tenant responded by bringing this application, seeking injunctive relief, which would allow the tenant to reenter the premises. Counsel for the tenant based his requested relief under the heading "relief from forfeiture."

3 The landlord takes the position that the tenant is in breach of numerous covenants in the lease. Specifically, the landlord submits that the tenant has not (i) provided proof of proper insurance; (ii) maintained regularly scheduled pest control; (iii) steam cleaned premises on a regular basis; and (iv) entered into a maintenance contract with respect to the HVAC system. In addition, there is an ongoing dispute with respect to the placement of

garbage bins on the exterior of the premises, notwithstanding that this issue was addressed in the Order of Echlin J.

4 The position taken by the tenant is that there are no persisting breaches and it denies that any past breaches would disentitle it to relief from forfeiture.

5 I am satisfied that the breaches cited by the landlord, as set out at paragraph 27 of the landlord's factum, were in existence at the time of the landlord's re-entry to the leased premises.

6 The actions taken up by the landlord should not have come as any great surprise to the tenant. The dispute was well documented in the correspondence between the parties over the last six months. Counsel for the tenant submitted that reasonable notice had not been provided by the landlord prior to the landlord taking steps to re-enter. It was submitted that the actions of the landlord were in contravention of the provisions of the lease and the Commercial Tenancies Act. This position has no merit. The correspondence establishes that the tenant was provided with more than reasonable notice on numerous occasions, and the correspondence clearly specified breaches of the lease.

7 Counsel for the tenant also submitted that, as a result of ongoing rent payments being made by the tenant, the notice provisions were effectively waived, such that the landlord was not in a position to enter the premises on January 20, 2006. This argument has no merit. Section 14.07 of the lease is a complete answer to this submission. It provides that the subsequent acceptance of rent by the landlord is not deemed to be a waiver of any preceding breach by the tenant.

8 The landlord and the tenant clearly have a problem in getting along with each other. The landlord is justified in taking the position that the tenant should comply with the provisions of the lease. The landlord has brought these matters to the attention of the tenant, who, for some reason, has taken the position that either it is in compliance with the provisions of the lease or it does not need to comply. An example of the tenant's conduct would be its response to the request of the landlord to satisfy the landlord that the tenant had entered into a HVAC maintenance contract. That tenant challenged the interpretation of the plain language of the lease, which requires a maintenance contract, on the basis that the HVAC system was relatively new, and that a maintenance contract was not required. This interpretation of the lease ignores the simple fact that the lease calls for a maintenance contract. Another example would be the insurance policy. The landlord is entitled to have the insurance provisions of the lease complied with, so as to ensure that its interests are fully protected. The tenant has been very slow in responding to the request of the landlord to verify that proper insurance was in place. It could be that as of January 25, 2006,

proper insurance had been obtained. However, this was after the deadline imposed by the landlord had passed, and it is still not clear from the material before the court that this issue has been resolved.

9 The placement of the exterior garbage bins is yet another example that the tenant has embarked on a course of conduct, which is not only inconsistent with the provisions of the lease, but also inconsistent with the requirements of the Order of Echlin J.

10 It is recognized that the tenant has a lot at stake in this matter. It was pointed out that a small business operates on the premises and that a number of people depend on the business for their livelihood. If this is so, the tenant should take appropriate steps to safeguard his livelihood. It is imperative that the tenant mend its ways and start to proactively comply with the provisions of the lease.

11 The landlord is not totally blameless in this dispute. The actions of the landlord may have been necessitated by the tenant's lack of compliance with the provisions of the lease, but the landlord appears to have been somewhat inflexible in responding to certain concerns of the tenant.

12 It was also noted that, with one minor exception, the breaches that the landlord complains of are nonmonetary breaches. That does not excuse the tenant from the requirement to comply with the lease and the breaches must be, if they have not already been, remedied. However, the fact that the tenant is in compliance with the covenant to pay rent is significant. This demonstrates that this is an operating business and efforts should be taken to attempt to save the business.

13 Relief against forfeiture is a discretionary remedy provided for in section 20 of the Commercial Tenancies Act. The court has the discretion to impose terms for such relief. In my view, this is an appropriate case in which to grant relief from forfeiture, but the tenant will be required to do the following:

- (i) Maintain rent on a current basis.
- (ii) Provide satisfactory evidence to the landlord that proper insurance has been obtained.
- (iii) Provide a satisfactory proposal to the landlord to resolve the garbage bin issue. The proposal must comply with the provisions of the Order of Echlin J.
- (iv) Provide satisfactory evidence to the landlord that proper steps have been taken to ensure compliance with the provisions of the lease in respect of the pest control, steam cleaning and HVAC maintenance contract provisions.

14 The landlord is directed to act reasonably in responding to the tenant's proposals and to the evidence being put forward by the tenant with respect to its compliance with the lease.

15 On this basis, relief from forfeiture is granted and the tenant shall have immediate access to the premises. The tenant shall comply with the terms set out in paragraph 13 by 5 p.m. on February 15, 2006. In the event that the tenant is unable to satisfy the landlord that it is in compliance with the lease, and specifically in respect of the points noted above, the landlord shall have the right, between February 20, 2006 and March 31, 2006, to move before this court on four days notice to set aside this order.

16 From and after April 1, 2006, if the landlord is of the view that the tenant is not in compliance with the lease and the landlord wishes to re-enter, the landlord will be required to provide notice in accordance with the provisions of the lease and the Commercial Tenancies Act before taking action.

17 The effect of this order is to reinstate the lease and it is not necessary to grant the injunctive relief that the tenant requested. The landlord will have to comply with its obligations under the lease, which includes providing the tenant with access to the leased premises and permitting the tenant to conduct its business in a lawful manner.

18 On the subject of costs, although the tenant was successful in obtaining relief from forfeiture, such relief was granted in order to provide the tenant with one last opportunity to demonstrate that it is serious in its desire to continue in business. This is not a situation where it is appropriate to award costs in favor of the tenant. Quite the contrary, it is the landlord who should be awarded costs, which after taking into account the factors contained in Rule 57, I fix at \$5,000 inclusive of disbursements and GST payable by the tenant forthwith.

G.B. MORAWETZ J.

cp/e/qw/qltc