

**CITATION:** Gerenby Investments Limited v. Paramount Franchise Inc., 2024 ONSC 4478

**COURT FILE NO.:** CV-22-00681562-0000

**DATE:** 2024/08/15

**SUPERIOR COURT OF JUSTICE-ONTARIO**

**BETWEEN:**

GERENBY INVESTMENTS LIMITED, Plaintiff

-and-

PARAMOUNT FRANCHISE INC., 1726837 ONTARIO INC.  
and 2223541 ONTARIO INC., Defendants

**BEFORE:** Leiper, J.

**COUNSEL:** *Michael D. Magonet*, Counsel for the Plaintiff

No one appearing for the Defendants

**HEARD:** August 8, 2024

**ENDORSEMENT**

**Introduction and Overview**

[1] This is a motion for summary judgment and damages brought by the Plaintiff, Gerenby Investments Limited (“Gerenby”), against the Defendants for their breach of obligations under a commercial lease.

[2] Gerenby seeks its damages in unpaid rent and the losses which remain after mitigation by finding a replacement tenant. Gerenby also seeks its costs of the bailiff after the tenant abandoned the premises and the cost of securing the replacement lease, as well as its costs of this action.

[3] This motion was scheduled in Civil Practice Court on April 25, 2023. The Defendants filed no material in accordance with the timetable, nor did they consent to the order. Two weeks prior to the return of the motion, counsel to the Defendants advised counsel to the Plaintiff that they would not be opposing the motion.

[4] For the reasons set out below, I grant the motion for summary judgment and make the order that the Plaintiff's request. I also order costs on a substantial indemnity basis in accordance with the terms of the lease, the cost outline filed and the principles relative to the imposing of costs.

### **The Lease and Default**

[5] Gerenby owns a commercial property at 2309 and 2311 Yonge Street, Toronto, Ontario which is comprised of a ground floor and basement area at 2311 Yonge Street and second floor space at 2309 Yonge Street (the "Premises").

[6] The Defendant, Paramount Franchise Inc. ("Paramount"), is a corporate entity that carried on business as an operator of restaurants, and a franchisor of a restaurant system. Paramount leased the Premises from Gerenby and operated a restaurant there.

[7] The Defendant, 1726837 Ontario Inc. ("172"), is a corporate entity and a related party to Paramount. 172 was an indemnifier in respect of the lease between Paramount and Gerenby.

[8] The Defendant, 2223541 Ontario Inc. ("222"), is a corporate entity and a related party to Paramount. Together with Paramount, 222 was formerly involved in operating the restaurant business at the Premises.

[9] By a lease dated October 21, 2016 (the "Lease"), made between Gerenby (as Landlord), Paramount (as Tenant) and 172 (as Indemnifier), Paramount leased the Premises from Gerenby.

[10] The parties agreed to a ten-year term starting on November 1, 2016 with minimum rent set at \$163,992 plus HST in the first year and escalating each year after that in accordance with section 6 of the Lease. Paramount was also to pay additional rent including taxes, maintenance, insurance and operating costs.

[11] The Lease provided that any amounts past due by Paramount would bear interest at prime plus 10% in accordance with the rate charged by Gerenby's bank.

[12] 172 signed a further Indemnity Agreement, Appendix "A" to the Lease, which provided that it would indemnify Gerenby against any breach of the Lease by Paramount. The indemnity was absolute and unconditional and Gerenby was not required to exhaust its remedies against Paramount before seeking indemnity from 172.

[13] In November of 2016, Paramount caused a franchisee or licensee to operate a restaurant from the Premises.

[14] On March 1, 2018, Paramount gave notice to Gerenby that its franchisee or licensee would no longer be operating the restaurant but that, instead, the restaurant at the Premises would be operated by Paramount's corporate head office, with 222, an entity owned, controlled, or related to Paramount, becoming the operator.

[15] In 2021, Paramount ceased to pay rent as required. By the end of October 2021, Paramount was in arrears of approximately \$130,000 having failed to make its rent payments for June to October, 2021.

[16] In November 2021, Paramount again failed to pay monthly rent and without notice, on November 9, 2021, it closed the restaurant and abandoned the Premises.

[17] On November 16, 2021, Gerenby delivered a “Notice to Terminate” to Paramount, 172 and 222. Gerenby retained a bailiff firm to change the locks and coordinate the removal of rotting food left behind at the Premises at a cost of \$1,971.85.

### **The Plaintiff’s Efforts to Mitigate**

[18] Gerenby retained The Behar Group Realty Inc. (“Behar”), on December 2, 2022 to list the Premises on the multiple listing service and market the space to potential new tenants.

[19] These efforts succeeded. On February 24, 2022, a new tenant, TCBIZZ.COM Corp, dba Stag Shop, entered into a Lease, with occupancy beginning on March 1, 2022 (the “Mitigation Lease”), with one month free rent at the start of the lease. Before signing the Lease, Gerenby received an opinion from Behar that due to the challenges in the commercial rental market arising from the Covid-19 pandemic that this Gerenby was “unlikely to do better with any other deal.” Gerenby acted on that advice and signed the new tenant.

[20] Gerenby has included a spreadsheet in its motion materials which calculates its losses after taking into account its success at mitigating the losses from Paramount’s default. The total figure is \$480,516.34 (inclusive of HST) This amount has three components; namely,

- (i) Paramount’s unpaid rent for 2021 in the sum of \$181,266.95 taking into account payments received from Paramount in respect of various rental arrears,
- (ii) \$77,119.35 in respect of Paramount’s unpaid rent for the three month period between January 2022 to and including March 2022, and
- (iii) the deficiency amount of \$222,130.04 in relation to the difference in minimum (base) rents that Gerenby would have collected from Paramount had it not defaulted under the Lease, relative to the minimum rents called for under the Mitigation Lease (the “Deficiency Amount”).

[21] Gerenby tendered a further spreadsheet which breaks down the arrears payments received from Paramount and credits Paramount for those payments, based on actual costs.

[22] To mitigate its damages and secure the new tenancy with TCBZZ, Gerenby spent \$100,492.95 in fees to Behar. Behar’s invoice for its services was filed on the motion.

[23] Thus, overall Gerenby sought damages in the following amounts:

- (a) \$1,971.85 for the charges incurred and monies paid to the bailiff;
- (b) \$181,266.95 in respect of Paramount’s unpaid rent for 2021
- (c) \$34,734.28 in interest as provided under the terms of the Lease calculated from December 1, 2021 to March 31, 2023;

- (d) \$77,119.35 in respect of Paramount's unpaid rent for the three month period of January 2022 to and including March 2022.
- (e) The Deficiency Amount of \$222,130.04 in relation to the difference in minimum (base) rents that Gerenby would have collected from Paramount had it not defaulted under the Lease, relative to the minimum rents called for under the Mitigation Lease;
- (f) \$100,492.95 for the realtor fees incurred in connection with Gerenby's mitigation of its damages and as reflected in the Behar invoice, together with interest from the date that Gerenby paid that invoice, June 16, 2022.

### **The Defences of Construction and Failure to Mitigate**

[24] Although they did not file material on the motion for default judgment, in their pleadings, the Defendants alleged that Gerenby failed to advise Paramount of planned transit and road construction outside the Premises which amounted to a material misrepresentation intended to induce the Defendants into signing the Lease.

[25] Gerenby submits that the light rail construction in the area began in 2011, years before the Lease was signed, and was a matter of public record. Gerenby submits further that there is no merit to the defence as pleaded of material misrepresentation. In addition the Lease includes a tenant acknowledgment that there are no "covenants, representations, warranties, agreements or conditions expressed or implied, collateral or otherwise forming part of or in any way affecting or related to this Lease save as expressly set out in this Lease and that this Lease constitutes the entire agreement between the Landlord and Tenant."

### **The Issue on the Motion**

[26] The issue on the motion is whether summary judgment should be granted in this case.

### **Analysis**

[27] Rule 20.04(2) states that the court shall grant summary judgment if it "is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence." There is no genuine issue requiring a trial if the evidence before the court allows the 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 v. Mauldin*, 2014 SCC 7, at para. 49; *Mayers v. Khan*, 2017 ONSC 200 (aff'd at 2017 ONCA 524) at para. 18.

[28] Defendants, as responding parties on a motion for summary judgment, are not entitled to rely only on the allegations or denials in their Statement of Defence. Rule 20.02 requires them to set out the facts that show a genuine issue requiring a trial: *2506045 Ontario Inc. v. Gaskell and Rahmaty*, 2023 ONSC 5809 at para. 37.

[29] Summary judgment is appropriate for allegations of breach of a commercial lease resulting in damages: *2506045 Ontario Inc. v. Gaskell and Rahmaty* at para. 38; *Caparelli v. Langevin*, 2019 ONSC 3305, at para. 22; *Premium Properties Limited v. 2362880 Ontario Inc. (Serious Sandwich)*, 2015 ONSC 4306, at para. 5.

[30] The uncontested evidence based on the terms of the Lease and the affidavit material on behalf of Gerenby, establishes that the Paramount breached the terms of the Lease, thus exposing itself and the indemnifying defendant to an action to recover damages related to that breach.

[31] Gerenby has provided evidence that it took reasonable and timely steps to mitigate the loss arising from Paramount's abandoning the premises and breaching the terms of its lease. The material filed in the affidavit of the Gerenby representative establishes losses as a result of the Mitigation Lease and the basis for its decision to sign that lease. Mitigation is not assessed on standard of perfection. The Defendants have filed no material to refute the evidence from Gerenby. I am satisfied that there is no genuine issue for trial on the question of Gerenby's mitigation of its losses.

[32] Further, there is no evidence to substantiate any defence of misrepresentations relative to the LRT/road construction pleaded in the Statement of Defence. Having filed no material on that point, the Defendants have failed to "put their best foot forward" (or any foot) on the motion for summary judgment. There is no genuine issue for trial on the question of misrepresentation.

[33] Finally, Gerenby's damages are supported by affidavit evidence and the terms of the Lease. The calculations are set out in the spreadsheets attached to the affidavits.

### **Conclusion**

[34] I conclude that Gerenby is entitled to summary judgment. There is no genuine issue requiring a trial. The Lease clearly sets out liability and remedies in the event of default.

[35] The Plaintiff's motion for summary judgment is granted.

### **Costs**

[36] The Plaintiff seeks substantial indemnity costs, based on the agreement to that effect in section 21(a) of the Lease. The courts will give effect to the agreement of parties as to costs, so long as those agreements do not offend the principles of costs including that they be fair and reasonable and are subject to the court's discretion to award costs: *Jencel 407 York Street Inc. v. Bright Immigration Inc. and Ramroop*, 2021 ONSC 6030 at para. 42.

[37] Counsel to the Plaintiff has submitted a detailed costs outline which supports the claim for costs. This motion was not opposed but was nonetheless necessitated by the Defendants' passivity in the year and four months since it was timetabled.

[38] Applying the principles of costs found in r. 57.01 to the question of quantum, this was a moderately complex, detailed motion which Gerenby was required to bring because the Defendants did not engage with the process. Senior counsel on the file has supported the time spent on the file with a detailed costs outline. In all the circumstances, including the Lease provision for substantial indemnity costs, I find that the amount claimed by Gerenby for its costs is fair and reasonable.

**Order**

[39] I order that:

1. Judgment is granted against the Defendants in the amount of \$\$729,158.14;
2. The Defendants shall pay prejudgment interest at the rate set out in the Lease Agreement; and
3. The Defendants shall pay costs in the amount of \$37,678.77.

---

**Date: August 15, 2024**