CITATION: *Subramaniam v. Metamore Inc.*, 2024 ONSC 1902
COURT FILE NO.: CV-23-00000043-0000
DATE: 04/02/2024

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Jeyakumar Subramaniam and J K Eats & Pub Inc.

Applicants

AND

Metamore Inc.

Respondent

BEFORE: Madam Justice K. McVey

COUNSEL: *Noel Gerry,* for the Applicants

Mark Pedersen, for the Respondent

HEARD: In writing

COSTS DECISION

[1] The Applicants seek costs of $31,333.09 on a substantial indemnity basis after securing the reinstatement of their commercial tenancy on the basis that the Respondent did not comply with section 19(2) of the *Commercial Tenancies Act*, R.S.O. 1990, c. L.7 ("*CTA*"): *Subramaniam v Metamore Inc.*, 2024 ONSC 1189.

Positions of the Parties

[2] The Applicants argue that, at minimum, it was apparent that a reviewing court would grant relief from forfeiture given that the Respondent's termination of the lease was overtly disproportional to the nature of the alleged breach. As such, they argue that the Respondent acted unreasonably in failing to settle the litigation at an early stage after counsel for the Applicants first

reached out to the Respondent via letter on September 11, 2023, seeking to resolve the differences between the parties. Second, the Applicants emphasize that they made an offer to settle that closely resembled the relief they ultimately obtained, and that neither offer made by the Respondent included reinstatement of the lease despite the equities clearly lying in favor of it. Finally, the Applicants suggest that substantial indemnity costs are appropriate given the reprehensible and high-handed conduct of the Respondent during the breakdown of the parties' commercial relationship.

[3] The Respondent asserts that the Court should deny the Applicants their costs because they served only a Costs Outline and not a Bill of Costs as required by the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "*Rules*"), rendering this Court unable to assess the reasonableness of the Applicants' efforts on the file. Second, the Respondent argues that the costs advanced by the Applicants are excessive when compared to its own Bill of Costs. Third, the Respondent claims that the Applicants were only partially successful on the application because they did not secure punitive damages. Finally, the Respondent argues that the Applicants unnecessarily lengthened and complicated the proceedings when tendering an affidavit and annexed business plan from Yogi Pararajasingam, a Chartered Professional Accountant, in support of a claim for lost revenue, which the Applicants later abandoned.

[4] I agree with the Respondent that the Applicants ought to have provided a Bill of Costs as per the *Rules*. However, this does not necessarily disentitle the Applicants to their costs. No cases were provided by the Respondent in support of that rather extreme result given that the Applicants were the successful party. I agree, however, that I must address costs cautiously and conservatively given the lack of detailed breakdown in the Applicants' Costs Outline.

Scale of Costs

[5] Elevated costs may be warranted where the unsuccessful party has engaged in conduct that is reprehensible, scandalous, or outrageous: *Davies v Clarington (Municipality)*, 2009 ONCA 2722, at para. 28. Substantial indemnity costs are appropriate "in rare and exceptional cases to mark the disapproval of the conduct of the party in the litigation": *Hunt v TD Securities Inc.* (2003), 66 O.R. (3d) 481 (C.A.), at para. 123. Conduct triggering elevated costs may encompass not only

behavior *during* litigation, but also conduct *giving rise* to litigation: *Mortimer v Cameron* (1994), 17 O.R. (3d) 1 (C.A.), at p. 23, as cited in *Mars Canada Inc. v. Bemco Cash & Carry Inc*., 2018 ONCA 239, at para. 43.

[6] In my view, the conduct of the Respondent is worthy of judicial rebuke and ought to trigger an elevated costs award. The Respondent was an experienced commercial landlord during its dealings with the Applicants. Agents for the Respondent unjustifiably locked the Applicants out of the property on the verge of their opening day. Despite Mr. Subramaniam's collaborative and cooperative attitude towards the alleged breach, agents for the Respondent treated him with aggression and disrespect. Agents for the Respondent turned the power off at the property, knowing that doing so jeopardized the Applicants' food inventory. Agents for the Respondent used this as leverage to force Mr. Subramaniam out of the restaurant despite his status as a rent-paying tenant who had been afforded none of the protections set out in the *CTA*. Agents for the Respondent repeatedly threatened to involve the police, and ultimately did. The intimidatory behavior by agents of the Respondent culminated in them intentionally smashing a case of beer on the floor when interacting with Mr. Subramaniam. As I indicated in my reasons dated February 26, 2024, the conduct of the Respondent was outrageous and reprehensible.

[7] I have no hesitation concluding that the Applicants are entitled to costs on a substantial indemnity basis.

Quantum of Costs

[8] Costs are quintessentially discretionary: *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 131(1); *Restoule v Canada (Attorney General)*, 2021 ONCA 779, at para. 344. Costs are intended to foster a number of fundamental purposes: 1) indemnify the successful party of the legal costs they incurred; 2) encourage settlement; 3) deter frivolous actions and defences; and 4) discourage unnecessary steps that unduly prolong the litigation: *1465778 Ontario Inc. v. 1122077 Ontario Ltd.* (2006), 82 O.R. (3d) 757 (C.A.).

[9] Rule 57.01(1) of the *Rules* delineates factors the court may consider when determining an appropriate amount of costs. Ultimately, the costs fixed by the Court "should reflect more what the court views as a fair and reasonable amount that should be paid by the

unsuccessful parties rather than any exact measure of the actual costs to the successful litigant": *Boucher v Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 281 (C.A.), at para. 24. The overall objective of fixing costs is to fix an amount that is objectively reasonable, fair, and proportionate for the unsuccessful party to pay in the circumstances of the case: *Apotex Inc. v. Eli Lilly Canada Inc.*, 2022 ONCA 587, at para. 61.

[10] First, I conclude that the time spent by the Applicants' counsel was reasonable. Counsel for the Respondent spent 54.2 hours on the file as per its Bill of Costs. This is similar to the 60.45 total hours spent by counsel for the Applicants, who bore the onus and the tactical responsibility of putting together a convincing record. The discrepancy between the amounts claimed by the parties is a function of the relative experience levels of counsel and their corresponding hourly billing rate, not the time spent on the file.

[11] Second, the issues in the litigation were significant. The Applicants had invested close to $200,000 in the restaurant before they were unlawfully locked out of the property the day before their restaurant was scheduled to open.

[12] Third, the Applicants were wholly successful on the Application.

[13] Fourth, I find the offer to settle extended by the Applicants in January 2024 was reasonable and, in substance, closely mirrored the relief they ultimately secured. The Applicants extended a total of three offers to settle at various stages of the litigation. On September 19, 2023, while making it plain that the Applicants' primary desire was to see their lease reinstated, the Applicants offered to settle the matter with a lump sum payment of $193,000 to account for their lost investment. In January 2024, the Applicants made two further offers. The first offer had the Respondent reinstating the tenancy and paying damages in the amount of $25,000. In the alternative, the Applicants offered to settle with a lump sum payment of $212,000.

[14] The Respondent made two offers to settle. Neither contemplated the restoration of the Applicants' tenancy nor did they account for the Applicants' financial losses. The first proposal had the Applicants retrieving their chattels from the property, and then parting

ways with the Respondent. The second proposal offered the Applicants $20,000 in consideration for their chattels, chattels the Applicants purchased for $80,000 just a few months prior. Neither offer came anywhere close to addressing the financial impact unfairly occasioned to the Applicants by the disproportionate and unlawful termination of their lease.

[15] Fifth, I have considered the unnecessary effort expended on the litigation by the introduction of the business plan completed by Mr. Pararajasingam. This necessitated counsel for the Respondent preparing for and attending a 45-minute cross-examination before the specific claim was abandoned by the Applicants. I am not prepared to compensate the Applicants for the costs associated with this aspect of the litigation. Quantifying this amount is difficult given that the Applicants did not file an itemized Bill of Costs. I note, however, that the business plan did not feature prominently in the Applicants' claim and was relatively brief (approximately 20 pages).

Conclusion

[16] The Applicants are entitled to costs on a substantial indemnity basis. In my view, fixing costs at $25,000 is fair, reasonable and ought to have fallen within the Respondent's reasonable expectations given the nature and complexity of the proceedings and its conduct during the dispute.

[17] Accordingly, I fix costs of the application at $25,000, all inclusive, payable by the Respondent to the Applicants within 30 days.

Madam Justice K. McVey

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COSTS DECISION

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Released: 04/02/2024