

CITATION: ASCO Manufacturing Ltd. v. P. Judge Investments Inc., 2024 ONSC 419
COURT FILE NO.: CV-22-641-00
DATE: 2024 01 18

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:)
)
 ASCO MANUFACTURING LIMITED) *Bhupinder Nagra*, for the Plaintiff
)
 Plaintiff)
)
 - and -)
)
)
 P. JUDGE INVESTMENTS INC. &) *Shaun R. Singh*, for the Defendants
 MALLOCH INVESTMENTS LLC c.o.b.)
 ADVANCE BLVD. PROPERTY)
)
 Defendants)
)
)
) **HEARD:** May 31, 2023 at Brampton

2024 ONSC 419 (CanLII)

REASONS FOR JUDGMENT

Emery J.

[1] The plaintiff ASCO Manufacturing Limited (“ASCO”) is a tenant of approximately 21,500 square feet of commercial space at 197 Advance Boulevard in Brampton (the “premises”). At all material times, those premises were owned

jointly by the defendant landlords, P. Judge Investments Inc. and Malloch Investments LLC, which carry on business as Advance Boulevard Property (together, "Advance").

[2] ASCO has brought an action against Advance seeking a declaration that it has a valid lease to occupy the premises for a further five year period commencing in September 2022 and ending in September 2027. In the alternative, ASCO seeks a declaration that it has a valid tenancy for the four year period commencing in September 2021 and ending in September 2025.

[3] Advance has defended the action on the basis that any lease in which ASCO had an interest expired on September 30, 2021. On November 25, 2021, Advance served ASCO with a Notice of Termination of the tenancy as the lease had expired, and requiring ASCO to give up possession of the premises by February 28, 2022. As ASCO has remained in possession of the property without a lease since that date, Advance has brought a counterclaim for payment of overholding rent and for the resulting loss it has experienced by ASCO's continued occupation. Advance now brings this motion for summary judgment to dismiss the ASCO action, and on the counterclaim.

Factual background

[4] ASCO is described in the affidavit of its manager, Didar Singh, as one of Canada's leading furniture suppliers for educational institutions including schools, colleges and universities. Mr. Singh states that ASCO has contracts to manufacture school desks for many institutional customers, including the Peel District School Board.

[5] Mr. Singh is also a principal of another corporation, MG Manufacturing Inc. ("MG"). In the spring of 2016, Mr. Singh was interested in locating sufficient industrial space in which to relocate MG's operations. Mr. Singh viewed the premises and found the space to be suitable for MG's purposes as it consisted of approximately 21,500 square feet, it was zoned for light industrial, and it was located right off the 407 ETR Highway.

[6] Howard Dixon is an officer and director of 1179066 Ontario Limited, which carries on business as HD Property Management. He gave an affidavit on behalf of Advance for this motion. In his affidavit, Mr. Dixon describes how HD Property Management has acted as the agent and property manager for Advance since 2002. He states that he is the individual who has been "exclusively engaging" with ASCO and its predecessors in relation to the leasing, payments and maintenance for the premises since 2016.

[7] MG and Advance entered into an OREA form of agreement to lease on June 15, 2016 (the “2016 lease”). The 2016 lease was to run for a five year term from July 1, 2016 to June 30, 2021. Mr. Singh advised Mr. Dixon during the initial discussions about leasing the premises that MG was interested in having the option of extending the lease for another five years at the end of the term. Mr. Singh states in his evidence that Mr. Dixon told him that he first wanted to see how the relationship developed before committing Advance to anything further. He said that Mr. Dixon told him at the time that if everything went well, he did not see any problems with renewing for another term. Mr. Singh states that “It was based on these representations that a formal lease was to be executed.”

[8] MG was entitled to two months free rent upon taking possession of the premises under the 2016 lease. At the end of August 2016, MG had been operating its business from the premises for two months and the free rent/net rent period provided under the 2016 lease was coming to an end. MG approached Mr. Dixon to make certain changes to the 2016 lease, including an extension of the lease for one year, and to add an additional month of free rent for September, 2016. Mr. Dixon refrained from agreeing to these changes until September at which time he agreed on behalf of Advance to extend the 2016 lease for one more year. The 2016 lease was therefore amended to expire on June 30, 2022, all other terms to remain the same.

[9] At the time the lease extension was discussed in September 2016, MG had again raised the question of adding a further option of a further five year term. Mr. Dixon responded that he was only prepared to add one more year to the lease at the time, and that the parties could negotiate the five year option at the end of June 2022. Mr. Singh states in his affidavit that this was accepted and that an amendment to the lease was signed on or about August of 2016 (the “2016 amendment agreement”) based on this representation.

[10] Mr. Singh states in his affidavit that the relationship between MG and the Advance proceeded smoothly over the next year and a half. He states that MG met all its obligations as the tenant and that Advance had no issues to speak of with MG’s performance under the lease. Mr. Singh states that Mr. Dixon would come by the premises once or twice a week and the parties developed an excellent working relationship.

[11] According to Mr. Singh, Mr. Dixon attended the premises in December 2017 to ask that a formal lease be signed. Mr. Dixon advised that he could not locate the original 2016 lease the parties had entered. Mr. Singh states that it was at this time that he and Mr. Dixon engaged in further discussions regarding the lease. Mr. Singh states that they agreed that since a year and half had already passed, the lease would commence for a new five year term. He states that Mr.

Dixon was agreeable to this proposal, but required the new lease between MG as the tenant and Advance as the landlord start from October 1, 2017 and end on September 30, 2022.

[12] According to Mr. Dixon, MG approached Advance on December 22, 2017 to ask that the 2016 lease be terminated and that the parties enter a new lease retroactive to October 1, 2017. The 2016 lease was therefore terminated by the document (the “2016 lease termination agreement”), and a new lease agreement (the “2017 lease”) was entered. Under these agreements:

- a. the 2016 lease was terminated;
- b. the 2017 lease for the premises would run for a term of four years, commencing October 1, 2017 to September 30, 2021;
- c. MG would be given total free rent for the month of October 2017; and
- d. MG would be permitted net free rent for a further two month period from November 1, 2017 to December 31, 2017.

Landlord's position on renewal of lease

[13] In his affidavit, Mr. Dixon states that MG asked Mr. Dixon on or about September 1, 2018 to obtain the consent from Advance as the landlord to the

assignment of the tenant's interest in the 2017 lease from MG to 2603420 Ontario Inc. ("260"). He states this request was made as 260 was operating the business as ASCO Manufacturing at the time. Advance gave this consent (in the "2018 assignment agreement"), which re-affirmed all terms of the underlying 2017 lease and the expiry of that lease on September 30, 2021.

[14] Mr. Dixon states that 260 requested the consent of Advance to further assign its interest in the 2017 lease to ASCO on or about March 19, 2021. This assignment of lease (the "2021 assignment agreement"), was made with the consent of Advance as the landlord and reaffirmed the same terms of the 2017 lease.

[15] Mr. Dixon and Advance take the position that the 2017 lease expired on September 30, 2021 according to its terms. ASCO became a month to month tenant after that date, liable for rent as an overholding tenant.

[16] On November 25, 2021, HD Property Management issued a Notice of Termination that the tenancy was terminated and putting ASCO on notice that it was required to give up possession of the premises by February 28, 2022. Mr. Dixon explained in his affidavit that greater notice was given for ASCO to vacate the premises to secure alternate premises for the relocation of its business and property.

[17] Mr. Dixon makes the point in his evidence that at no time during the negotiations of either lease agreement, or in the amendments or assignments of any lease with MG, 260 operating as ASCO Manufacturing or ASCO itself, did Advance agree to an option to extend or to renew a lease beyond the fixed term set out in those agreements.

ASCO position on renewal

[18] ASCO takes a contrary position on what was agreed between Mr. Dixon as agent for the landlord Advance and itself. Mr. Singh states that the term of the 2016 lease with MG, as amended, would have expired in June 2022 and that there was no reason to reduce the term of the lease in the 2017 lease by one year. This reduction would not have benefited MG's business in any way.

[19] On the basis that the lease would extend to September 30, 2022, MG executed the 2017 lease even though it expressly states that the term of the lease will be four years, ending on the last day of September 2021. On the same day, MG executed the 2016 lease termination agreement.

[20] Mr. Singh states that there was no assignment of the lease in September of 2018 to convey MG's leasehold interest to 260. He states that he did not sign the purported 2018 assignment agreement anywhere on the first two pages, and

that the signature on the third page is not his. Accordingly, Mr. Singh takes the position that MG remained the tenant throughout this time.

[21] In December of 2020, Mr. Singh had plans to expand at the premises to provide services as a private trade college with a focus on welding and CNC operator courses. It is not clear from his affidavit whether the proposed plans were those of MG or of ASCO. He goes on to state in para. 24 that he had a prior discussion with Mr. Dixon that “we” had purchased a business by the name of ASCO Manufacturing. He states that “we” already had the machines for operations in the existing premises and were proposing to build classrooms in the front of the premises to add approximately 2,200 square feet.

[22] At the time, Mr. Singh states that he advised Mr. Dixon of the proposed plans and the need to renovate the premises to accommodate those plans. He states Mr. Dixon told him that a college would be acceptable provided it related directly to the existing manufacturing operations.

[23] Mr. Singh states he also told Mr. Dixon that ASCO would be looking for a renewal of the lease at the end of the term in 2022. He states in his evidence that Mr. Dixon told him that this was not an issue. Mr. Singh alleges that Mr. Dixon told him that they would deal with a new formal lease in 2022 for at least another five year term because ASCO was expanding its business to include the college.

[24] In support of this statement, Mr. Singh describes how Mr. Dixon requested that he provide him with a drawing for the expansion of the premises prior to giving the necessary approval. Mr. Singh sent a drawing of the layout for the renovations, also known as the sketch, to Mr. Dixon by email on January 4, 2021.

[25] On January 6, 2021, Mr. Dixon sent an email to Mr. Singh stating that, subject to certain terms and conditions, the “proposed office renovations were approved”. Mr. Dixon sent a further email on January 14, 2021 that all work would be inspected to ensure compliance.

[26] Mr. Singh states in his affidavit that renovations commenced in and around April of 2021. During one of Mr. Dixon’s regular visits to the premises, Mr. Singh asked him to arrange for the transfer of the lease from MG to ASCO. Mr. Singh explains that in view of ASCO’s intention to have the college up and running by September of 2021, he wanted to ensure the “corporate organization” was proper.

[27] Mr. Singh states that Mr. Dixon provided his consent to the assignment on behalf of Advance on or about March 19, 2021. He brought some papers to formalize the assignment, but only had pages 2 to 4 at that time. The “amendment” was signed again on Mr. Singh’s understanding that the lease was still ending in September of 2022 but would be renewed.

[28] The renovations were finally completed in early May of 2021.

[29] On or about September 30, 2021, ASCO received a notice of default from Advance. This notice states it was given because ASCO had failed to make the rent payments for the months of July, August and September of 2021 and demanding payment of \$82,655.69 by October 9, 2021. The notice provided that failure to comply will result in the termination of the lease.

[30] This notice does not give as a ground that the lease had expired because the end of the term had been reached. Mr. Singh states that it does not say that because the defendants knew that the lease term would not expire until 2022.

[31] Mr. Singh states that the rent for the months July to December 2021 inclusive had been prepared and left at the ASCO office for the landlord. Neither Mr. Dixon nor anyone from Advance had come by to pick up the cheques.

[32] In any event, ASCO paid the full amount of \$82,655.69 in certified funds on October 4, 2021. Subsequently, a further letter by registered mail was received without any notice in late November of 2021 from Mr. Dixon. The letter stated that ASCO was an overholding tenant and would be required to vacate the premises by February 28, 2022.

[33] ASCO submits that Mr. Dixon knew that it wanted to proceed with the college and had made the necessary renovations at its expense, and with his approval. ASCO would not have carried out those renovations if Advance was going to take the position that the lease would expire three months later. Mr. Singh immediately called Mr. Dixon by telephone to ask for an explanation. Mr. Dixon advised Mr. Singh that Advance could not continue the lease at the base rent of \$5.00 per square foot, and it was not possible to renew the lease at that amount.

[34] Mr. Dixon told Mr. Singh that Advance wanted \$13.00 per square foot as base rent. Mr. Singh describes in his affidavit that, after some negotiation, the parties agreed that the base rent would increase to \$8.00 in a new lease for a further five year term. Mr. Dixon said he was in Florida and would not return until the new year at which time the parties would formalize the new lease. The new lease was to be effective as of September of 2022.

[35] Mr. Singh states that there was no reason not to believe that the parties had an agreement on all terms. It was just a matter of Mr. Dixon providing a new lease for execution as there was plenty of time until the previous lease expired in September 2022.

[36] ASCO complied with Mr. Dixon's instructions to provide a further six post dated cheques for rent to June of 2022. Mr. Singh disputes Mr. Dixon's assertion that only two cheques were provided.

[37] The rent cheques for January and February 2022 were cashed, each in the amount of \$20,274.08. This is the monthly rent calculated on \$5.00 a square foot for base rent in the amount of \$8,970, and an equal amount for additional rent, which was consistent with the rent payable each month for the fourth year under the 2017 lease, plus HST.

[38] Mr. Singh waited for Mr. Dixon to return in January 2022 and to provide a new lease. Instead, Mr. Dixon sent an email on January 25, 2022 stating that an engineer for a new tenant would be visiting to inspect the premises.

[39] ASCO takes the position that Advance has acted in bad faith by agreeing to give it a new lease, and instead entering into a commercial relationship with a third party to lease the same premises.

[40] ASCO was first made aware that Advance had entered into a lease with another tenant when litigation counsel for Advance wrote a notice letter to counsel for ASCO on February 16, 2022. There was no mention or identification of Axium Packaging Inc. ("Axium") as the tenant, only to an "independent third party." Mr.

Singh states that Axium did not view the premises at any time prior to executing the lease appended at Exhibit “M” of Mr. Dixon’s affidavit. He states that it does not make sense that Axium would enter into a three year lease agreement without ever seeing the space that it agreed to pay for.

[41] Mr. Singh further states that Advance entered into a lease knowing that there was a lease in place with ASCO until at least September 2022. He submits that Advance had agreed to renew it and that any damages arising as result of dealing with Axium is their own fault.

[42] On March 3, 2022, ASCO brought a motion to obtain an interlocutory injunction to prevent Advance from locking it out or otherwise taking possession of the premises. On March 8, 2022, Justice Barnes granted the Order and ASCO has remained in possession of the premises ever since.

Issues and law

[43] The questions on this motion are:

1. Is this case appropriate for summary judgment?
2. If so, is there no genuine issue requiring a trial for the court to determine there was no valid lease or basis to find that ASCO is entitled to a

tenancy in the premises beyond September 30, 2021, and if there was, the effect of that extension?

3. Alternatively, is there no genuine issue requiring a trial whether Advance had a duty to act in good faith as the landlord during any lease, and if so, did it breach that duty?
4. Whether there is no genuine issue requiring a trial for summary judgment on the counterclaim.

Principles on summary judgment

[44] The approach on a motion for summary judgment is set out in *Hryniak v. Mauldin*, 2024 SCC 7 and is well known. For the purposes of this motion, the principles most applicable are the requirements that each party must put their best foot forward on the motion, and that the motions court judge is entitled to presume that all evidence that would be available at trial from both parties is before the court. See *Mazza v. Ornge Corporate Services Inc.*, 2016 ONCA 753 at para. 9 (as to the best foot forward principle), and *2313103 Ontario Inc. et al. v. JM Food Services Ltd. et al.*, 2015 ONSC 4029 at para. 40 (as to the principle of assuming that *both* parties have put all available evidence before the court). See also *1061590 Ontario Ltd. v. Ontario Jockey Club*, 1995 CanLII 1686 (Ont. C.A.).

[45] The key issue on a summary judgment motion is whether the motions judge can make a fair and just determination on the evidentiary record to resolve the dispute, even though the evidence is not equivalent to a full record at trial. The summary judgment procedure must be found to be a fair process to make these determinations. There will be no genuine issue requiring a trial where the process allows for the motions judge to make the necessary findings of fact, allows the judge to apply the law to the facts, and is a proportionate, more expeditious and less expensive means to achieve a just result: *Hryniak*, at para 49.

[46] While the plaintiff always has the onus of proving its case, the evidentiary burden on a motion for summary judgment is on the moving party to show there is no genuine issue requiring a trial. As the Court of Appeal held in *Trotter Estate*, 2014 ONCA 841 at para. 73, bald assertions do not give rise to a genuine issue requiring a trial.

[47] A self-serving affidavit is not sufficient to create a genuine issue for trial in the absence of detailed facts and supporting evidence. See *Guarantee Co. of North America v. Gordon Capital Corp.*, 1999 CanLII 664 (SCC) at para. 31, and *Grewal v. Khaira et al.*, 2021 ONSC 4908, at para 25.

[48] The Supreme Court in *Hryniak* recognised that the motions court judge in some cases may utilize the enhanced fact-finding powers set out in the

amendments to Rule 20.04 when required. Where the written evidence filed on a motion for summary judgment does not satisfy the evidentiary burden to make the necessary determination, Rule 20.04 (1.2) provides the court with those enhanced fact-finding powers. Glustein J. summarized the process for accessing these powers under *Hryniak* in *Mayers v. Khan*, 2017 ONSC 200 (aff'd at 2017 ONCA 524) as follows:

i).....the judge must first determine if there is a genuine issue requiring a trial based only on the evidence before the judge and without using the judge's fact-finding powers. If there appears to be a genuine issue requiring a trial, the judge should then determine if the need for a trial can be avoided by using the powers under Rules 20.04(2.1) and (2.2) (*Hryniak*, at para. 66); and

ii) The standard for determining whether summary judgment will provide a fair and just adjudication is not whether the procedure is as exhaustive as a trial, but rather "whether it gives the judge confidence that [the judge] can find the necessary facts and apply the relevant legal principles so as to resolve the dispute" (*Hryniak*, at para. 50). A judge must be confident that he or she can fairly resolve the dispute (*Hryniak*, at para. 57).

[49] The Court of Appeal explained in *Broadgrain Commodities Inc. v. Continental Casualty Company*, 2018 ONCA 438 that the court will assume that all necessary evidence has been tendered. A motions judge is entitled to presume that the evidentiary record is complete and there will be no further evidence at trial. A motions judge is not required to resort to the enhanced powers provided by subrules 20.04(2.1) and (2.2) to backfill a party's evidentiary shortcomings.

[50] The anticipation that a party will have better evidence at trial should not defeat a motion for summary judgment: *Van Nispen v. McCarron & Chobotiuk Financial Services Inc.*, 2020 ONCA 146, at para. 4.

Principles that apply to leases

[51] Advance relies on s. 1(1) of the *Statute of Frauds*, RSO 1990. c. S.19 that requires every estate or interest in ...lands, tenements or hereditaments be made or created in writing and signed by the parties. Advance further relies upon s. 4 of the *Statute of Frauds* for the proposition that no action shall be brought on any contract or sale of lands or any interest in or concerning them unless the agreement on which the action is brought is in writing and signed by the party or an authorized person. Any amendment or variation to an agreement pertaining to a lease with a term over three years must be evidenced in writing to be enforceable: *C.I.D. v. Garnier Holdings*, 2012 ONSC 196 at para. 52.

[52] The 2017 lease was entered for a term of four years. It contained an “entire agreement” clause under para. 21.05 that provided the lease contains the entire agreement between the parties with respect to the subject matter. This clause further provided that the lease supersedes and revokes all previous negotiations, arrangements, letters of intent, offers to lease, lease proposals, brochures, agreements, representations, promises, warranties, understandings, and

information conveyed, whether oral or in writing. MG as the tenant specifically acknowledged and agreed that it had not relied upon any statement, representation, agreement or warranty except such as are expressly set out in the lease.

[53] Advance also relies upon section 21.06 of the 2017 lease. That section requires any amendments, modifications or supplements to the lease to be in writing to be valid or binding:

Amendments or Modifications Unless otherwise specifically provided in this lease, no amendment, modification or settlement to this Lease will be valid or binding unless set out in writing and executed by the parties hereto in the same manner as the execution of this Lease.

[54] Evidence of negotiations are generally not admissible to interpret a contract by creating ambiguity in a contract that is otherwise clear, or that would in effect be the making of a new agreement: *Zenex Enterprises v. Promenade*, 2019 ONSC 3262 (SCJ). Ultimately, the words of the agreement are paramount to determine the mutual agreement between the parties.

[55] The courts have held that parties to a lease must not look to negotiations to interpret a lease. The basic principles of interpretation for commercial contracts, summarized in *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673, require the court to determine the intentions of the parties by the language used in

the written documents and presumes the parties have intended what they have agreed upon by the language used. The court can refer to the objective evidence of the “factual matrix” leading up to the contract, but not the subjective evidence as to the intention of the parties for making the contract. See also *Goodlife Fitness Centres Inc. v. Rock Developments Inc.*, 2019 ONCA 58.

[56] Subject to the doctrine of surrounding circumstances, collateral agreements that are not in writing and inconsistent with the terms of a written agreement are not admissible by operation of the parol evidence rule: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, at p. 59.

Requirement of good faith

[57] In *Bhasin v. Hyrnew*, 2014 SCC 71, the Supreme Court of Canada recognized as an organizing principle of contract law that parties to a contract owe a duty of good faith in the performance of that contract. From this organizing principle flows the duty to act honestly with another contracting party. The contracts to which these principles apply over the conduct of contracting parties include the performance of leases between landlords and lessees.

[58] The Court of Appeal has held that the common law concept of good faith must not be applied in such a way that it would undermine established contract

law principles: *CM Callow Inc. v. Bram Enterprises Ltd.*, 2018 ONCA 896, at paras. 11 and 12. The courts have therefore articulated the advancement of this duty of good faith as an incremental step in the development of the law over contractual relations.

[59] There are cases where it has been held that the duty of good faith and the duty to deal honestly owed by and between parties does not extend to negotiations between those parties. Contract law and the principles governing business relations in Ontario reflect that parties negotiating a contract are entitled to act out of self interest to optimize their positions in the marketplace: *978011 Ontario Ltd. v. Cornell Engineering Company Ltd.*, 2001 CanLII 8522 at para. 32. Thus, those principles do not apply to the negotiation of the contract or its terms: *The Power Limited Partnership v. OEFC*, 2016 ONSC 4415, at para. 71.

[60] These principles relate to ASCO's claim that the parties mutually agreed upon a five year term for the 2017 lease. ASCO has argued that 2017 lease does not reflect the oral agreement of the parties that the term was intended to run for a five year term, instead of the four years as written. ASCO has therefore raised the remedy of rectification on the motion if not to obtain that relief, then to at least use it to raise a genuine issue requiring a trial.

[61] In *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, the Supreme Court explained that rectification is an equitable remedy that can be deployed to correct mistakes the parties to a contract have made in recording their contractual intentions. It is not available to re-write or to revisit terms. Rectification is applicable to bring the written version of the agreement between the parties into accord with the terms they had previously agreed upon. To give effect to these objectives, the party seeking such relief has the onus to satisfy the following criteria:

- a. to demonstrate the existence of a prior oral agreement;
- b. to establish that the other party knew or ought to have known of the error;
- c. to establish the precise terms of rectification; and
- d. to satisfy an evidentiary burden of “convincing proof”.

[62] ASCO did not ask for any other equitable remedy such as relief from forfeiture. As the request for other relief was not requested, Advance had no reason to respond to such a submission. Consequently, no principles regarding this area of the law have been considered.

Analysis

1. Summary judgment

[63] I am confident that I will be able to make the findings of fact necessary to apply the law on the current evidentiary record and determine the claim made by ASCO with respect to whether the 2017 lease expired or continued on or after September 30, 2021. I reach this conclusion on applying the legal presumption that each of the parties has put their best foot forward on the motion, and that I have the evidence of both parties that would be available at trial in the current record.

[64] I consider that reaching the required determinations using the summary judgment procedure is a proportionate, more expeditious and less expensive means to achieve a just result in this case. It is an appropriate process to decide the case in view of its nature and the evidence adduced. This result is consistent with the “shift in culture” to realize the just adjudication of this civil dispute short of a conventional trial as discussed in *Hryniak v. Mauldin* (at para. 28).

[65] Despite the issues that invite questions of credibility raised by Mr. Singh in his affidavit, the record also contains the evidence on which to resolve gaps in the evidence. I refer here to the 2016 lease attached to the affidavit materials including

the 2016 amendment agreement, the 2016 lease termination agreement, and the 2017 lease and related assignments. Where I cannot make a determination of a particular fact on the written record because of a conflict between Mr Singh's affidavit and the affidavit of Mr. Dixon, or there is an absence of evidence to determine whether there is a genuine issue, I have enough evidence to draw a reasonable inference, or to make a finding on credibility.

[66] If Advance shows on the record before this court there was no genuine issue that the 2017 lease expired on its own terms with no grounds for the parties to renew or to enter a new lease, the evidentiary burden shifts to ASCO to show there was a triable issue. If ASCO cannot demonstrate on the evidence filed or the law provided that there is a reasonable issue requiring a trial after all, the only conclusion for the court to reach will be that there is no genuine issue requiring a trial on that claim. The language used in Rule 20.04(2) is mandatory, signified by the word "shall", to grant summary judgment if the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.

[67] I am also confident that I will be able to make the appropriate findings of fact on the written record to decide the issues on the counterclaim Advance has made, with one exception. I cannot make any findings on the claim for contribution and indemnity Advance is seeking from ASCO for damages that the third party

Axium Packaging Inc. is making in a separate action. There is insufficient evidence regarding the issues between Axium and the Advance landlords to make the necessary findings on this motion. Axium is not a party to this proceeding in any event.

[68] I therefore consider this case is appropriate for summary judgment on ASCO's claim, and on the counterclaim.

2. Lease or tenancy after September 30, 2021

[69] The parties to the 2016 lease were Advance as the landlord and MG as the tenant. This was the only lease that was extended by the 2016 lease amending agreement to September 2022. There is no question on the evidence that this 2016 lease, as amended, was terminated by the 2016 lease termination agreement and the 2017 lease was entered by the same parties in its place.

[70] Advance submits that the evidence shows that MG assigned its interest to 260 in September 2018 where all terms to the underlying lease were re-affirmed. Advance also claims that it received a further request for the landlord's consent to the subsequent assignment of the 2017 lease to ASCO in March 2021. Advance asserts that both consents were given when those assignments were made. The

2018 assignment agreement and the 2021 assignment agreement were attached to Mr. Dixon's affidavit filed in support of the motion and form part of the record.

[71] ASCO denies that the assignments were made in 2018 or 2021 as described in Mr. Dixon's affidavit. Mr. Singh states that Mr. Dixon provided his consent on behalf of the landlords at the time ASCO was planning the renovations to the premises to make way for the college. Mr. Singh states that an "amendment" was signed again on the basis that the lease was still to end on September 2022, but would be subject to renewal.

[72] There are a number of findings that I am making about the landlord and tenant relationship between the parties. I find that the 2017 lease was the active commercial lease between Advance as the landlord and MG or its assigns as the tenant from October 1, 2017 to September 30, 2021. The evidence is clear from the amendment to the 2016 lease that the parties had agreed that MG have a leasehold interest in the premises for a five year period. One of those years had already run by the time the 2016 lease was terminated on or about December 22, 2017 *by agreement*.

[73] I find as a fact that the parties expressly agreed that the 2017 lease would have a term for the remaining four years. Not only did the 2017 lease state in clear and unambiguous language in s. 3.01 that the term of that lease would be four

years ending on the last day of September 2021, it goes on in s. 4.01 to give a schedule of annual rent payable for each of those four years in ascending amounts. This schedule of rents also served as confirmation to ASCO that the term of the 2017 lease would extend only to September 30, 2021. By the fourth year, ASCO was paying \$5.00 a square foot under para. 4.01 of lease. The rent payable at this rate translates into \$8,970.67 a month for base rent.

[74] Counsel for ASCO agrees that the additional rent for taxes, maintenance and insurance for the same year was chargeable in an equal amount of \$8,970.67 under s. 4.02. The total amount of rent payable by ASCO as of September 30, 2021, including HST, was therefore \$20, 274 a month.

[75] There are good reasons for Advance to contain the term of the 2017 lease to only four more years. First, the rent that ASCO was to pay under the graduated schedule in the new lease was incrementally lower than under the 2016 lease. I find that lowering the rent under the 2017 lease was a concession given by Advance to obtain a lease that would expire one year before the 2016 lease, as amended.

[76] Second, there were payment issues in October 2017 that are addressed in s. 4.01(f) of the 2017 lease. This provision relieved MG from paying the minimum rent, additional rent and HST for the month of October, and from paying net rent

for the period November 1 to December 31, 2017. This fact is evident from the document itself. While there is no evidence that ASCO was in arrears for rent owing in October, November and December 2017, I find it a reasonable inference to draw from this accommodation that ASCO owed rent for those months.

[77] I therefore find that Advance was prepared to forgive those rents and to accept a lower payment of rent throughout the term in exchange for the shorter term of four years. It was a new lease, with a new term.

[78] I conclude that ASCO was the appropriate tenant at the end of the 2017 lease because the assignment agreements are proof of the transfers of the tenant's leasehold interest. I do not accept the evidence of Mr. Singh refuting the signing of the 2018 assignment agreement or purported lack of knowledge of the 2021 assignment agreement for three reasons. First, he has not put any evidence forward to show that he did not sign either assignment agreement in the face of those documents. Second, he gave evidence in cross-examination that 260 purchased the assets of a corporation known as ASCO Manufacturing Limited, and subsequently acquired the name of that corporation from a receiver in a timeline that roughly tracks with the dates of those assignments. Mr. Singh has not provided an explanation how ASCO became the tenant without 260 serving as the link between MG and ASCO without the 2018 assignment.

[79] Third, and perhaps foremost, ASCO started this action in the name of the corporation shown as the ultimate assignee of the 2017 lease. He has not explained in his affidavit or on cross-examination if ASCO Manufacturing Limited is the new name of 260. I therefore find that Mr. Singh's recollection of the lease documents signed by MG, 260 or ASCO is not credible.

[80] ASCO cannot rely on the evidence of Mr. Singh about the negotiations leading up to either lease, or the representations he attributes to Mr. Dixon that are inconsistent with the clear and express terms of the 2017 lease. This would be contrary to the entire agreement clause under s. 21.05 of the 2017 lease. It would also exceed the permissible limits of the role and nature that surrounding circumstances play in contractual interpretation. The Court in *Sattva* explained at para. 57 that "while the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement [*citation omitted*]".

[81] There is more. Mr. Singh states in his affidavit at para. 21 that he proceeded on the basis that the parties had a new five year lease ending September 2022 after the signing of the 2017 lease. He states that his understanding prior to that time was "*as discussed with Mr. Dixon we would look to negotiating a new lease for a further period.*" This evidence, in my view, is

conclusive that there is no genuine issue requiring a trial to find as a fact there was no extension or renewal of the 2017 lease beyond September 30, 2021. To the contrary, this evidence supports the finding that, while ASCO believed that the lease would extend beyond the four year period, it completed the formation of the 2017 lease knowing that it was still up to the parties to negotiate a new lease for a further period.

[82] ASCO asked the court in the course of submissions to rectify the 2017 lease to vary the end of term date to September 30, 2022. This was an extraordinary request given that ASCO had not requested this equitable relief in its statement of claim. Nor did ASCO bring a cross-motion for an order of this nature. As a result, there was no pleading or motion that requested the order sought.

[83] In the absence of any request for this relief, the Advance landlords did not have notice that this was the relief ASCO would be seeking on the motion. This relief was also contrary to the express words of the 2017 lease and every assignment agreement that followed.

[84] There is no room for rectification between the entire agreement clause in the 2017 lease or s. 4 of the *Statute of Frauds* and the test for rectification set out in *Sylvan Lakes*. ASCO has offered no convincing proof of an alternate prior oral

agreement within the landlords' knowledge, or the precise terms of the rectification requested in the face of the lease documents. Without proof that the parties had agreed upon an alternate term for the lease, there is no need to consider the doctrine of part performance to circumvent the requirements of the *Statute of Frauds*. In the event part performance is a consideration, ASCO points to delivery of eight rent cheques for January and February 2022, and for the next six months. ASCO has provided no evidence on the motion for summary judgment that the cheques for rent after February 2022 were delivered, or how their delivery constituted part performance to allow for rectification.

[85] ASCO has taken the position that the term of the 2017 lease ought to have been five years, ending September 30, 2022 for essentially two reasons. The first of those reasons would be to remain in possession of the premises beyond February 28, 2022 to the end of that term. The end date of the tenancy under the 2017 lease has now run its course with the passage of time, with ASCO in possession of the premises since Barnes J. granted ASCO's interlocutory injunction.

3. *Did Advance act in bad faith?*

[86] The second reason for ASCO's position that the 2017 lease ran to September 30, 2022 is that the later date provides the framework to argue that

Advance acted in bad faith with respect to the tenancy and the contractual negotiations for a new lease during the 2017 lease. It argues that this bad faith is an issue that can only be adjudicated properly at trial.

[87] With respect, I disagree. The court is entitled to presume the parties have put all evidence into the motion record that would be available at trial. Parties to a contract owe a duty of good faith and of honesty to each other in the performance of contracts: *Bhasin v. Hrynew*, at para. 71. This duty of honesty and good faith does not extend to the negotiation of a new contract: *The Power Limited Partnership v. OEFC*, at para. 71. In this case, any new lease discussed by Mr. Singh for ASCO and Mr. Dixon for Advance took place over the telephone in October 2021, after the 2017 lease had come to an end. Any discussion between them can only be characterized as negotiations.

[88] The facts relied upon by ASCO for this show of bad faith is not supported by the evidence in any event. Mr. Singh focuses on the discussion of ASCO's plans to renovate the premises to add 2,200 square feet for classrooms to open the college, and Mr. Dixon's approval of that plan. He points to evidence in his affidavit dated October 20, 2022 of a sketch provided by Mr. Singh to Mr. Dixon of the intended renovation by email dated January 4, 2021 (at exhibit D). He refers to the email from Mr. Dixon dated January 6, 2021 (at exhibit E) stating "We

approve your proposed office renovations subject to the following conditions and terms...”. Several of those conditions required that work done to the operational aspects of the premises.

[89] Mr. Singh attached no evidence to his affidavit that any building permit was obtained by ASCO, or of any request made to Advance as the owner to apply for a permit to construct an addition. There were no plans provided and no evidence that extensive renovations were carried out as proposed, let alone the construction of additional space. No invoices or documents showing construction costs were produced in evidence for this motion.

[90] Mr. Dixon states that ASCO has never requested an amendment or change of use under the 2017 lease from light industrial to a use that would accommodate educational activities. Mr. Singh has only made bald allegations in para. 36 of his affidavit that the renovations commenced in or around April of 2021 were completed in or *around the end* of May 2021, and then at para. 41 that they were completed *in early May 2021*. These bald statements are insufficient to raise a genuine issue requiring a trial. The internal inconsistency of Mr. Singh’s affidavit on the dates that renovations were completed also makes this evidence unreliable.

[91] Mr. Singh states that he continued with the process of registering the college and getting ready to open it, and that he received approval in June 2021

for the name of the college to operate as “Didar Multivocational College of Technology Inc.” No documents were appended to his affidavit showing what Ministry approved of the name or whether the venture was accredited as a college. There was no evidence provided to show this college ever opened or that students were ever enrolled. In fact, Mr. Singh stated in para. 7 of his affidavit in reply dated March 3, 2022 filed that “we did not operate a college and have not.” He stated that he planned to have the school properly registered and approved and that he was on track to open it in September 2022.

[92] Mr. Dixon stated in cross-examination on his second affidavit that he recalls telling Mr. Singh that he did not link the request for approval to make renovations to the premises with Mr. Singh’s plan to open a college. Although he does not recall much of these conversations about the college, he has a recollection of telling Mr. Singh that he should look into the zoning and other regulatory requirements because ASCO’s occupancy in the premises comes under “F1” under the *Ontario Building Code*, and all classrooms are considered class “A” occupancies or “assembly occupancies.” No expert evidence was called by either party on this categorization, or on any related building requirements or zoning changes they may involve.

[93] Mr. Singh's evidence is lacking in respect of the renovations for which he requested approval, and whether the college is operating. This lack of evidence is relevant to the allegation of bad faith. Any such evidence could undermine the credibility of Mr. Dixon and his obligation to deal with Mr. Singh honestly and in good faith by leading them to believe the parties were in a long term relationship. The absence of that evidence translates into a lack of any substance to the allegation of bad faith with respect to making renovations or opening the college.

[94] Mr. Singh also relies on his description of the telephone conversation he had with Mr. Dixon after receiving the Notice to Terminate dated November 25, 2021 as evidence of bad faith. Mr. Singh states that Mr. Dixon told him that they would enter a new lease for five more years when he returned to Ontario as Mr. Dixon was in Florida at the time. Mr. Singh states that he left six rent cheques for the landlord to pick up for the first six months of 2022, and that Advance cashed two of those cheques for the rent in January and February, 2022.

[95] Mr. Singh submits that the delivery and acceptance of these cheques constitutes part performance of the oral agreement he alleges he made with Mr. Dixon on the telephone.

[96] Mr. Dixon rejects that evidence, stating there was never an agreement for a further lease, and disagreeing that any cheques other than the rent cheques for January and February were ever made available at the time.

[97] There is no basis on the evidentiary record to call Mr. Dixon's credibility into question as there is no evidence he did not deal honestly or in good faith with ASCO. I find as a fact that he never entered an oral agreement as agent for Advance to grant a new five year lease to ASCO commencing after September 2022 based on the base rent of \$8.00 a square foot annually. I make this finding on inferences I have the authority to draw from the written record under Rule 20.04(2.1) for the following reasons:

- a. The Notice to Terminate was effective February 28, 2022. The cheques made available by ASCO and cashed by Advance would pay the rent due for those months ending on February 28, 2022 based on \$5 a square foot for base rent;
- b. ASCO has given no evidence on this motion to show any entries in a ledger or by cheque stubs that the cheques for rent after February 2022 in the amount of \$20,274.08 were ever paid;

- c. No rent based on \$8.00 per square foot plus additional rent was ever paid after September 2022. Payment of rent and additional rent by ASCO on the new terms alleged by Mr. Singh would have been consistent with ASCO's position that an oral agreement on those terms had been reached and might have qualified as part performance; and
- d. There is no confirmation in writing from either party of this oral agreement for a new lease.

[98] Any such discussion about a new lease between Mr. Singh and Mr. Dixon after September 30, 2021 were in the nature of negotiations, and not subject to any duty of good faith.

[99] Mr. Singh's evidence does not raise a genuine issue requiring a trial in this respect.

[100] I therefore conclude that the 2017 lease expired according to its terms on September 30, 2021. ASCO remained in possession as an overholding tenant from October 1, 2021 until February 28, 2022 with the consent of the landlords. ASCO therefore owed rent for those months under s. 13.01 on a month to month tenancy only.

The landlord's counterclaim

[101] The counterclaim Advance has brought is made up of two essential parts. The first part is for rental payments as ASCO has occupied the premises under a tenancy at sufferance since March 1, 2022. The second is for indemnity for a claim Axium has allegedly made against Advance for its inability to perform the Axium lease by giving possession of the premises to Axium.

[102] The determination of ASCO's tenancy also determines its liability for damages under the 2017 lease. As of March 1, 2022, ASCO has occupied the premises after the expiration of the term without the consent of the landlords upon a tenancy at sufferance. ASCO therefore owes rent since that date at a monthly rental equal to two times the base rent plus the additional rent payable under para. 13.02 of the lease.

[103] Section 13.02 provides that the tenant upon a tenancy at sufferance shall pay a monthly rental equal to two times the Rent in accordance with Articles 4.01, 4.02 and 4.03. Two times the base rent under s. 4.01 each month equals \$17,941.66, to which \$8,970.83 must added for additional rent under s. 4.02, for a total of \$26,912.49. I have not doubled the additional rent for each month as Advance did not seek that double sum in its factum. When HST is added to the

cumulative rent payable, ASCO has owed \$30,411.11 to Advance for each month it has occupied the premises since March 1, 2022.

[104] The total rent payable for the 24 months since the Order made by Barnes J. enjoined Advance from taking possession of the premises equals \$729,866.64. ASCO is entitled to a credit of at least \$215,299.92 for the base rent of \$8,970.83 it has paid each month plus any additional rent and HST it has actually remitted. The remaining difference is the sum of the damages Advance is entitled to recover under the lease for this part of the counterclaim. These are damages ASCO agreed to pay when Mr. Singh gave the Undertaking.

[105] Damages also flow from the Undertaking dated February 28, 2022 given by ASCO to the court under Rule 40.03 on the motion for injunctive relief. By this Undertaking, ASCO agreed to abide by any Order concerning damages the court may make if it ultimately appears that the granting of the order has caused damages to the defendants for which ASCO ought to make compensation. The Undertaking was attached as exhibit Q and acknowledged in para. 43 of Mr. Singh's affidavit dated February 28, 2022.

[106] In view of the findings I have made, I am vacating the interlocutory Order granted by Barnes J. on March 8, 2022. Given the logistics involved with moving an industrial plant, I am ordering ASCO to give up the possession of the premises

by February 28, 2024. This order extending the date for possession is granted on the condition that ASCO pays \$20,274 for the month of January 2024, including the \$8,941.83 it may have paid on January 1, 2024, by January 31, 2024, and \$20,274 on February 1, 2024 for the month of February 2024. If any of these conditions are breached, ASCO shall be deemed to have surrendered the possession of the premises as of that date.

[107] For the second part of the claim for damages, Advance has filed the statement of claim by which Axium commenced its action against the Advance landlords on August 30, 2022. This statement of claim seeks general damages against Advance in the amount of \$3,500,000, punitive damages of \$500,000, a declaration that the lease between them is valid or in the alternative to damages, specific performance of the lease, among other things.

[108] Advance has also filed the affidavit of Ven Bhindwallam dated March 2, 2022, Mr. Bhindwallam describes himself as the CFO of Axium and that he resides in Albany, Ohio. This affidavit is 16 paragraphs long. It was filed by Advance in connection with ASCO's motion for the interlocutory injunction and speaks of prospective loss. Advance did not file any evidence on the status of the Axium action or proof from the disclosure process in that litigation of actual damages or loss Axium has incurred in its claim against Advance. As Axium is not a party to

this action and no evidence of damages has been filed for which indemnity is sought, there is good reason to conclude that the claim for indemnity is a genuine issue requiring a trial.

Conclusion

[109] The defendants' motion for summary judgment is granted. The action of ASCO Manufacturing Limited is dismissed. There shall be judgment on the landlord's counterclaim as follows:

- a. The Order for injunctive relief made by Barnes J. on March 8, 2022 is vacated;
- b. A declaration that ASCO has occupied the premises without a leasehold interest since September 30, 2021 when the 2017 lease expired;
- c. ASCO shall surrender possession of the premises effective February 28, 2024;
- d. It shall be a condition of its continued occupancy until February 28, 2024 that ASCO shall pay \$20,274, including any amount paid for January 2024, by January 31, 2024, and a further \$20,274 by February 18, 2024 for February 2024, failing which the date for

possession of the premises shall be accelerated to the date of any breach;

- e. ASCO shall pay damages to Advance in an amount to be determined on a reference in accordance with these reasons under Rule 20.04(3);
- f. The motion for contribution and indemnity of any amounts the defendants' may be required to pay Axium Packaging Inc. for breach of contract is dismissed, without prejudice to seek that relief against ASCO as the sole issue on the counterclaim at trial, or as a third party in any other action.

Costs

[110] The parties are encouraged to resolve the issue of costs between them. If they cannot, Advance may file written submissions on costs by February 2, 2024, after which ASCO may file responding submissions by February 16, 2024. No submissions in reply shall be permitted. Written submissions may not exceed 3 double spaced, typewritten pages, excluding any offer to settle or bill of costs, and may be filed by email to my judicial assistant at melanie.powers@ontario.ca.

[111] The parties may also file brief submissions by the same dates on any perceived mathematical error contained in these reasons, provided they do not alter the findings of fact or conclusions on questions of law I have made.

[112] I thank counsel and the parties for their patience while waiting for this judgment.

Emery J.

Released: January 18, 2024

CITATION: ASCO Manufacturing Ltd. v. P. Judge Investments Inc., 2024 ONSC 419
COURT FILE NO.: CV-22-641-00
DATE: 2024 01 18

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

ASCO MANUFACTURING LIMITED,

Plaintiff

- and -

P.JUDGE INVESTMENTS INC. &
MALLOCH INVESTMENTS LLC c.o.b.
ADVANCE BLVD. PROPERTY,

Defendants

REASONS FOR JUDGMENT

Emery J.

Released: January 18, 2024