

Case Name:
Hakim Optical Laboratory Ltd. v. Phillips

Between
Hakim Optical Laboratory Limited, applicant, and
Helen Phillips, respondent

[2005] O.J. No. 5636

144 A.C.W.S. (3d) 1101

Court File No. 05-CV-302590 PD2

Ontario Superior Court of Justice - Motions Court

J.B. McMahon J.

Heard: December 20, 2005.
Oral judgment: December 20, 2005.
Released: December 23, 2005.

(14 paras.)

[Editor's note: Supplementary reasons for judgment were released April 3, 2006. See [2006] O.J. No. 1386.]

Landlord and tenant law -- Termination -- Forfeiture and re-entry -- Relief against forfeiture -- Application by Hakim Optical for relief from forfeiture of lease allowed on interim basis -- Hakim operated successful business and only failed to pay rent on time once during previous five years -- Hakim's failure to repair damage to wall caused by sign and to provide post-dated cheques insufficient to deny relief.

Application by Hakim Optical for relief from forfeiture of lease -- Hakim rented premises from respondent Phillips -- Phillips claimed she did not receive rent for one month -- Phillips took possession of leased property -- Hakim claimed it provided certified cheque to solicitor -- Parties previously involved in litigation -- Phillips claimed Hakim previously obtained order by fraudulent misrepresentations and appealed previous rulings -- Phillips claimed Hakim breached conditions of lease by damaging wall and providing post-dated cheques -- HELD: Application allowed on interim basis -- Phillips was within her right to take possession of premises following Hakim's failure

to pay rent -- Hakim only failed to pay rent on time once during previous five years -- Hakim operated successful business -- Breaches complained of by Phillips insufficient to deny relief from forfeiture -- Application to be revisited after hearing of fraudulent misrepresentation claim.

Counsel:

Paul Starkman, for the Applicant

Melvyn L. Solmon, for the Respondent

1 J.B. McMAHON J. (orally):-- The applicant is seeking relief from forfeiture under a commercial lease. The tenant has occupied the premises under lease for at 5 years. There were no outstanding rent arrears as of November 30, 2005.

2 The respondent never received on December 1, 2005, the rent for December. On December 17, 2005, the landlord terminated the lease and took possession of the premises. It also gave the applicant, by way of letter dated December 17, notice it was terminating the lease for non-payment of rent of December, 2005.

3 The applicant, through its solicitors, was going to send the respondent's solicitor a certified cheque to cover the arrears. Although the cheque had not been received, I accept that the certified cheque is in the possession of the solicitor and will be dealt with.

4 The respondent acted within its rights to terminate the lease. The issue is whether the Court should exercise its discretion and grant the applicant relief for forfeiture.

5 I agree with counsel for the respondent, the Court is entitled to look at the conduct of the applicant and any other breaches under the lease in determining whether to grant relief from forfeiture.

6 The relationship between the parties has not been an easy one. There has been prior litigation in this Court. See Himel J.'s Order of September 26, 2003. On June 21, 2005, Master MacLeod granted summary judgment to the appellant and struck out the respondent's Statement of Defence and counter-claim.

7 The landlord alleges that the tenant obtained the MacLeod order based on fraudulent affidavits. The landlord is moving to set aside the Master MacLeod order on January 20, 2006.

8 It would appear that the parties have and continue to rely on the courts to adjudicate upon their rights under the lease agreement.

9 In exercising my discretion, I take into consideration that the only rent arrears now owing over a lease period of 5 years is one month's rent of approximately \$5,500.00. I also consider that the breach has or is about to be rectified by certified cheque.

10 The tenant is operating a viable commercial business, Hakim Optical, out of this location and is presently out of business.

11 The other breaches complained of by the landlord (including damage to the wall from the removal of the sign, not providing 12 post-dated cheques) and the breaches as claimed in its cause of action presently before the Court are significant, but not so significant as to deny the applicant the relief from forfeiture.

12 The respondent also claims fraudulent misrepresentation by the applicant to the Court. That matter is presently to be heard on January 20, 2006.

13 I am not prepared to rule on this issue of fraud on this date as the matter will be fully canvassed on January 20, 2006.

14 In weighing all of the factors, I am prepared to grant immediate interim relief from forfeiture on the following conditions:

- (i) The applicant's counsel will provide to the respondent's counsel a certified cheque today to cover the December rent.
- (ii) Counsel will also provide to the respondent's counsel by December 29, 2005, 12 post-dated cheques.
- (iii) The receipt and acceptance of the cheques will not prejudice the respondent's rights.
- (iv) The applicant will have the right to re-enter the premises at 4822 Yonge Street, as of December 21, 2005 at 9:00 a.m. The landlord will take all reasonable steps to facilitate re-entry.
- (v) This matter will be adjourned to February 28, 2006 to be heard. The interim relief forfeiture will be revisited on that date.
- (vi) The cost of this application will be dealt with by written submissions. The respondent will serve and file by January 13, 2006. The applicant will serve and file by January 27, 2006.

J.B. McMAHON J.
cp/e/qw/qlesm/qlrme/qlmll