CITATION: 2356802 Ontario Corp. v. 285 Spadina SPV Inc. 2023 ONSC 6382
COURT FILE NO.: CV-21-0667377-00CL
REFERENCE HEARD: 20230928, 20230929, 20231003, 20231004
RELEASED: 20231110

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 2356802 Ontario Corp., Applicant

AND:

285 Spadina SPV Inc. and Ronald Hitti, Respondents

BEFORE: Associate Justice Jolley

COUNSEL: Nicolas Canizares, counsel for the applicant

John Ormston, counsel for the respondent 285 Spadina SPV Inc.

Ronald Hitti, self-represented respondent

HEARD: September 28, 29, October 3 and 4, 2023

REASONS FOR DECISION

Overview

[1] This reference comes before me by way of two decisions of Kimmel, J. concerning property located at 285 Spadina Avenue (the "Property"). It is the culmination of multiple attendances before Her Honour, all of which are part of a long-standing dispute between 2356802 Ontario Corp. (the "Landlord") and 285 Spadina SPV Inc. (the "Tenant") over the interpretation of the lease of the Property (the "Lease").

[2] As a term of the Lease, the Landlord provided the Tenant with advances of $3,164,000 (the "Construction Allowance") for it to carry out Landlord's Work, as defined in the Lease. This reference will deal with the disputes between the parties concerning the Tenant's use of that Construction Allowance.

[3] The Landlord argues that the Tenant has improperly used the Construction Allowance to pay for non-Landlord's Work. Mr. Hitti, on behalf of the Tenant, argues that the Tenant does not need to account for the Construction Allowance but, in the alternative, has appropriately used the funds and accounted for their use. Kimmel, J. has directed that the Tenant repay the Landlord any amounts that it does not prove were expended on Landlord's Work.

Terms of Reference

[4] Given the disputes over the Construction Allowance, in her decision released 25 April 2022 and reported as *2356802 Ontario Corp. v. 285 Spadina SPV Inc.* 2022 ONSC 2427 (the "Lease decision"), Kimmel, J. ordered as follows:

> [157] "The Construction Allowance Issue: The Landlord is entitled to receive a compliant Tenant's Certificate(s) certifying all amounts paid to any contractor, subcontractor, worker, or supplier for the Landlord's Work completed to date. This is required to be provided along with invoices and proof of payment for all of the Landlord's Work undertaken for which the Construction Allowance applies. The Tenant's Certificate(s) will allow for an accounting and reconciliation of the Construction Allowance. I imply a term into the SPV Lease and Schedule "E" requiring the Tenant to reimburse any overpayment of the Construction Allowance to the Landlord. Within 45 days of this decision, the Tenant is ordered to deliver a Tenant's Certificate(s) and supporting documents for all of the Landlord's Work that has been undertaken by the Tenant or on its behalf to date. Within 45 days of the delivery of the Tenant's Certificate(s), the Tenant is ordered to repay to the Landlord any amounts not proven through the Tenant's Certificate(s) and supporting documents to have been expended by the Tenant for the Landlord's Work, except amounts to be applied towards pending certified further installment(s). If the Tenant fails to provide the Tenant's Certificate(s) or repay the overpayments, that may be grounds upon which the Landlord may seek the court's permission to terminate the SPV Lease. If appropriate, in the future the Landlord may request a tracing order and/or disgorgement.

[5] In response to the Lease decision directive, Mr. Hitti provided his affidavit affirmed 14 June 2022 (the "Hitti affidavit") on behalf of the Tenant concerning the use of the Construction Allowance. Mr. Hitti was the representative of the Tenant until Steele, J. ordered his removal as an officer and director on 13 February 2023 and prevented him from exercising any authority or control over the company.

[6] The dispute was again before Kimmel, J. on 20 July 2022 when the Tenant brought a motion to set aside the Landlord's purported termination of the Lease. In the course of her decision (*2356802 Ontario Corp. v. 285 Spadina SPV Inc*. 2022 ONSC 4674), Her Honour noted that the parties had each devoted a significant amount of their evidence and argument to disputes related to Construction Allowance issues and the nature and sufficiency of the Tenant's certificate, accounting, reconciliation and supporting documents. While the issue was not relevant to the determination before her, Her Honour noted that the dispute had to be resolved before the amount of rent owing or owed could finally be determined. For that reason, it was agreed that these "largely factual disputes" concerning the Construction Allowance be addressed on a reference, which was directed to me on 12 October 2022.

[7] In her further decision on a motion by the Tenant for leave to introduce fresh evidence related to the Lease decision (the "New Evidence decision"), (*2356802 Ontario Corp. v. 285 Spadina SPV Inc*. 2022 ONSC 7318) Kimmel, J. reiterated:

> [9] In the Lease Decision, the Construction Allowance Issue (as defined therein at para. 9) was decided in favour of the Landlord. In particular, it was determined that the Landlord was entitled to receive a compliant Tenant's Certificate(s) certifying all amounts paid to any contractor, subcontractor, worker, or supplier for the Landlord's Work completed to date, to be provided along with invoices and proof of payment for all of the Landlord's Work undertaken for which the Construction Allowance applies.
>
> [10] The Tenant's Certificate(s) were to provide the foundation for a retroactive accounting and reconciliation of the Construction Allowance. A term was implied into the SPV Lease and Schedule "E" requiring the Tenant to reimburse any overpayment of the Construction Allowance to the Landlord (the "Implied Term") and the Tenant was ordered to repay to the landlord any amounts not proven through the Tenant's Certificate(s) and supporting documents to have been expended by the Tenant on account of the Landlord's Work (except to the extent of any credit to be applied to the remaining installments of the constructions allowance for which milestone(s) have been confirmed by the Payment Certifier) within forty-five days of the delivery of the Tenant's Certificate(s)."

[8] The New Evidence decision further directed me to "deal with any disputes about the sufficiency of the tenant's certificate, accounting and supporting documentation provided by the tenant that was ordered in connection with the Construction Allowance in the Lease Decision, *2356802 Ontario Corp. v. 285 Spadina SPV Inc.* 2022 ONSC 2427."

Evidence on the Reference

[9] The parameters of the reference were set in advance on consent in a series of case conferences and hearings for directions before me. On 18 November 2022 the reference was scheduled to be heard September 28, 29, October 3, 4 and 5. Given the volume of material that had been filed on other motions and hearings in this application, it was important that the parties knew in advance what evidence would be relied upon in this reference. It was agreed at the motion for directions heard by me on 28 March 2023 that the Landlord would call its property manager, Chris Baek and an expert witness, Mr. Farkas. It would also rely on the evidence of Modern Upgrades, the contractor that did work on the Property. It was expected that the evidence of the principal of Modern Upgrades, Mr. Younes, could be tendered by way of affidavit, failing which the Landlord would call him. The Tenant did not propose to call any evidence in chief. Mr. Hitti, in his personal capacity, proposed to call the Tenant's real estate agent, Robin Lewis, two individuals who worked on the Property whose names he would provide and himself.

[10] All affidavits of witnesses to be called were ordered exchanged by 28 April 2023. Cross examination would take place in the course of the reference.

[11] Mr. Hitti relied on the Hitti affidavit that he had provided earlier to account for the Construction Allowance funds received from the Landlord. He also served an affidavit sworn by Mr. Lewis on 27 March 2023. While the Hitti affidavit indicated that it was not final but represented a partial accounting, Mr. Hitti did not file a supplementary affidavit.

[12] Despite the directions of Kimmel, J. that the Tenant provide Tenant's Certificates, the sufficiency of which would form the basis for this reference, the Tenant did not file any Tenant's Certificates and the Landlord did not object. Instead, the parties were content that the Hitti affidavit satisfy that requirement.

[13] The affidavit of Mr. Younes on behalf of Modern Upgrades was sworn 10 September 2023 and delivered on or about that date. Mr. Younes was not cross-examined on his affidavit and it was accepted into evidence on consent.

[14] Also tendered in evidence were the Tenant's banking records from Royal Bank of Canada which were produced pursuant to my order of 28 March 2023.

[15] After the conclusion of the reference, Mr. Hitti provided submissions in the form of commentary to documents on CaseLines. I did not consider those submissions.

Mr. Hitti issues at the Outset of the Reference

[16] By email dated 19 September 2023, Mr. Hitti advised that the reference had to be adjourned because he had been denied access to his oxygen generator and his files as a result of his eviction from his residential premises. As there was no motion before me requesting an adjournment and no evidence that it could not proceed as ordered, I reiterated that the reference would continue as scheduled.

[17] Mr. Hitti was provided with a zoom link to deal with preliminary matters on the first morning. After a short zoom attendance, Mr. Hitti was able to attend in person, with a computer, and the reference commenced at 12:30 on September 28.

Relevant Terms of the Lease

[18] As Her Honour noted in the Lease decision, the parties executed two versions of the Lease – an "original version of the Lease" (with a watermark Draft) and a Trued-Up Version. While it was agreed that the original version would govern in the event of any discrepancy, the versions of Schedule E, central to this reference, do not vary materially, if at all, from each other, so the argument before me about which lease governed was moot.

[19] Under the terms of the Lease, the Tenant was responsible for carrying out the Landlord's Work, as defined, and the Landlord was responsible for reimbursing the Tenant for that work pursuant to a payment certification and milestone schedule. The Lease defined not only the scope of the Landlord's Work but also the Construction Allowance.

[20] Schedule "E" listed the Scope of Landlord's Works as follows:

A) Supply and installation of a new distributed HVAC system sufficient for an "AI" Occupancy Class and configured for the Tenant's as-built Premises, providing a total cooling capacity of no less than 70 Tons, provided that, wherever possible, roof top HVAC units are used.

B) Supply and installation of a new 800Amp main service panel with distribution to 2 or more service panels in the Premises.

C) Supply and installation of a new undistributed sanitary sewer and water supply line, consisting of cast iron sanitary sewer and a copper water supply to a metered connection.

D) Supply and installation of a new roof system in accordance with the option 1 recommendations of Read Jones Christoffersen Ltd. (Nov. 5, 2015 report) in order to ensure a safe and leak free roof during the Term of the Lease, including but not limited to:

i) Structural reinforcement and replacement of metal deck;

ii) a new waterproof roof membrane; and

iii) provision of adequate drainage.

E) Supply and installation of a new fire protection sprinkler system to the Premises for an "Al" Occupancy and the Tenant's proposed use.

F) Supply and installation of all related and ancillary labour and material to complete the foregoing, including but not limited to the protection/restoration of any elements of the Premises that are of a "historical" nature and removal/remediation with respect to hazardous materials.

[21] The Construction Allowance was defined in Schedule E as “the amount of FOUR MILLION DOLLARS ($4,000,000.00) (plus applicable taxes)”.

[22] The Construction Allowance was to be paid “on account of costs incurred by the Tenant with respect to the Landlord's Work, payable as follows:

(a) each of the draws below (Not including the Retainer) shall be subject to the Landlord's retention of the holdback amounts pursuant to the Construction Act;

(b) The "Retainer" shall be payable by wire transfer to the Tenant’s RBC Bank account (the Tenant to provide all relevant banking information to the Landlord) within 24 hours of the date of receipt by the Landlord of written demand from the Tenant, which may only be given following mutual execution of this Lease;

(c) all other draws set out in the table below shall be payable by the Landlord within 5 days of written confirmation from the Payment Certifier to the Landlord that the applicable milestone in the table has been achieved;

AMOUNT (HST extra)	PROVIDED MINIMUM MILESTONE COMPLETION
$ 1,000,000.00	Retainer
$ 500.000.00	Building permit issued by the City, GC retained, roof demo started
$ 500,000.00	Electrical & Plumbing are complete, HVAC Units ordered
$ 500,000.00	all roof demo is complete and roof replacement under way
$ 500,000.00	roof replacement is 75% complete
$ 500,000.00	roof is substantially complete + hvac & sprinkler started
Balance less 10% Holdback	all work is 95% substantially performed (as such term is defined under the Construction Act (Ontario))
10% holdback	all work is 100% complete and satisfactory and all applicable lien periods have expired under the Construction Act without registration of any lien against title to the Building

Without in any way affecting the Landlord's obligation to pay the Construction Allowance, the Landlord and the Tenant agree that a reasonable budget with respect to the Landlord's Work is as follows:

ARCHITECTURAL, ENG, PERMITS, FEES, ETC.;	$ 350,000.00
NEW ROOF INCLUDING DECK	$2,000,000.00
HVAC 70 TONS TOTAL RTU	$ 500,000.00
SPRINKLER SYSTEM & LIFE SAFETY	$ 550,000.00
RE & RE HISTORICAL CEILING	$ 400,000.00
HAZARDOUS MATERIAL HANDLING	$ 150,000.00
ELECTRICAL SUPPLY	$ 50,000.00
WATER SUPPLY (NEW BUILDING MAIN)	$ 70,000 00
TOTAL:	$4,080,000.00

The Construction Allowance Advances

[23] It is common ground that the Landlord paid the Tenant $3,164,000 in Construction Allowance instalments, as follows:

31 August 2020	$1,000,000
31 August 2020	$ 130,000
21 December 2020	$ 508,500
21 December 2020	$ 508,500
8 January 2021	$ 508,500
2 March 2021	$ 508,500
	$3,164,000

The Landlord's Position on the Reference

[24] The Landlord's expert Mr. G. Farkas, CPA, provided an expert's report, which was admitted on consent, as was his expertise. In chief, Mr. Farkas adopted the contents of his report. He concluded that the Tenant had submitted invoices totaling $1,864,388.36 (an additional $10,000 claim with no invoice) in support of its expenses. Before adjusting for the challenged invoices, this left $1,289,611.64 of the $3,164,000 Construction Allowance advances unaccounted for.

[25] Mr. Baek testified that a number of the invoices submitted by the Tenant did not fall within the scope of Landlord's Work. Once those disputed invoices were removed from the total, the Landlord's claim increased to $1,485,970.64, calculated as the $3,164,000 Construction Allowance advanced less only the legitimate invoices to Modern Upgrades of $1,678,029.36.

The Tenant's Position on the Reference

[26] The Tenant took no position on the reference. It did not lead evidence or make argument. Mr. Ormston sought leave to be excused after preliminary matters were dealt with on September 28, which request was granted. The Tenant recognized that, in its absence, there could be a finding that it owed significant funds to the Landlord.

Mr. Hitti's position on the Reference

[27] Mr. Hitti advanced four main arguments in support of his position that the Tenant was not responsible to the Landlord for repayment any of the Construction Allowance advances received:

(1) The Tenant is not required to account for any portion of the Construction Allowance;

(2) The Tenant is not required to account for $1,000,000 of the Construction Allowance;

(3) The Tenant is not required to account for the HST component of the Construction Allowance; and

(4) The Tenant has adequately accounted for the Construction Allowance.

First Argument – the Tenant is not required to account for any portion of the Construction Allowance

[28] Mr. Hitti advanced this argument, despite the clear decisions of Kimmel, J. requiring the Tenant to account. His argument that the Lease does not require the Tenant to account is *res judicata*. Her Honour specifically rejected this argument in the Lease decision and reiterated the requirement to account at paragraph 10 of the New Evidence decision. It is not open to the Tenant to continue to raise this argument, which has been decided.

[29] This argument is dismissed.

Second Argument – the Tenant is not required to account for the $1,000,000 retainer portion of the Construction Allowance

[30] Mr. Hitti argued that first $1,000,000 advanced as part of the Construction Allowance is exempt from an accounting for two reasons: first, by the language of the Lease and, second, because it was paid as part of a settlement with the Landlord.

[31] On the Lease language, Mr. Hitti relied on the distinction drawn in the Lease between the $1,000,000 retainer and the remaining Construction Allowance payments. He argues that the $1,000,000 is not subject to an accounting because, as distinct from the subsequent payments, it was specifically excluded from any milestone completion requirement before it was paid.

[32] As evidence of his position that no conditions were attached to this retainer amount, he also noted that, when the Landlord attempted to place conditions on the payment of those funds, he advised in his email to the Landlord of 28 August 2020 that the retainer was not conditional "on anything" other than the Tenant's demand that it be paid, as provided for in the Lease, and the Landlord complied.

[33] I reject this submission for three reasons.

[34] First, the order of Kimmel, J. requires the Tenant to account for the funds it received from the Landlord, which is agreed total $3,164,000. Her Honour did not carve out $1,000,000 from those funds and limit the Tenant's obligation to account to only $2,164,000. She required the Tenant to account for the entirety of the Construction Allowance.

[35] Second, the parties agreed in the Lease that a reasonable budget for the Landlord's Work was $4,080,000. It is illogical to suggest that the Landlord would pay the Tenant only $3,000,000 to carry out the Landlord's Work when the parties agreed that the Work was estimated to cost $4,080,000. The only logical conclusion is that the $1,000,000 was to be used for the Landlord's Work and therefore subject to an accounting.

[36] I do not agree that the fact that this first $1,000,000 tranche was advanced before any milestones were met or before any payment certification was required exempts the Tenant

from accounting for its use of these funds. The Lease specifically ties the payment of the first $1,000,000 to the Landlord's Work, stating that the Tenant is required to complete the plans for the Landlord's Work immediately upon the Landlord paying this first instalment.

[37] Third, there is no evidence to support the Tenant's contention that the $1,000,000 was paid as part of a binding settlement of the Tenant's claims for damages incurred as a result of delay by the Landlord and issues related to the state of the roof. Mr. Baek on behalf of the Landlord denied that the payment was a part of a settlement or was paid to compensate for the Landlord's liability to the Tenant over the prior two years, as alleged in the Hitti affidavit. He understood, as stated in the Lease, that it was simply the first payment due as part of the Construction Allowance under Schedule E.

[38] In support of his settlement argument, Mr. Hitti proffered an email from Mr. Baek dated 3 September 2020 stating: "Mr. Jo [the Landlord's principal] would like to confirm that as the Landlord and the Tenant have signed the lease agreement dated August 25, 2020, the parties will not claim any damages for the delay in the work and that [sic] will drop all such claims as part of the new lease deal. Please advise and let us know if there should be a formal separate document that would be signed to confirm this." The tenant responded that it did not think it necessary but might be "not a bad idea to sign something once all the construction is done." Ultimately, there was no corresponding acceptance, no agreement and no release. If it were agreed in July 2020 that these were settlement funds not required to be used for Landlord's Work and not subject to an accounting, as the Tenant contends, there is no explanation why there is no reference to these important terms in the Lease.

[39] The same answer can be made to the evidence of Robin Lewis, who acted as the Tenant's real estate agent at the time. Mr. Lewis testified that it was his understanding that the $1,000,000 payment was to compensate the Tenant for work that it had earlier performed and to act as a deposit against future Landlord's Work. This understanding was not memorialized by the parties and was disputed by the Landlord. Even if it were admissible, it is not precise enough to be relied upon in any event, as it is unclear how much Mr. Lewis understood was allocated for past work and how much was still subject to an accounting for future work.

[40] Mr. Lewis suggested that there was no need to specify in the Lease that the $1,000,000 was intended to compensate the Tenant for past expenses because there was an element of trust and goodwill between the parties. I do not accept that assertion. The parties had already been involved in significant litigation over the Property before the Lease was drafted. There was no evidence of trust or goodwill in the relationship by the time the Lease was signed.

[41] In any event, this position that the $1,000,000 retainer payment represented a settlement is, again, *res judicata*. Her Honour rejected any argument that the emails represented a settlement, stating at paragraphs 57 and 58 of the New Evidence decision:

> [57] However, the email that responded to the summary of the purported "settlement agreement" specifically states that: "I am sure you can appreciate that

> as there are many issues still to discuss on the lease aside of the roof, we need to have realistic expectations on timing to prepare a complicated and contentious lease agreement." Following which, there was no written confirmation from the Landlord that an agreement was reached before confirmation of the final form of the SPV Lease (that itself contains an entire agreement clause, in which both parties state that there were no prior promises, agreements or understandings between them).
>
> [58] This leads me to conclude that there was no prior settlement agreement contained in the July 2020 Settlement Emails; rather those emails were simply a precursor to the negotiations that eventually resulted in the SPV Lease. The operative SPV Lease identifies the $4 million to be paid by the Landlord to the Tenant as a Construction Allowance. The respondents' emphasis on the use of the term "inducement" in the July 2020 Settlement Emails (a concept that was not confirmed by any responding email from or on behalf of the Landlord and is not carried through into the SPV Lease) is inconsistent with the express provisions of the SPV Lease that describe this payment as a Construction Allowance with a budget, installments, certificates etc. (emphasis added)

[42] It is an abuse of process to raise this argument again, when the issue has already been clearly determined. This argument is dismissed.

Third Argument - The Tenant is not required to account for the HST component of the Construction Allowance

[43] Mr. Hitti next argued that the Tenant is not required to account for the HST component of the Construction Allowance funds it received as the HST could not be considered the Tenant's funds. He argues that $364,000 of the $3,164,000 the Tenant received was earmarked for HST and payable to the government, so that the Tenant is only required to account for $2,800.000.

[44] There are three problems with this argument.

[45] First, HST is fundamentally no different from any other payable that a recipient must remit to a third party. A Tenant could have a number of liabilities in addition to HST that affect its net take of the Construction Allowance. If the Tenant provided an invoice to the Landlord that included work done by a subcontractor on the Property, for instance, the Tenant would be similarly responsible for paying the subtrade from the funds received. While the payment obligation to suppliers or subtrades may not derive from legislation, the theory is the same – they are funds that the Tenant is required to pass on to others as part of its cost of the work undertaken and are not part of the Tenant's net receipts.

[46] Second, the HST amounts were specifically included in the definition of the Construction Allowance that is subject to the accounting. Schedule E provides that "the Landlord shall pay to the Tenant the amount of FOUR MILLION DOLLARS ($4,000,000.00) plus applicable taxes (the "Construction Allowance")" (emphasis added).

[47] Third, while Mr. Hitti argued that HST should not be counted as it is to be either remitted or appropriate credits shown to set it off, neither he nor the Tenant provided any documentation indicating that it had remitted the HST or had appropriate offsetting credits.

[48] This argument is dismissed.

Fourth Argument – the Tenant has Adequately Accounted for the Construction Allowance

(a) General Expenses

[49] On behalf of the Tenant, Mr. Hitti took the position that every expense incurred by the Tenant during the period of construction before and after the signing of the Lease constitutes Landlord's Work.

[50] In cross examination, Mr. Hitti was taken through the Tenant's bank statements and confirmed that the Tenant had paid its ongoing expenses from the account into which the Construction Allowances had been deposited. These included payments of an American Express card, cell phone bills, internet charges, two vehicle leases, rent on its office space on Wellington Street, insurance, bank fees and charges, and lawyers' fees incurred related to issues concerning the Landlord's Work.

[51] Mr. Hitti argued that carrying out the Landlord's Work was the Tenant's entire business throughout this time, so that every expense it incurred should be considered part of Landlord's Work, as they were necessary to keep the Tenant viable. He also argued that this was the intention of expanding the specific categories of Landlord's Work (*i.e.*, supply and installation of the HVAC, 800 amp main service panel, new roof system, fire protection sprinkler system) by adding the phrase "all related and ancillary labour and materials to complete the foregoing". Lastly, he relied on the use of the word "fees" in the budget description that reads "architectural, eng, permits, fees, etc - $350,000.00" to support his interpretation that all fees, including the company's salaries, banking fees and its legal fees incurred while carrying out the Landlord's Work could be paid from the Construction Allowance.

[52] I do not agree that the Lease can reasonably bear this interpretation. There is no language in the Lease that would support the conclusion that the Landlord agreed to fund the entirety of the Tenant's going concern expenses. To the contrary, the Lease provided that the Landlord agreed to fund five specific projects (HVAC, amp service, sewer and water line, new roof, new fire protection system) and the labour and materials to carry out those specific tasks. If the parties were going to agree to have the Landlord fund the Tenant's every expense throughout these years, they could have provided that term in the Lease and they did not.

[53] I conclude that the general expenses of the Tenant do not qualify as Landlord's Work and are, therefore, disallowed as Construction Allowance charges.

(b) Specific Expenses

[54] The Landlord argued that the Tenant improperly used the Construction Allowance to pay for work that was not Landlord's Work. Specifically, it challenges the $150,000 paid to Gatserelia Design, the $10,000 paid to Palarch, the $26,131 paid to Sysconverge, the $6,274 paid to Common Bond Collective, the $3,955 paid to Mazzulla and $50,000 of the amount paid to Modern Upgrades.

[55] Mr. Hitti argued that the Tenant has accounted fully by providing evidence of payment to Modern Upgrades of $1,700,000, in addition to the payments to the additional trades and service providers listed below. He argued that all of these challenged expenses were for work properly characterized as Landlord's Work.

(a) Modern Upgrades - $50,000

[56] On 11 September 2020, the Tenant entered into a contract with Modern Upgrades for it to carry out the Landlord's Work. The Tenant paid Modern Upgrades $1,700,000 by way of a series of cheques from September 2020 to August 2021. These cheques were not paid pursuant to received invoices but were paid at the request of the principal of Modern Upgrades, as funds were needed, according to Mr. Hitti. Modern Upgrades invoiced the Tenant $1,678,029.36.

[57] Notwithstanding its position in its factum, the Landlord advised at the outset of the reference that, of the $1,700,000 paid to Modern Upgrades, it was only challenging the $50,000 allocated to an HVAC deposit. The Tenant produced a document between Modern Upgrades and Lennox for five HVAC units. It is conceded that, if the HVAC units were ordered, they would be part of the Landlord's Work.

[58] However, the Tenant failed to disclose that $41,300 of the $50,000 deposit was returned to it. Instead, the Hitti affidavit includes the full $50,000 in its accounting of the funds received by the Tenant. Mr. Hitti advised on cross examination that he asked Modern Upgrades to return $41,300 of the original $50,000 as the Tenant needed to pay its lawyers for their services done in relation to the Landlord's Work. The funds were returned by bank drafts to the Tenant for $10,000, $10,000, $5,000 and $12,800 and an acknowledgement of receipt from Mr. Hitti of $3,500 from Modern Upgrades.) As the $50,000 was not spent, the Landlord argues that the reimbursed funds cannot be considered as part of the Construction Allowance accounting. I agree. If these funds were not used for Landlord's Work, they cannot be deducted as legitimate expenses. I have disallowed $41,300 of the $50,000 as it appears that Lennox or Modern Upgrades may still be holding $8,700 on deposit.

(b) Gatserelia Design - $150,000

[59] The Landlord argued that the work done by Gatserelia Design is not part of the Landlord's Work and the Tenant cannot use the Construction Allowance to pay for it.

[60] The Tenant entered into a Consultancy Agreement with Gatserelia Design on 17 October 2018. Under that Agreement, Gatserelia was to provide interior architectural design consultancy services for the Tenant's proposed "Gastronomic Theater" on the Property. Gatserelia was to provide floor plans, furniture layout, food and beverage concept presentations and related design development deliverables for the Tenant's Madame Wong's Salon Concept and The Victory Burlesque Theater and its Messiah Bar and Epulum Gastronomic Theater.

[61] It is important to reiterate here that the direction of Kimmel, J. required the Tenant to provide supporting documentation to prove that an expense qualified as Landlord's Work. It has not met that onus here. The Tenant and Mr. Hitti did not lead evidence that would have tied this work to one of the enumerated tasks in the Landlord's Work. The scope of the work as described in the Gatserelia Agreement does not relate to the Landlord's Work, as defined in the Lease.

[62] Based on the evidence provided, I cannot find the work done by Gatserelia Design forms part of the Landlord's Work which could be paid from the Construction Allowance. The $150,000 paid to Gatserelia Design is disallowed as a Construction Allowance charge.

(c) Palarch Architects - $10,000

[63] While the Tenant wrote two cheques to Palarch, the first for $5,000 on 23 March 2019 and the second for $5,000 on 14 September 2020, there is no description or supporting documentation provided and no invoice that would link these payments to the Landlord's Work. As a result, the $10,000 paid to Palarch is disallowed as a Construction Allowance charge.

(d) Sysconverge Mechanical Engineers - $26,131

[64] The Tenant produced four invoices from Sysconverge. The first three total $9,281 and relate to a high level mechanical feasibility report, mechanical drawings and mechanical engineering. Mr. Baek conceded that this mechanical engineering work related to the HVAC and was appropriately considered Landlord's Work. The fourth is dated 23 July 2021 and contains the description "fire protection – landlord scope – BOA – 285 Spadina" and totals $16,950, with HST. Mr. Baek conceded that this work also fell within Item E of Schedule E, Supply and installation of a new fire protection sprinkler system to the Premises, and that the Construction Allowance could be used to pay this invoice. I conclude that all the work carried out by Sysconverge was properly Landlord's Work and the payment of $26,131 from the Construction Allowance was proper. The $26,131 paid to Sysconverge is allowed as a Construction Allowance charge.

(e) Common Bond Collective - $6,273.46

[65] The Common Bond Collective invoice payments made 14 April 2019 and 5 October 2020 total $6,273.46. The Tenant did not provide an invoice for the 2019 work. The 2020 invoice indicates that it relates to heritage consulting services from April to July 2019. The Tenant did not provide any evidence that this relates to Landlord's Work as opposed to its own Tenant's Work and, as a result, I find the invoice should not have been paid from the Construction Allowance. The $6,273.46 paid to Common Bond Collective is disallowed as a Construction Allowance charge.

(f) Mazzulla Structural Engineering - $3,955

[66] The Tenant produced a cheque to Mazzulla for $5,000 dated 18 September 2020. There was no invoice provided and no evidence as to whether this related to Tenant's Work or Landlord's Work. Further, the Tenant did not explain why it paid $5,000 when the invoice from August 2019 was for $3,955. Given the lack of evidence on point and the onus on the Tenant to provide that evidence, I cannot determine that the Tenant could use the Construction Allowance to pay this invoice. The $3,955 paid to Mazzulla Structural Engineering is disallowed as a Construction Allowance charge.

Issue Concerning the RBC Tenant Statements

[67] Mr. Hitti argues that he is prejudiced by the Landlord's failure to produce the Tenant's complete RBC bank statements. Had they been produced, he could have demonstrated that the Tenant properly paid for qualifying expenses for which it was then reimbursed through the Construction Allowance.

[68] I do not accept this argument. All parties were aware that the Tenant operated two accounts at RBC. They were referenced by the applicant in its production motion before me on 28 March 2023. The Landlord sought an order compelling the Tenant to deliver to it all of its RBC bank records. The Tenant and RBC did not oppose the order which I then issued on 11 April 2023. The order required the Tenant to produce to the applicant and to Mr. Hitti the RBC records for its two accounts. If Mr. Hitti was of the view that the productions were deficient, he would have known that by mid May 2023 and had some months to either contact RBC or return to me if he believed that the productions were incomplete. The onus was on the Tenant to demonstrate that it had appropriately used the Construction Allowance for Landlord's Work. I cannot assume that payments were made for expenses for Landlord's Work from an account that is not before me and about which there is no evidence, either by way of an invoice or acknowledgement of payment, let alone a bank cheque or statement.

Conclusion on the additional invoices paid from the Construction Allowance

[69] The Tenant has not discharged its onus and demonstrated that the amounts set out above, other than the Sysconverge invoices, were properly Landlord's Work for which it could use the Construction Allowance.

[70] I find the sum of $211,528.46 comprised of $150,000 paid to Gatserelia Design, $10,000 paid to Palarch, $6,273.46 paid to Common Bond Collective, $3,955 paid to Mazzulla and

the $41,300 refunded for the HVAC deposit were not for Landlord's Work and cannot be paid from the Construction Allowance.

Accounting Conclusion

[71] The Tenant has demonstrated that $1,678,029.36 in invoices from Modern Upgrades (less $41,300 that was refunded) and $26,131 in Sysconverge invoices were proper charges against the Construction Allowance. It received $3,164,000 in Construction Allowances and has accounted for $1,662,860.36.

[72] For the reasons set out above, I find the Tenant liable to reimburse the Landlord for the sum of $1,501,139.64, being difference between what it received in Construction Allowances and what it proved as properly Landlord's Work.

Joint and Several Liability

[73] The Landlord seeks an order that Mr. Hitti be held jointly and severally liable with the Tenant for reimbursement for any Construction Allowance funds not used for Landlord's Work. It argues that Mr. Hitti operated the Tenant's bank account, authorized any misappropriation and personally received a substantial portion of the funds.

[74] While the Landlord conceded that the Modern Upgrades invoices fell within the definition of Landlord's Work, there was evidence that Modern Upgrades returned $3,500 to Mr. Hitti as an "overpayment" on or about 25 April 2022. There was no further documentary information or evidence offered about the nature of the work or the overpayment or, specifically, why the overpayment was paid to Mr. Hitti as opposed to being returned to the Tenant – or the Landlord. Mr. Hitti has not accounted for those funds. The only evidence before me is that he is in possession of this $3,500 that originated from the Construction Allowance. Mr. Hitti must repay that amount to the Landlord.

[75] I do not find that Mr. Hitti is otherwise personally liable to repay the funds used by the Tenant for non-Landlord Work. Aside from the $3,500, there is no evidence that Mr. Hitti personally received the funds or benefit from them.

Conclusion

[76] I find the Tenant liable to reimburse the Landlord the sum of $1,501,139.64. I find Mr. Hitti liable to reimburse the Landlord the sum of $3,500.

Costs

[77] No party delivered or uploaded a costs outline. If the parties are unable to agree on costs by 30 November 2023, they may each submit a costs submission no more than two pages in length along with a costs outline to my assistant trial coordinator, Ms. Meditskos. If materials are not received by that date, I will assume the parties have settled this issue.

Associate Justice Jolley

Date: 10 November 2023