

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
2668602 Ontario Inc.) *Nadia Campion, Lars Brusven & Jeffrey*
) *Kaufman, for the Plaintiff*
Plaintiff)
)
– and –)
)
GWL Realty Advisors Inc., The Great-West)
Life Assurance Company and London Life) *Gasper Galati, Wolfgang Kaufmann &*
Assurance Company) *Dylan Baker, for the Defendants*
)
Defendants)
)
)
) **HEARD:** September 10-17, 2024

2024 ONSC 6913 (CanLII)

JUSTICE POLLAK

REASONS FOR DECISION

[1] This is the trial of an action for the Plaintiff’s claim for conversion. The Plaintiff alleges that the Landlord surreptitiously sold and disposed of its Racking to a third party.

[2] The Plaintiff, 2668602 Ontario Inc. (“266”) was incorporated on December 3, 2018. 266 obtained an assignment of Fluid Brands Inc., 11041037 Canada Inc., and 11041045 Canada Inc’s. (the “Bankrupt Companies”), debt of \$4.3 million owed to CIBC. Mr. Benitah is the sole officer and director of 266.

[3] The defendants, GWL Realty Advisors Inc., Great-West Life Assurance Company, and London Life Insurance Company (the “Landlord”) are the commercial landlords. They leased a distribution centre at 3389 Steeles Ave, Brampton (the “warehouse”) to the bankrupt companies. The Racking System 266 purchased from the bankrupt companies was located at that warehouse.

[4] Mr. Benitah has many years of experience in the homewares and furniture retail business. His business, Benix & Company, has 91 stores in Ontario. In 2005, his Bombay/Bowring

companies leased retail locations and distribution centres in Canada; these premises included the warehouse where the racking at issue in this action is located.

[5] On December 5, 2018, 266 bought the FF&E – located in the Landlord’s Warehouse – from the Bankrupt companies for \$116,668, plus HST. The December 5, 2018 invoice for the Warehouse FF&E is addressed to 266, was paid for with Mr. Benitah’s credit card, and specifically references the racking. It was purchased pursuant to this Court’s Liquidation Process Order, dated November 2, 2018 (the “Order”). The invoice for the purchase of the Warehouse FF&E had a notation that read: “*All FF&E to be removed by January 15, 2019 or as agreed upon with Landlord*”. The Landlord did not agree to extend the time to remove the FF&E.

[6] 266 removed almost all of the FF&E from the Warehouse by the end of December or early January 2019; it did not, however, remove the Racking by January 15, 2019 – the Warehouse lease disclaimer date when possession of the warehouse was returned to the Landlord. The Landlord treated the Racking as having been abandoned and had it removed from the Warehouse so that it could rent the Warehouse to a new tenant.

[7] Mr. Benitah testified that he has 40 years of experience in dealing with commercial landlords and that he has never had a landlord seize goods for nonpayment of rent, nor has a landlord ever refused a meeting with him to discuss any issues. Mr. Benitah testified, “It’s one of the things I like to do – have meetings so that we can resolve the issues and we all know – we sit at a meeting at a table and we resolve issues, and if there is an issue, we can discuss them and get them done orderly and quickly.”

[8] The Landlord’s defence to the claim for conversion is that 266 did, or is deemed to have abandoned the Racking, pursuant to the Order dated November 2, 2018. Alternatively, the Landlord submits that when 266 did not remove the racking by the Lease Disclaimer date, such failure was a trespass and the Landlord therefore had the right to dispose of the racking. The Landlord counterclaims for damages to compensate for the losses it suffered as a result of 266’s failure to remove the racking from the Warehouse following the Lease Disclaimer date.

[9] The issues to be resolved by the Court in this action are:

- a. Is the deemed abandonment provision in paragraph 9 of the Sale Guidelines, referred to in the Liquidation Process Order, a defence to 266’s claims?
- b. If 266 did not abandon the racking, was the presence of the racking in the warehouse after the Lease Disclaimer date a trespass to property entitling the Landlord to remove it?
- c. Did 266 actually abandon the racking?
- d. If the Landlord was not entitled to remove the racking, is 266 entitled to damages and if so, how are the damages valued?

[10] The Plaintiff submits that the counterclaim should be dismissed.

Is the deemed abandonment provision in paragraph 9 of the Sales Guidelines of the Order a defence to 266's claims?

[11] The Order provided, in part, as follows:

“On reading the Notice of Motion of the Debtors, in particular, the Affidavit of Fred Benitah, sworn November 1, 2018 and on reading the First the counsel slip. The Report to Court of the Proposal Trustee and on hearing the submissions of the counsel for the Debtors, counsel for the Proposal Trustee and counsel for the Canadian Imperial Bank of Commerce, being the first-ranking secured creditor and primary operating lender of the Debtors and such other persons listed on the counsel slip.”

[12] The Order approves the Consulting Agreement, including the Sale Guidelines attached as Schedule “A” (the “Sale Guidelines”), and the transactions referred to in the Consulting Agreement.

[13] Schedule A is appended to the Order and it provides that:

“the following procedures shall apply to the Sale to be conducted at the Stores of 11041037 Canada Inc., and 11041045 Canada Inc. (collectively, the “Merchant”). **All terms not herein defined shall have the meaning set forth in the Consulting Agreement** by and between a joint venture comprised of Merchant Retail Solutions, ULC, an affiliate of Hilco Merchant Resources, LLC, and Gordon Brothers Canada ULC, an affiliate of Gordon Brothers Retail Partners, LLC (the “Consultant”) and the Merchant dated as of October 31, 2018 (the “Consulting Agreement”).”

[14] Paragraph 9 of the Sale Guidelines provides as follows:

At the conclusion of the Sale in each Store, the Consultant shall arrange that the premises for each Store are in "broom-swept" and clean condition, and shall arrange that the Stores are in the same condition as on the commencement of the Sale, ordinary wear and tear excepted, No property of any Landlord of a Store shall be removed or sold during the Sale. No permanent fixtures (other than FF&E which for clarity is owned by the Merchant) may be removed without the applicable Landlord's written consent unless otherwise provided by the applicable Lease. **Any fixtures or personal property left in a Store after the Sale Termination Date in respect of which the applicable Lease has been disclaimed by the Merchant shall be deemed abandoned, with the applicable Landlord having the right to dispose of the same as the Landlord chooses, without any liability whatsoever on the part of the Landlord.** [Emphasis added.]

[15] As stated in the Order above, Mr. Benitah’s affidavit was relied on by the Court for the relief requested on behalf of the Bankrupt Companies. Mr. Benitah signed the Consulting Agreement (the “Agreement”) dated October 31, 2018, for the Consultant’s sale of merchandise

and of the FF&E in the “Stores”, which are listed and attached as Exhibit “A” to the Agreement. The Sale Guidelines are attached as Exhibit “C” to the Agreement.¹

[16] Specifically, the Landlord relies on the Sale Guidelines, which provide that “any fixtures or personal property that are not removed by the lease disclaimer date (January 22, 2019), is deemed to be abandoned and the Landlord may dispose of it, without liability”. The Landlord submits that the racking is a “fixture or personal property”.

[17] 266 submits that the Landlord knew it could not prove actual abandonment, and consequently amended the Defence to include a defence of “deemed abandonment” four days before trial. The Plaintiff submits that the “deeming” provision relied upon, either does not apply to the Racking or, alternatively, it is rebutted by the parties’ conduct. 266 did not object and agreed to the Defendants’ amended defence, but submits it has no merit.

[18] The Landlord claims damages for the lost opportunity to receive almost \$400,000 in rental payments as a result of 266’s trespass.

[19] 266 pleads that since it did not abandon the Racking, the Landlord acted unlawfully when it disposed of the Racking. 266 claims damages of \$7,910,000 for its loss to enable it to purchase new racking.

[20] Our Court summarized the principles of interpretation of judicial orders in *Kuang v. Young*, 2023 ONSC 2429 as follows:

“Interpretation of judicial orders requires a contextual approach to determine the intent of the judge. As drawn from the authorities discussed below, the determination includes a consideration of text, context, and purpose based on:

- (a) The express language of the order itself,
- (b) The purpose of the terms of the order,
- (c) The authority to make the order, including the statutory context and procedural rules,
- (d) The broader context within which the order was granted, including the pleadings and the litigation events leading to the order,
- (e) Resolving apparent inconsistencies between different terms by reaching an interpretation which can reasonably give meaning to each of the terms in question.”

¹ Agreement (at F947 caselines).

[21] The Order was made during bankruptcy proceedings, which have tight timelines and the prices are liquidation values.

[22] In applying these principles to the interpretation of the Order, some of the evidence in this trial is relevant.

[23] In the Agreement, “Stores” are referred to as “Merchant’s stores set forth on premises set out on Exhibit A”. This exhibit lists the Warehouse, at 3389 Steeles Avenue East, in Brampton, Ontario. 266 relies on the fact that the actual Warehouse was 220,000 sq. ft. at the relevant time of the sale, but Exhibit A refers to “Selling Sq. Ft.” of the Warehouse as being 20,000 sq. ft. The Plaintiff submits that the approved selling area in the Lease does not include the whole warehouse. Further, the fact that the reference in Schedule A does not include the whole warehouse also supports the conclusion that the sales guidelines do not apply to the warehouse. However, there is only one lease for the Warehouse. The lease disclaimer applies to the entire area of the Warehouse. The invoices for the racking and the Consulting Agreement do not distinguish between selling area, office area, or storage area. There is no distinction between office FF&E, sales area FF&E, and storage FF&E.

[24] Mr. Benitah submits that the words on the invoice that “All FF&E to be removed by January 15, 2019 or as agreed upon with Landlord”, were included because the Consultant knew that the Racking could not be removed in one or two weeks. The Racking would be used by the Consultant until the sale was completed and that as a result, 266 needed to make arrangements with the landlord because the removal of the Racking would take some time. He testified that after the Racking was removed, he would store it at his 118,000 square foot warehouse until his new business was running.

[25] 266 also bought the FF&E located in 23 retail stores across Canada for \$101,120.31, and, the FF&E located at the head office of the bankrupt companies for \$12,744.14.

[26] The December 5, 2018 invoice for 266’s purchase of the racking is for an amount of \$131,834.84 and refers to “all of the FF&E” located at the Distribution Centre including “desks, chairs, computers, printers, folding tables, cameras, a phone system, IT equipment, servers, **complete warehouse racking**, all machinery, all reaches, all tow motors, **conveyer belt**, battery chargers, floor cleaner, shrink wrap machines, and **pick tower**.” [Emphasis added.]

[27] It had the notation:

“All FF&E to be removed by January 15, 2019 or as agreed upon with Landlord.”

[28] The two other invoices for the purchase of the FF&E that was not located in the warehouse provided that:

“All FF&E to be removed by December 31, 2018, as instructed by Hilco” and

“All FF&E to be removed by January 15, 2019, as instructed by Hilco.”

There is no reference to the Landlord.

[29] Mr. Benitah recognized that there was reference to “as agreed with the Landlord” in the other two invoices for the FF&E located at the other stores and the head office. They did not include a racking system and therefore could be removed more quickly.

[30] Mr. Benitah testified that the reason 266 wanted to buy all of the FF&E was because he wanted to run a new retail business that could use the Racking. Mr. Benitah’s evidence is that he is using the FF&E bought from the stores for his new Bowring business. Currently, the FF&E is either stored in a 118,000 square foot warehouse or in six 53-foot trailers for future growth of the retail business. He needed this FF&E for back-office infrastructure to start his new retail business. Some of it is being used in the back office and some of it is being stored in the six 53-foot trailers. In mid-December of 2018, he asked an employee, Ms. Carvajal to contact contractors with experience in handling racking to remove it from the warehouse. Ms. Carvajal’s evidence is that the removal of the Racking would take around six weeks and cost around \$200,000 to \$300,000.

[31] Ms. Carvajal is Mr. Benitah’s only employee that testified about the efforts made to find contractors who could dismantle and remove the Racking. The contractors she spoke with told her that they needed a timeline, but she was not able to provide one until Mr. Benitah could make arrangements with the Landlord. The invoice for the FF&E at the warehouse stipulated that the FF&E (including the complete racking) was “to be removed by January 15, 2019 **or as agreed with the landlord.**”

[32] 266 therefore knew that it would take longer to remove the Racking than the time remaining before the January 15th removal deadline. In his testimony, the earliest date on which Mr. Benitah mentioned calling the Landlord’s representative, was in January 2019. Mr. Benitah also knew that on December 20, 2018, the Bankrupt companies issued a Notice of Intention to Disclaim the Lease with an effective date of January 22, 2019.

[33] After Ms. Carvajal’s discussions with racking removal contractors in December of 2018 and early January 2019, she did not contact any contractors about removing the Racking because she had not received further instructions from Mr. Benitah. Mr. Benitah testified that Mr. Gunn would ultimately decide on the Landlord’s behalf, what accommodations 266 would receive with respect to removing the Racking after the Disclaimer Date. He had previously dealt with Mr. Gunn directly regarding Lease issues. Mr. Benitah did not contact Mr. Gunn to seek such accommodations.

[34] He did not write to any Landlord’s representative concerning the Racking’s removal. Rather, 266’s first written communication (by email) occurred on January 31, 2019, in response to an email from the Landlord’s counsel. They wrote to 266’s counsel regarding the presence of the Racking in the warehouse and asked for written confirmation that the Racking had been abandoned. No response was received. All further communication took place by email. Landlord’s counsel followed up on February 3, 2019, advising that the Racking needed to be removed immediately to allow for a new Lease for the warehouse. They stated that the Racking would be assumed to be abandoned if no response was received by the end of the next business day. 266’s counsel responded the next day, advising that Mr. Benitah would like to arrange a meeting with the Landlord the following week “*to discuss this matter*”.

[35] Counsel replied that the Landlord did not want to meet with Mr. Benitah, that it considered the Racking to be abandoned, and that it would be disposed of. On February 6, 266's counsel advised that the Racking, for which 266 "*paid good value*", was not abandoned. Landlord's counsel responded to 266's counsel on February 7, 2019, with a proposal whereby the Landlord would permit 266 to remove the Racking. Counsel advised that if that proposal was not accepted by 5:00 pm the following day, the Landlord would move ahead "as it saw fit".

[36] 266 did not respond by the deadline of 5 p.m. on February 8, 2019, but advised that Mr. Benitah was in Germany and that counsel was trying to coordinate schedules with him to respond in a timely manner. There was no response from 266 for 13 days. On February 21, 2019, counsel wrote to the Landlord's counsel, repeating 266's positions that it had purchased the Racking and that it was not abandoned. The only proposal 266 made was that "*the landlord undertake a joint effort to sell the racking to a third party... and the landlord and 266 can then split the sale proceeds.*"

[37] Mr. Benitah, an experienced negotiator, testified that he understood that the proposal of February 7, referred to above, provided him with an opportunity to negotiate. On February 25, 2019, counsel advised 266's counsel that the racking had been disposed of. 266 made no further inquiries into where and how the Racking may have been disposed until this action was commenced.

[38] Until 266's response on February 5, 2019, the only evidence to support 266's position that it did not intend to abandon the racking following the Disclaimer Date is Mr. Benitah's evidence that he attempted to call Mr. Butera in early January 2019. Mr. Butera's evidence was that he did not receive or miss any calls from Mr. Benitah in December 2018 or January 2019 (he has not been employed by the Landlord since May 2019).

[39] 266 did not produce any phone records to substantiate this evidence.

[40] Mr. Gunn and Mr. Butera testified that the usual process when a call from a tenant is received, is that Mr. Butera would document the call. In this case, no such document was created.

[41] The Landlord submits that this court should conclude that after Ms. Carvajal met with racking contractors, 266 became aware that the Racking had little value because its removal and storage costs would be greater than what 266 paid for it. It also could not be removed before the Disclaimer Date and would result in more expenses for 266.

[42] The racking located in the 220,000 square foot warehouse was a system of pallet racking, pick module shelving, and powered-conveyor equipment used to store and access commercial inventory.

[43] 266 submits that the Sale Guidelines do not apply to the sale of FF&E located in the warehouse, because it is not a store. Alternatively, 266 submits that even if the warehouse is a "Store", section 9 of the Sale Guidelines only applies to "fixtures and personal property." The Racking was repeatedly referred to and described as "equipment" in the Landlord's emails and is therefore neither a fixture nor personal property. I do not accept this submission as the invoice for

the warehouse purchases specifically refers to the fact that the racking is included in the FF&E. The Racking also runs through the warehouse and was not sold in pieces, located only in the sales area.

[44] Finally, 266 argues that in interpreting the Order, “Deemed abandonment” could not as a matter of law, apply to a fixture that had been sold to a third-party purchaser. In the further alternative, 266 submits that the Sale Guidelines could not grant the Proposal Trustee authority to “deem” merchandise and FF&E abandoned when it had already been sold to non-tenants prior to the lease disclaimer date. The Proposal Trustee would no longer have control or authority over the fixtures or personal property, because ownership has already been transferred to 266. For the reasons below, I do not accept this submission.

[45] To interpret the Order, I must consider its purpose and its content. The Landlord cites the textbook *Canadian Bankruptcy and Insolvency Law for Commercial Tenancies*, (Toronto: LexisNexis Canada Inc., 2016) [“*Bish Text*”], which has been referenced by the Ontario Court of Appeal in *7636156 Canada Inc. (Re)*, 2020 ONCA 681, 153 O.R. (3d) 271 and *Curriculum Services Canada/Services Des Programmes D’Études Canada (Re)*, 2020 ONCA 267, 150 O.R. (3d) 529.

[46] The author refers to “*continuous squabbles*” between debtors, liquidators, and landlords with respect to the appropriate procedure for liquidation sales approved in insolvency proceedings.

[47] The author discusses the 2007 Bombay Furniture Company proceedings wherein Justice Morawetz (as he then was), developed a model order that set out the procedures for liquidations in leased retail premises. In the *Bish Text*, the content and purpose of the model order is described as follows:

...provided certainty, transparency, and fairness with respect to the rights and obligation of landlords. “Standard sale guidelines are incorporated as part of liquidation sale orders which provide that leased premises are to be left in “broom swept’ condition and good state of repair” and that any fixtures or personal property left in the leased premises after a Lease has been disclaimed can be disposed of by the landlord as it is considered to be abandoned. [Emphasis added.]

I agree with the author’s conclusion that the purpose of the development of a model order is, in part, to provide certainty, transparency, and fairness with respect to the rights and obligation of landlords. The Order contains the provision that leased premises are to be left in “*broom swept’ condition and good state of repair*”.

[48] 266 also emphasizes that the text of the Order states that nothing contained in the Sale Guidelines shall “grant to the landlord any greater rights than already exist under the terms of any applicable lease”. The Lease does not authorize the Landlord to dispose of property belonging to 266, a third party. These submissions are not persuasive in light of the considerations I have referred to above with respect to the context and purpose of liquidation and sale orders. The purpose of the order is to provide, in part, for “*certainty, transparency, and fairness with respect to the rights and obligation of landlords*”. In the absence of this provision, issues like the present

one would continue to be raised by the parties. The Order was designed to ensure certainty, clarity, and finality. For this reason, I also do not accept 266's alternate submissions that the deeming provision is rebuttable when considered in the context of the Order. If this were the case, the purpose of the Order would not be achieved. I therefore find that the purpose of the "deeming provision" is to protect the Trustee and Consultant from liability with respect to unsold property, or property left behind by tenants. It also provides the landlord with rights to dispose of property remaining after the sale period concludes and the Landlord regains its possession rights. This is consistent with an objective to ensuring that "*provided certainty, transparency, and fairness with respect to the rights and obligation of landlords*". I find that the "deeming provision" in section 9 of the Sales Guidelines is a defence to the Plaintiff's claim.

[49] Finally, I do not accept that the Landlord is barred from relying on the "deemed abandonment" defence because the Landlord did not refer to the Sale Guidelines until four days before trial. The Plaintiff agreed to the amendment of the statement of defence and did not object to the new ground of defence, or ask for any relief as a condition of allowing the amendment to the defence.

[50] Notwithstanding my finding above, if I have erred, I will consider the alternative defence the Landlord relies upon. Namely, 266's trespass for its failure to remove the racking from its warehouse within a reasonable time after the lease disclaimer, the date the Landlord was entitled to possession.

[51] In *Stewart v. Gustafson*, 1998 CanLII 14001, 171 Sask. R. 27 (K.B.), the Court of King's Bench held that when a landowner withdraws the permission given to the owner of property owner and the owner fails to remove it within a reasonable period of time, a trespass is committed. The Court held that such trespass may be a defence to a claim for conversion. It was held that the landowner could remove and sell the property if "*a cost-benefit analysis demonstrates that the cost of preserving or removing a chattel, as the case may be, materially exceeds its market value or reasonably imputed value to its owner*" [Emphasis added.]: *Stewart*, at para. 31; see also *Cassandro v. Glass*, 2019 ONCA 654 and *Dean v. Kotsopoulos*, 2012 ONCA 143..

[52] Our Court has held that if a defendant has acted reasonably to rectify a trespass and has satisfied the cost-benefit analysis, this may serve as a defence to a claim of conversion: *Sinclair v. Small*, 2007 Can LII 20794 (Ont. S.C.).

[53] The uncontradicted evidence of the Landlord was that the costs of preserving the Racking in the warehouse were substantial. The Warehouse could not be leased until the Racking was removed. The Trustee paid rent up until January 22, 2019 (the Disclaimer Date), but after that date the landlord lost a significant amount of rent (almost \$200,000 per month) until it was able to lease to the new tenant. The new tenant MARS Canada Inc. paid over \$300,000 per month.

[54] The evidence is that the Racking was supposed to be out of the Warehouse by January 15, 2019 or the Disclaimer Date. The removal of the Racking was not complete until almost two months later, on March 18, 2019. By that time, the Landlord had lost the opportunity to earn almost \$400,000 in rental payments.

[55] I now must determine whether the Landlord acted reasonably. A cost benefit analysis based on the evidence, establishes that it would not have been reasonable for the Landlord to pay for the dismantling and removal of the Racking for several reasons. Ms. Carvajal testified that contractors advised her that it would cost between \$200,000 and \$300,000 to remove the Racking. The cost to carefully remove the Racking so that it could be re-used would be higher, particularly when combined with the delayed removal, and would increase the Landlord's rent revenue losses. Further, the large Racking could not be disposed of on the street and substantial costs would be required to store it.

[56] The evidence supports the finding that these costs greatly exceeded the market value of the Racking for the Landlord. The evidence of Mr. Butera was that two of the three companies he consulted advised him that the Racking was not worth paying anything for and that Russell Systems was only willing to pay \$50,000 for the racking. 266 paid \$116,668 for all of the Warehouse's FF&E, which included the Racking. 266's only suggestion on how to deal with the racking was a proposal that it be sold with the profits split between it and the Landlord.

[57] Mr. Conroy of Russell Systems testified that his company scrapped much of the Racking given the tight timelines – which in his experience is usual for bankruptcy liquidations.

[58] When I consider the evidence in this trial, I find that a cost-benefit analysis favours finding that the Landlord acted reasonably by entering into an agreement for the purchase and removal of the Racking by Russell Systems.

[59] Mr. Benitah testified that he never had any issues with any landlords across the country. In some cases, where the FF&E had to be removed by December 31, 2018 (which was the lease disclaimer date on many of the leases) and it was not possible to do so because the liquidation sale was ongoing, he reached an agreement with the landlords. They were cooperative and supportive in permitting the removal of the FF&E after December 31, 2018. He testified that: "All landlords allowed us. I didn't have one problem with any landlords." All communications with the landlords occurred over the phone. Mr. Benitah testified, "I'm a phone person. I've always been a phone person. Everybody that deals with me knows that I communicate by phone".

[60] 266 did not provide any evidence of how it intended to deal with the Racking and the costs of doing so. Rather, Mr. Benitah's evidence on behalf of 266 was that he wanted to meet with the Landlord to discuss how and when the racking was to be removed. I have referred to Mr. Benitah's efforts to deal with the removal of the Racking above. Mr. Benitah knew that the Racking had to be removed by January 15, 2018; the date was noted on the Invoice for the Racking. However, he interpreted the words "or as agreed to by the Landlord as giving 266 the right to have a meeting with the Landlord to discuss how and when the racking would be removed." I disagree with this interpretation. He assumed that he did not have to make any proposals to the Landlord until he had a meeting with the Landlord. I disagree with this assumption. I find that notwithstanding Mr. Benitah's desire to meet with the Landlord after the January 15, 2019 deadline, the Landlord did not have any obligation to meet with Mr. Benitah.

[61] The evidence established that disassembly and removal of the Racking required access to the facility and the services of a specialized contractor who could dismantle it so that it could be reassembled for reuse. There was 220,000 square feet of Racking. It took from February 11 to March 18 to complete the removal of the Racking from the warehouse. Mr. Benitah testified that “You can’t hire somebody to remove racking when you’re going to give them one week if I have to be out by the 15th [...] nobody would take on that responsibility and that liability”. Mr. Benitah had the obligation to remove the Racking from the warehouse and should have, but did not, take steps to arrange for the removal of the racking.

[62] 266’s evidence was that it could not sign a contract with any contractors until the necessary arrangements and timelines were made with the Landlord. The evidence referred to above shows that 266 made no efforts to contact the Landlord. Most importantly, 266 failed to make a proposal to the Landlord about how it would dispose of the racking and made no counterproposal to the Landlord after February 2019. 266 only responded to indicate that it wanted a meeting to discuss the removal of the racking with the Landlord. This evidence supports the findings I have made above and the conclusion that the Landlord’s actions were reasonable in light of 266’s trespass.

[63] Mr. Benitah testified that he called the Landlord’s representative, Mr. Lubarsky to discuss removal of the Racking on February 5, 2018. The call was confirmed by Mr. Benitah’s phone logs. Mr. Lubarsky reported directly to Mr. Gunn and was in charge of leasing the warehouse. He is no longer employed by the Landlord and did not testify.

[64] Mr. Benitah testified that Mr. Lubarsky yelled at him because of the rent arrears, told him to call his lawyer, and said to Mr. Benitah “don’t ever call me again”. As Mr. Lubarsky was not a witness, Mr. Benitah’s evidence is uncontradicted.

[65] After the phone call with Mr. Lubarsky, Mr. Benitah testified that he immediately telephoned the Landlord’s counsel, Mr. Gasper Galati, who did not return his phone call. Mr. Benitah stated that he left a voicemail for Mr. Galati. Mr. Gunn testified that this phone call was also *not* reported to him. At trial, counsel Mr. Galati advised the court that because Mr. Benitah was represented by counsel, he could not respond to his phone call. The January 19, 2019 email from Mr. Galati had already been sent to 266’s counsel at the time of his voicemail.

[66] On February 6, 2019, at 7:50 am, 266’s counsel emailed Mr. Galati that:

“I understand that Fred Benitah reached out to the landlord directly, who advised that he should speak with you. He then tried calling you but it went to voicemail. ***He would like to arrange a meeting with the landlord for next week to discuss this matter.*** I am currently away on holiday. Please advise if there is a time that would work for the landlord. I have copied Mr. Benitah on this email for his reference.” [Emphasis added]

[67] Mr. Benitah testified that he instructed 266’s counsel to arrange for a meeting between him and the Landlord Defendants.

[68] On the same day, February 6, the Landlord’s counsel responded to 266’s counsel:

We have been instructed to advise that the landlord is not interested in meeting with Mr. Benitah. We have also been instructed to advise that the landlord considers the racking as abandoned and will dispose of the racking as it sees fit. [Emphasis added]

[69] On the basis of this evidence regarding the actions of both Mr. Benitah and the Landlord, I find that the Landlord has met its burden to prove that it acted reasonably when it disposed of the Racking. Therefore, 266's claims ought to be dismissed. It is therefore not necessary to address the further alternative defence of abandonment. However, I also find that when viewed objectively, 266's inaction demonstrates that it had the intention to abandon the Racking. 266 did not ask the Landlord to extend the January 15 date. It was the Landlord who contacted 266 with respect to the removal of the Racking, after the deadline and the Lease Disclaimer date. Further, the passage of time after the deadlines, supports a finding that 266 intended to abandon the Racking as it had made no arrangements and was not in the midst of negotiations with a contractor or the Landlord to remove the Racking.

Bad Faith Allegation

[70] Although 266 did not make a claim for a breach of duty of good faith, 266 submits that the Landlord's actions demonstrate its bad faith.

[71] Mr. Benitah testified that in early January he tried calling Mr. Butera, the property manager for the Landlord. He wanted to arrange a meeting to discuss timelines for the removal of the Racking because he knew it was going to take six to eight weeks to complete. Mr. Benitah testified that he and Mr. Butera had previously worked together and had many meetings together, which also sometimes included Mr. Butera's superior, Mr. Gunn. However, he would always start with Mr. Butera, particularly when dealing with operational issues. Mr. Benitah's phone calls went to voicemail and his messages were not answered. As noted above, Mr. Butera denies that he got any voicemails from Mr. Benitah. I find that since Mr. Benitah made no progress via voicemail, he should have communicated his proposal for the removal of the racking to the Landlord in writing. Mr. Benitah did not testify about what proposal he was prepared to make.

[72] 266 relies on the evidence that the Landlord was soliciting bids from third parties for the purchase and sale of the Racking.

[73] I have found that the Landlord acted reasonably to remove the racking from the warehouse as quickly as possible, so that they could re-lease it at a higher rate. The Landlord was entitled to take such action.

[74] It had the right to possession of the warehouse and was not being paid any rent. It is important to note that the allegation of the breach of a duty of good faith was not pleaded by 266. The analysis relevant to this allegation of bad faith is relevant to this court's determination of whether or not the Landlord acted reasonably in disposing of 266's Racking in light of the trespass.

[75] 266 also relies on the fact that the Landlord's efforts to sell the Racking were never disclosed to Mr. Benitah to establish bad faith. I find that the Landlord had no obligation to

discloses its efforts to remove the racking to Mr. Benitah. The submission that the Landlord acted in Bad Faith does not alter this court's finding that the Landlord acted reasonably.

[76] Had I found in favour of the Plaintiff, the remaining issue would have been the quantum of damages that the landlord would have to pay the Plaintiff. The parties retained experts to opine on the replacement cost of the Racking System. The experts are almost in agreement with respect to the replacement cost of the racking. The Plaintiff's expert's opinion was the amount of \$7,910,000, and the Defendant's expert's opinion was the amount of \$7,578,300.

[77] The Landlord argues that the Plaintiff is entitled to the amount that the Racking System was sold for in January 2019 (\$45,200) to Russell Conroy.

[78] In a claim for conversion, the jurisprudence provides that damages are determined on the basis of how much it would cost the Plaintiff to replace the lost racking.

[79] The evidence was that the Racking System was in good condition, unique, and highly specialized and that there was no used racking inventory available. The Landlord has not met its burden of proving that available used racking would support a lower damages award.

[80] I would have found that damages should be assessed as at the date of trial using the value range agreed upon by the experts.

Counterclaim

[81] The Landlord's Counterclaim for damages for the lost rental revenue for period of time that the Racking was in the warehouse after the disclaimer date of January 22, 2019 requires evidence. The Landlord's evidence was that once the racking was removed on March 21, 2019, it could lease the warehouse to the new tenant. There was no evidence about how much earlier the new tenant, MARS, would have rented the warehouse had it not been for the presence of the Racking. The lease discussions with MARS occurred in February and March 2019.

[82] Since the Landlord has not provided the required evidence, it has not met its burden of proof of establishing the damages claimed in its counterclaim.

Costs

[83] The Defendant is the successful party in this trial and is entitled to its costs on a partial indemnity basis as submitted at trial. The Defendant's costs of \$331,242 on a partial indemnity basis were appropriate and reasonable having regard to the higher amount of damages claimed by the Plaintiff and also in light of the Plaintiff's request for costs of \$486,992 on a partial indemnity basis. However, if the parties are unable to agree on costs that arise as a result of the Rules on **Offers to Settle**, the Defendant may make submissions of no more than two pages, double spaced, sent to the Plaintiff, uploaded to CaseLines, and a copy sent to my assistant Roxanne Johnson at Roxanne.johnson@ontario.ca by December 20, 2024. The Plaintiff may make submissions of no more than two pages, double spaced, sent to the Defendant, uploaded to CaseLines, and a copy

sent to my assistant by January 3, 2025. No reply submissions will be accepted. If no submissions, in the manner specified above, are received by January 3, 2025, costs will be deemed to be settled.

Justice Pollak

Released: December 11, 2024

CITATION: 2668602 Ontario Inc. v. GWL Realty Advisors Inc., 2024 ONSC 6913
COURT FILE NO.: CV-19-627841
DATE: 20241211

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

2668602 Ontario Inc.

Plaintiff

– and –

GWL Realty Advisors Inc., The Great-West Life
Assurance Company and London Life Assurance
Company

Defendants

REASONS FOR DECISION

Justice Pollak

Released: December 11, 2024