

CITATION: 2753012 Ontario Inc. v. Pylos Holdings Ltd., 2025 ONSC 2441
COURT FILE NO.: CV-24-2457-0000
DATE: 2025-04-22

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 2753012 Ontario Inc., Applicant

AND:

Pylos Holdings Ltd., Respondent

BEFORE: Kurz J.

COUNSEL: James McReynolds, for the Applicant

Ian Cantor, for the Respondent

HEARD: April 14, 2025

ENDORSEMENT

[1] The Applicant commercial tenant (the “Tenant”) moves for relief from forfeiture regarding the termination of its former commercial tenancy (the Tenancy”) at 8724 Regional Road #25 Milton, Ontario (the “Premises”) and for related relief. The Tenant says that the Respondent landlord (the “Landlord”) waived its rights to terminate the Lease between the parties (the “Lease”) arising from nonpayment of rent. The Tenant adds that it was the Landlord who breached the Lease when it purported to terminate the Lease based upon the accumulated rental arrears.

[2] While the parties disagree about the amount of the Tenant’s rental arrears, even on the Tenant’s evidence, it was substantially in arrears on January 25, 2024, when the Landlord changed the locks to the Premises and served its notice of termination on the Tenant.

[3] In its submissions, the Tenant argues that:

1. The Lease was wrongly terminated because:

- (1) The Landlord waived reliance on rental arrears as a ground for terminating the Lease when it accepted a payment equivalent to one month's rent in November 2023;
- (2) it required the Landlord to offer the Tenant a notice of default before terminating the Lease.
- (3) The Landlord wrongly calculated the Tenants' arrears of rent.

[4] Accordingly, the Tenant asserts that it is entitled to relief from forfeiture and to be allowed back into the premises.

[5] The Landlord responds that:

1. It never waived payment of the arrears when it accepted back rent equivalent to one month's rent in November 2023.
2. The Lease clearly requires that any waiver by the Landlord of any of its terms be in writing and signed by the Landlord. That has not occurred here.
3. Any sensible reading of the Lease demonstrates that the Landlord need not offer a tenant a notice of default for non-payment of rent before terminating a lease on that ground.
4. The Tenant fails to meet the test or equities for an order for relief from forfeiture. In particular:
 - (1) The Lease was terminated almost a year and a quarter ago,
 - (2) The Lease expires in a few days; and
 - (3) a new tenant has already occupied the premises for over a year.

[6] This case raises the following issues:

1. Did the Landlord waive its right to terminate the Tenant's tenancy?

2. Did the Landlord breach the Lease when it terminated the subject tenancy?
3. In any event, is the Tenant entitled to relief from forfeiture?
4. Is the Tenant entitled to other relief?

[7] For the reasons that follow, I dismiss this application. I find that the Landlord neither waived the tenant's nonpayment of rent as a ground for the termination of the Lease, nor did it breach the Lease when it terminated the Tenancy. Rather the Landlord was entitled to terminate the Tenancy based on the tenant's significant nonpayment of rent. Further, and in any event, the Tenant is not entitled to relief from forfeiture on equitable grounds, including delay and the fact that the Lease is about to end. The Tenant is also not entitled to any other relief based on the tenancy or the Lease.

Background

[8] The parties entered into the Lease for the Premises on February 1, 2020. The term of the Lease is five years, ending April 30, 2025. The Lease allowed free rent from February – April 2020.

[9] The Tenant wished to operate a restaurant on the Premises, which had long been used as a restaurant.

[10] The relevant terms of the Lease included the following:

1. Rent of \$4,000 per month payable on the first day of each month plus an estimated additional rent of \$1,000 per month for a total of \$5,560 per month, including HST. While the rent was supposed to increase after the first year, the Landlord did not enforce this term.
2. Paragraph 10 of the Lease sets out acts of defaults and the Landlord's remedies in the event of default. Relevant terms include:

10 ACTS OF DEFAULT AND LANDLORD'S REMEDIES

- (1) An act of Default occurs when:
- a. The Tenant has failed to pay Rent for a period of fifteen (15) consecutive days, regardless of whether demand for payment has been made or not;
 - b. The Tenant has breached his covenants or failed to perform any of his obligations under this Lease; and
 - i. The Landlord has given notice specifying the nature of the default and the steps required to correct it; and
 - ii. The Tenant has failed to correct the default as required by the notice;
- ...

- (2) When an Act of Default on the part of the Tenant has occurred:

- a. The current month's rent together with the next three months' rent shall become due and payable immediately; and
 - b. The Landlord shall have the right to terminate this Lease and to re-enter the Premises and deal with them as he may chose.
- ...

- (6) If, when an Act of default has occurred, the Landlord chooses to waive his right to exercise his remedies available to him under this Lease or at law the waiver shall not constitute condonation of the Act of Default, nor shall the waiver be pleaded as estoppel against the Landlord to prevent his exercising his remedies with respect to a subsequent Act of Default. No covenant, term or condition of this Lease shall be deemed to have been waived by the Landlord unless the waiver is in writing and signed by the Landlord.

[11] The Tenant never opened its restaurant in the almost four year period after it signed the Lease. That in itself was an act of default under the Lease, although the

Landlord chose not to enforce the term. However the Tenant began to fall further and further into default of rent.

[12] The Tenant does not deny that it failed to pay rent on the twelve following months: December 2021, October 2022, February – July 2023, September – October and December 2023 as well as January 2024. In addition, the Tenant was forced to replace six NSF cheques between June 2021 and January 2023.

[13] Emails between the parties in late 2023 and early 2024 disclose numerous promises by the Tenant to bring the rental arrears into good standing. However the only rent payment made by the Tenant at that time was one monthly payment in November 2023. The Tenant says that the Landlord waived its right to terminate the tenancy when it accepted that cheque. However, as set out above, the Tenant also failed to pay rent in December 2023 and January 2024.

[14] On January 24, 2024, the Landlord terminated the tenancy by using a bailiff to change the locks and post a notice of termination on the Premises. Correspondence between the parties prior to that date made clear to the Tenant that the Landlord was losing patience with the Tenant's constant unfulfilled promises to bring its rent into good standing.

[15] The Tenant points out that it paid the Landlord a security deposit of \$30,519.24, a sum which was inclusive of one month's rent. It also claims that the Landlord failed to credit it with two months rent it paid in 2021. It does not supply its own calculation of rental arrears. But even if that were all accurate and taken into account, twelve months of arrears add up to \$66,720. Subtracting the \$30,519.24 and two months of rent (\$11,120), the arrears of rent still amount to \$25,081.

[16] While the Tenant agreed to pay part of the costs of stuccoing the Premises there is no evidence that the Landlord had agreed to reimburse it for that cost.

[17] After the Tenancy was terminated, the parties negotiated for a time. In an email on March 3, 2024, the Landlord's paralegal informed the Tenant that the Landlord was

unwilling to continue the landlord and tenant relationship and that the Lease termination stood. The Landlord repeated that position in emails of April 2 and 12, 2024.

[18] In or about April 2024, the Landlord entered into a new five-year lease with new tenants (the “New Tenants”), effective April 15, 2024. Those New Tenants opened their own restaurant after further renovation to the Premises. The New Tenants’ restaurant opened in May 2024 and remains in business.

Issue No 1: Did the Landlord Waive the Tenant’s rental default?

[19] The legal principles governing the doctrine of waiver were set out by the Supreme Court of Canada in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490, at para 19, as follows:

19 Waiver occurs where one party to a contract or to proceedings takes steps which amount to foregoing reliance on some known right or defect in the performance of the other party: *Mitchell and Jewell Ltd. v. Canadian Pacific Express Co.*, [1974] 3 W.W.R. 259 (Alta. S.C.A.D.); *Marchischuk v. Dominion Industrial Supplies Ltd.*, [1991] 2 S.C.R. 61 (waiver of a limitation period). The elements of waiver were described in *Federal Business Development Bank v. Steinbock Development Corp.* (1983), 42 A.R. 231 (C.A.), cited by both parties to the present appeal (Laycraft J.A. for the court, at p. 236):

The essentials of waiver are thus full knowledge of the deficiency which might be relied upon and the unequivocal intention to relinquish the right to rely on it. That intention may be expressed in a formal legal document, it may be expressed in some informal fashion or it may be inferred from conduct. In whatever fashion the intention to relinquish the right is communicated, however, the conscious intention to do so is what must be ascertained.

20 Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them. The creation of such a stringent test is justified since no consideration moves from the party in whose favour a waiver operates. An overly broad interpretation of waiver would undermine the requirement of contractual consideration.

[20] In November 2023 the Tenant provided the Landlord with a cheque for one month’s rent. At the time, it was in arrears of ten months’ rent. The Tenant argues that by accepting one month’s payment in November 2023, the Landlord waived its right to terminate the Lease based on the previous rental arrears.

[21] There are three flaws to that argument. First, as set out above, para. 10(6) of the Lease sets strict conditions for a waiver of a lease term. It requires any waiver to be in writing and signed by the Landlord. That did not occur. Second, there is no evidence of the Landlords “unequivocal and conscious intention” to waive its rights under s. 10(1) of the Lease. Third, the Tenant failed to pay its December 2023 and January 2024 rent. Thus, even if the Landlord had waived the Tenant’s rental default in November 2023, the Tenant committed new defaults in December 2023 and January 2024, which entitled the Landlord to terminate the Lease.

[22] In sum, the Landlord did not waive the Tenant’s rental default. Even if it did, the Tenant fell into further default in December 2023 and January 2024, which the Landlord never waived.

Issue No 2: Did the Landlord breach the Lease when it terminated the Tenancy?

[23] The Tenant argues that the Landlord breached the termination provisions of the Lease by failing to provide notice of its intention to terminate the Lease for non-payment. Here, the Tenant refers to para. 10(1)(b) of the Lease, which requires notice specifying the default and the opportunity to correct it before the Landlord can terminate the Lease.

[24] However, that argument ignores the specific provisions of s. 10(1)(a), which refer to default in the payment of rent which continues for 15 consecutive days. The default and right to terminate on that basis exists “whether demand for payment has been made or not”.

[25] As the Supreme Court of Canada noted in *Sattva Capital v. Creston Moly Corp.*, 2014 SCC 53, at para. 57:

The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract... While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement .

[Citations Omitted.]

[26] Here, it is clear that the specific provision, dealing with termination arising out of rental arrears was intended to take precedence to termination based on other factors, which the Landlord is required disclose to a tenant through proper notice. A tenant will know whether they failed to pay rent without notice from the Landlord. There is no evidence of any intention by the parties to interpret the Lease otherwise.

[27] I add that in the communications between the Landlord and Tenant up to the date that the Lease was terminated, the Tenant acknowledged its rental payment default and the extent of its arrears. The Tenant made a series of unfulfilled promises to pay those arrears.

Issue No. 3: In any event, is the Tenant entitled to relief from forfeiture?

[28] In *2324702 Ontario v. 1305 Dundas*, 2019 ONSC 1885, at para. 15, Nakatsuru J. set out the scope of the equitable doctrine of relief from forfeiture. He wrote:

15 The power to relieve from forfeiture is discretionary, fact-specific, and granted sparingly. The onus lies on Remix. It must show that enforcing the contractual right of forfeiture would lead to an inequitable consequence on Remix. Factors to consider include the conduct of Remix, the gravity of the breach, the disparity between what is forfeited and the damage caused by the breach: *Saskatchewan Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490, at para. 32. This assessment is based on a reasonableness standard: *Ontario (Attorney General) v. McDougall*, 2011 ONCA 363, at paras. 87 to 92. In the context of a default due to non-payment of rent, other specific factors to consider are whether the tenant comes to court with clean hands; whether there is an outright refusal to pay rent; the extent of the rental arrears; and whether the landlord has suffered serious loss due to the delay in paying rent: *Michele's Italian Ristorante Inc. v. 1272259 Ontario Ltd.*, 2016 ONSC 4888, at para. 36.

[29] As the Ontario Court of Appeal stated in *Rahawanji v. Gwendolyn Shop (1973) Ltd.*, 2011 ONCA 771, at paras. 2-3, relief from forfeiture is a remedy which is not granted as a matter of course, particularly regarding commercial leases. The court adopted this statement by Doherty J.A. in *Ontario (Attorney General) v. 8477 Darlington Crescent*, 2011 ONCA 363, at para. 93:

Relief from forfeiture is very much the exception and will be granted only where the party seeking that remedy clearly makes the case that forfeiture would be an inequitable and unjust order in all the circumstances.

[30] The Court added at para. 3 of *Rahawanji* that in an application for relief from forfeiture, the court was entitled to consider the Appellant's failure to proceed in a timely fashion.

[31] In *Big Land Farm (Burnhamthorpe) Ltd. (c.o.b. Big Land Farm) v. 1658586 Ontario Inc.*, [2006] O.J. No. 418 (S.C.J.), at para. 41, Belleghem J. described the impact of the principle of laches on the consideration of a request for relief from forfeiture, writing:

41 At the end of the day, we have a situation where the landlord has unquestionably terminated a lease. The tenant asks for relief from forfeiture. This is a claim for equitable relief. In a claim for equitable relief, the Ontario Court of Appeal in *Harris v. McNeely* 47 O.R. (3d) 161 (February 25, 2000) reaffirmed the principle that "laches" will bar the granting of equitable relief where one party has "put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted ..." It also reaffirmed the significant relevance of two circumstances, the length of the delay and the nature of the acts done during the interval which "might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy". In doing so the court was following the early principles laid down in *Lindsay Petroleum Company v. Hurd*, (1874) 5 L.R.P.C. 221.

[32] Here, the Tenant waited over five months following the changing of locks and service of the notice of termination to bring its application. It is true that the parties negotiated for about six weeks thereafter. But the Tenant was aware by March 3, 2024 that the Landlord was unwilling to continue the landlord and tenant relationship and that the Lease termination stood. Yet the Tenant waited for 3 months and 23 days, until June 26, 2024, before bringing this application. During that time, the Landlord had relet the premises to a new tenant. That tenancy has remained in place for over a year since that re-letting.

[33] I add two other equitable factors which apply here. First, the tenant failed to offer any payment of rental arrears to the Landlord if it were relet into the premises. Second, the Lease expires at the end of this month in any event.

[34] For all of those reasons, I dismiss the claim for relief from forfeiture.

Issue No. 4: Is the Tenant entitled other relief?

[35] The Tenant sought other relief in his Notice of Application which his counsel did not argue in any detail during this hearing. He sought:

- An order declaring that the term of the tenancy is ten (10) years;
- An order requiring the Landlord to provide an accounting of the amounts paid by the Tenant to the Landlord;
- An Order requiring the Landlord to obtain an order from this Court prior to taking any steps to terminate the Lease with respect to the issues raised in these proceedings;

[36] I will briefly deal with each of those requests below.

[37] Regarding the length of the term of the tenancy, the tenant's counsel conceded during the course of argument that there is no amendment to the Lease which was signed by both parties which extends the five-year term of the Lease.

[38] Regarding an accounting, it is clear that 1) the tenant can work out its own accounting of what it says is owing under the Lease and who owes it. It does not require the Landlord to perform an accounting for it; 2) whatever the accounting, the Tenant owes more to the Landlord than vice versa; and 3) the Tenant is judgment proof in any event. Thus there is no utility to ordering the accounting. If the Tenant wishes and believes that it has a viable cause of action, it can commence an action against the Landlord for alleged overpayment of rent.

[39] Regarding an order requiring leave to take any further steps to terminate the Lease, in light of my findings above, that request is moot.

Conclusion

[40] For the reasons set out above, I dismiss this application.

Costs

[41] The Landlord was completely successful in this proceeding. If it seeks its costs of this application, it shall submit its costs submission of up to three pages, double-spaced, one-inch margins, plus bill of costs/costs outline and any offers to settle within seven days. The Tenant may respond in kind within a further seven days. No reply unless I request it. If I do not receive costs submissions upon the timeline set out above, I will assume that the costs issue is resolved and make no order.

Kurz J.

Date: April 22, 2025