Tenants Beware of Estoppel Certificates — Don’t Inadvertently Waive Your Existing Lease Rights

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The Ontario Superior Court’s judgment in *1960529 Ontario Inc. v. 2077570 Ontario Inc., 296 Brunswick LP Corp., and CMLS Financial Ltd.* 2017 ONSC 5254 provides a cautionary reminder to tenants to carefully review their lease before signing an estoppel certificate.

Background

1960529 Ontario Inc. carried on business as a bar and game arcade using the name Tilt Arcade Bar (“Tilt”). Tilt, the tenant, leased the first floor of the property located at 296 Brunswick Avenue, Toronto, from the landlord, 2077570 Ontario Inc. (“207”). The lease between Tilt and 207 contained a right of first refusal provision which stated that 207 agreed to provide Tilt with a copy of an offer to buy the building prior to accepting any offer for the sale of the property and that Tilt would have 24 hours to provide 207 with an offer that was the same as the offer that 207 intended to accept.

On October 17, 2016, 207 entered into an agreement of purchase and sale with 296 Brunswick LP Corp (“Brunswick”) for the sale of the property. On February 14, 2017, the President of 207 attended at the property with a form of estoppel certificate informing Evan Oswald (“Oswald”), Tilt’s President, that the property had been sold and that the estoppel certificate was required immediately to effect the assignment of the lease from 207 to Brunswick.

The estoppel certificate was addressed to CMLS Financial Ltd., Brunswick’s lender (the “Lender”). 207 was identified as the landlord, and Tilt was identified as the tenant. The estoppel certificate confirmed that there were no defaults under the lease. No reference to the right of first refusal was made in the estoppel certificate. Oswald, who didn’t realize he had a right of first refusal under the lease, signed the estoppel certificate.

The property was transferred from 207 to Brunswick on February 17, 2017. Brunswick then exercised a demolition provision in the lease and gave Tilt notice of termination. It was only at this point that Tilt realized that it should have been given the right to buy the property pursuant to the right of first refusal in the lease. Tilt commenced an application seeking relief in support of its claim for enforcement of a right of first refusal. Tilt also

brought a motion for injunctive relief restraining Brunswick from demolishing the property, which was the subject of this decision.

Court Decision

The Court denied Tilt's motion for an interlocutory injunction on the basis that there was no serious question to be tried. The court explained that Tilt waived its right of first refusal by signing the estoppel certificate and confirming that there was no default under the lease at the time the estoppel certificate was signed (*i.e.* the landlord was not in breach of any of its obligations relating to the right of first refusal). The Court stated that parties to a commercial real estate transaction are entitled to rely upon an estoppel certificate to prevent the party signing the certificate from taking a position that is contrary to the statements therein. By signing the estoppel certificate, Tilt must be taken to have known that the parties affected by the sale of the property would rely on the contents thereof.

Comment

This case is an important reminder of what can happen to tenants when they fail to review their lease before signing an estoppel certificate. Tenants can be viewed to waive their existing rights if they are not careful. In this situation, Tilt could have potentially prevented Brunswick from purchasing the property had it identified the landlord default in the estoppel certificate before signing.

This case is also a reminder that even though an estoppel certificate is addressed to a particular entity/individual, it does not necessarily prevent a non-addressee from relying on the estoppel certificate.

Tenants should always be mindful of all of their rights under their lease and ensure that they are aware of the purpose for which an estoppel certificate is being sought. This will allow tenants to see the "big picture" relative to their existing leasehold rights.

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