Commercial leasing: Ontario Superior Court takes judicial notice of anti-Black racism

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Case summary

In *Elias Restaurant v. Keele Sheppard Plaza Inc.*, 2020 ONSC 5457 (Elias Restaurant), the Ontario Superior Court of Justice (the Court), granted relief from forfeiture in favour of an overholding commercial tenant. The Court noted the discriminatory attitude of the landlord towards the tenant in its judgement. This is a significant and timely decision for Canadian commercial leasing jurisprudence, as the Court took judicial notice of anti-Black racism.

Background

The tenant, Lassie Charles, and her husband owned and operated a restaurant that served African/Black/Caribbean cultural foods, and was also licensed to serve alcohol. The tenant catered primarily to a Black customer base.

The tenant took an assignment of the original lease for the premises in 2013. The original lease was for five years, with options to renew for two additional five-year terms (the Lease). The tenant failed to provide written notice to the landlord in regards to exercising its first renewal option by the required date of Jan. 31, 2017 (the Option Expiry Date). However, the tenant attempted multiple times to contact the landlord and the landlord's property manager in regards to its option to renew, before and after the Option Expiry Date.

The tenant became an overholding tenant once the initial five-year term lapsed and was paying overholding rent at 125 per cent until the landlord served the tenant a notice of termination on May 28, 2020. The tenant applied to the Court for an injunction and relief from forfeiture of the Lease.

Issue

Was the tenant entitled to relief of forfeiture to prevent eviction?

Analysis

Relief from forfeiture is enshrined in Section 98 of the *Courts of Justice Act*, RSO 1990, c C43. This type of injunctive relief is discretionary and fact-specific. Factors courts consider include the following, as cited in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, 1994 CarswellAlta 769 (SCC):

- The conduct of the applicant and gravity of breaches;
- Whether the object of forfeiture is to secure payment of money; and
- Whether there is disproportionate value between the property forfeited and damage caused by breach.

Based on the above factors, the Court granted relief from forfeiture to the tenant because the balance of equities weighed in the tenant's favour. The tenant made repeated efforts to meet its obligations under the Lease and there was no real economic loss for the landlord.

The tenant made multiple efforts to contact the landlord and property manager to start the renewal process in advance of the Option Expiry Date, but the landlord and property manager failed to answer the tenant's calls. The property manager also refused to acknowledge the tenant's leasing lawyer and demanded proof that he was authorized to represent the tenant, despite having prior engagements with the lawyer in 2013. The tenant acted with good faith in its desire to renew the Lease. However, as the Court noted, the landlord's actions made their intentions clear – the landlord and property manager were deliberately avoiding the tenant.

The landlord claimed a prospective tenant wanted to lease the space for a medical office, which was later proven unsubstantiated. The new offer to lease with the prospective tenant was also for less than what the tenant was paying as an overholding tenant and what the tenant had offered to pay to preserve the Lease. Accordingly, the Court found there was no real economic loss for the landlord.

On the other hand, the tenant would suffer irreparable harm if evicted. The tenant would lose a substantial investment of $150,000 it spent on renovations, the goodwill associated with the restaurant, and the ability to sustain a livelihood. Based on the landlord's conduct, its lack of financial loss, the potential irreparable harm to the tenant and the balance of convenience in the tenant's favour, the Court determined that the test for injunctive relief had been met.

The Court addresses racial bias

Elias Restaurant is a significant case in Canadian commercial leasing jurisprudence as the Court chose to highlight the "barely veiled tones of racism" in the submissions and evidence provided by the landlord. For example:

- The landlord purported that the tenant did not attract "like-minded" family-oriented customers, and suggested that was why that the tenant was not to the landlord's liking. The Court saw this as contradictory, as the restaurant was a family-owned establishment.

- The landlord submitted affidavit evidence from one of the landlord's contractors that said people were smoking, drinking and gambling outside the restaurant; however, there was no evidence of how the contractor knew those individuals were the tenant's customers. In light of this, the Court said the landlord articulated what "might be considered almost a caricature of racially derogatory themes," and used that to portray the tenant's customers.

The Court determined that there was racial stereotyping by the landlord and also said that terminating the lease would risk "giving force to the landlord's subjective, if perhaps unconscious prejudices."

The Court also provided social commentary on how intent and motivation are not necessary for racial bias to exist. Despite nothing on the record to show that the landlord's actions were racially motivated the Court elected to consider the landlord's subconscious attitude toward the tenant, even if the landlord was not necessarily aware of it. Accordingly, the Court took notice of an aggregate of circumstances that pointed to a "mindset that condemns the minority population for what is considered normal behaviour for the majority population."

In rendering its decision, the Court did not solely focus on the landlord's evasive attitude while avoiding the notion of racism. Rather, it proactively emphasized the racial biases of the landlord towards the tenant, and highlighted the presence of anti-Black racism in society.

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