CITATION: Second Real Properties Limited v. S&P Data Corporation, 2025 ONSC 2
COURT FILE NO.: CV-20-74788
DATE: 2025-01-02

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
SECOND REAL PROPERTIES LIMITED	)	
	)	
Plaintiff	)	Maryam Samani, for the Plaintiff
	)	
– and –	)	
	)	
S&P DATA CORPORATION	)	
	)	
Defendant	)	Catherine E. Allen, for the Defendant
	)	
	)	
	)	
	)	**HEARD:** December 16, 2024

REASONS FOR JUDGMENT

BORDIN J.

Overview

[1] The plaintiff, defendant by counterclaim, brought a summary judgment and a r. 25.11 motion to strike portions of the defendant's affidavits filed in response to the motion for summary judgment. The property manager for the plaintiff, Allison Drennan, swore affidavits in support of the plaintiff's position. Drennan was cross-examined and refused certain questions.

[2] This is a motion brought by the defendant/plaintiff by counterclaim seeking to compel answers to four questions refused by Ms. Drennan.

[3] It appears that approximately 16 or more affidavits were filed in the summary judgment motion. As such, I informed counsel at the outset of the motion that, in accordance with the current Consolidated Civil Provincial Practice Direction, the parties must bring to the attention of the court

all relevant material facts and the authorities that establish the legal propositions relied upon and that materials that are not brought to my attention will not be considered.

The factual allegations

[4] The following is a summary of the allegations made by the parties.

[5] The defendant leased a property in Hamilton from the plaintiff. As a result of COVID-19 restrictions, the defendant's workforce attending the leased premises was reduced to approximately 20 percent. On April 22, 2020, the defendant's representative, Mr. Borts, wrote to the plaintiff's representative to request reduced rent and to invite a discussion on assistance regarding monthly rent payments.

[6] The plaintiff sent a memo to all tenants on April 27, 2020, stating that there were no current rent reductions and that the plaintiff would evaluate eligibility for the Canada Emergency Commercial Rent Assistance ("CECRA") program once the criteria were released by the government.

[7] The defendant says it asked the plaintiff whether the plaintiff would apply for the CECRA program, and the plaintiff initially said that it was not certain whether it would apply and it would keep the defendant advised.

[8] The plaintiff sent another memo to the tenants on June 3, 2020, setting out the information the plaintiff needed for inclusion in it's CECRA application, and set a deadline of June 19, 2020, for receipt of the information from the tenants. The plaintiff sent the memo by email to two individuals who were listed as the defendant's contacts for "building issues." Those individuals say they had no role in the CECRA issues. A copy of the memo was not sent to Mr. Borts. The principals of the defendant responsible for CECRA issues say they did not receive the memo.

[9] The defendant says that it first became aware that the plaintiff was applying for CECRA on July 8, 2020. On that date, it appears that Ms. Drennan wrote to the defendant's representative, Mr. Risenman, to ask why the plaintiff was only receiving 25 percent of the rent. Ms. Drennan advised Mr. Risenman that the defendant had failed to provide the documentation required to apply

for CECRA and asked if he intended for the plaintiff to apply to the CECRA program on behalf of the defendant. Ms. Drennan asserts that she spoke to Mr. Risenman and advised him to compile documentation in anticipation of the application. Following this, communication exchanged between the parties about the defendant compiling the required information.

[10] The defendant asserts that it was very unclear from the plaintiff's emails and correspondence whether the defendant was still able to provide the plaintiff with the information required for the CECRA application. The defendant says it was never advised by the plaintiff of the true deadline for the application or when the plaintiff would be submitting the application.

[11] Ultimately, the defendant did not provide the plaintiff with the information required to apply for CECRA. The defendant sets out reasons why it did not respond to the request for information and why it paid a reduced rent of approximately 25 percent. The plaintiff submits evidence that counters some of these reasons.

[12] The plaintiff submitted an application for CECRA on behalf of 52 other tenants in the building but says it did not include the defendant in its application and so no benefits were received on behalf of the defendant. At the cross-examinations of Ms. Drennan, which took place on July 6, 2022, the plaintiff disclosed that it submitted the CECRA application on July 29, 2020.

[13] Eventually, the plaintiff demanded the unpaid rent from the defendant and delivered a notice of default as well as follow up communication. The defendant requested a reduction of rent to 50 percent and an extension of the term of the lease.

[14] On December 16, 2020, the plaintiff locked the defendant out of the premises. The defendant asserts this was contrary to *Protect, Support and Recover from COVID-19 Act (Budget Measures),* 2020, S.O. 2020, c. 36 – Bill 229, which amended the *Commercial Tenancies Act*, R.S.O. 1990, c. L.7, to prevent a landlord, eligible to receive CECRA, from exercising the right of re-entry and set out that if a landlord contravened Bill 229, they would be liable to the tenant for any damages suffered.

[15] The defendant asserts the plaintiff denied it access to the premises for about 2 ½ or 3 days and denied it access to another leased property not owned by the plaintiff, but which it managed.

[16] The plaintiff issued a statement of claim about two days later.

Scope of cross-examination on an affidavit and refusals

[17] The court in *Ontario v. Rothmans Inc.*, 2011 ONSC 2504, [2011] O.J. No. 1896 (Ont. S.C.) ("*Rothmans*") reviewed the distinction between examination for discovery and cross-examination on affidavits. The scope of cross-examination on an application or motion is only coincidentally commensurate with the scope of an examination for discovery: *Rothmans*, at para. 142.

[18] Relevance is a key determinant of a proper question. Relevance is determined by reference to the matters in issue in the motion in respect of which the affidavit has been filed and by the matters put in issue by the deponent's statements in the affidavit: *Rothmans*, at para. 142.

[19] Relevance is concerned with the logical tendency of evidence to prove a fact. To determine whether an item of evidence is relevant, a judge must decide whether, as a matter of human experience and logic, the existence of a particular fact, directly or indirectly, makes the existence of a fact more probable than it would be otherwise: *R. v. Candir*, 2009 ONCA 915, 250 C.C.C. (3d) 139, leave to appeal refused, [2012] S.C.C.A. No. 34622, at para. 48.

[20] Put another way, if the question asked could elicit a response that the trial judge could rely on to resolve a matter in issue, the question asked is relevant: *Romspen Investment Corporation v. Woods et al.*, 2010 ONSC 30005, [2010] O.J. No. 2546, at para. 16.

[21] At para. 143 of *Rothmans*, the court set out the following principles on the scope of cross-examination of a deponent on an application or motion:

- The scope of a cross-examination of a deponent for an application or motion is narrower than an examination for discovery: *BOT Construction (Ontario) Ltd. v. Dumoulin*, [2007] O.J. No. 4435 (S.C.J.) at para. 6.

- A cross-examination is not a substitute for examinations for discovery or for the production of documents available under the *Rules of Civil Procedure: BOT Construction (Ontario) Ltd. v. Dumoulin*, *supra* at para. 7; *Westminer Canada Holdings Ltd. v. Coughlan*, [1989] O.J. No. 252 (Master), aff'd [1989] O.J. No. 3038 (H.C.J.).

- The examining party may not ask questions on issues that go beyond the scope of the cross-examination for the application or motion: *Thomson v. Thomson*, [1948] O.W.N. 137 (H.C.J.); *Toronto Board of Education Staff Credit Union Ltd. v. Skinner*, [1984] O.J. No. 478 (H.C.J.) at para. 12; *Westminer Canada Holdings Ltd. v. Coughlan*, [1989] O.J. No. 3038 (H.C.J.).

- The questions must be relevant to: (a) the issues on the particular application or motion; (b) the matters raised in the affidavit by the deponent, even if those issues are irrelevant to the application or motion; or (c) the credibility and reliability of the deponent's evidence: *Superior Discount Limited v. N. Perlmutter & Company; Superior Finance Company v. N. Perlmutter & Company*, [1951] O.W.N. 897 (Master) at p. 898; *Re Lubotta and Lubotta* [1959] 0.W.N. 322 (Master); *Wojick v. Wojick*, 1971 CanLII 538 (ON SC), [1971] 2 O.R. 687 (H.C.J.); *Toronto Board of Education Staff Credit Union Ltd. v. Skinner*, [1984] O.J. No. 478 (H.C.J.) at para. 11; *BASF Canada Inc. v. Max Auto Supply (1986) Inc.*, [1998] O.J. No. 3676 (Master) at paras. 6, 10-11; *Caputo v. Imperial Tobacco Ltd.*, [2002] O.J. No. 3767 (Master) at paras. 14-15; *BOT Construction (Ontario) Ltd. v. Dumoulin*, [2007] O.J. No. 4435 (S.C.J.) at para. 4; *Shannon v. BGC Partners LP*, 2011 ONSC 1415 (Master) at para. 8.

- If a matter is raised in, or put in issue by the deponent in his or her affidavit, the opposite party is entitled to cross-examine on the matter even if it is irrelevant and immaterial to the motion before the court: *Wojick v. Wojick and Donger*, 1971 CanLII 538 (ON SC), [1971] 2 O.R. 687 (H.C.J.), at p. 688; *Ferring Inc. v. Richmond Pharmaceuticals Inc.* [1996] O.J. No. 621 (Div. Ct.) at paras. 14 and 15; *Logan v. Canada (Minister of Health)*, [2001] O.J. No. 6289 (Master); *Guestlogix Inc. v. Hayter*, 2010 ONSC 5570 at para. 16.

- The proper scope of the cross-examination of a deponent for an application or motion will vary depending upon the nature of the application or motion: *Blum v. Sweet Ripe Drink Inc.* (1991), 47 C.P.C. (2d) 263 (Ont. Master); *Moyle v. Palmerston Police Services Board* (1995), 1995 CanLII 10659 (ON SC), 25 O.R. (3d) 127 (Div. Ct.).

- A question asked on a cross-examination for an application or motion must be a fair question: *Superior Discount Ltd. v. N. Perlmutter & Co.*, [1951] O.W.N. 897 (Master) at p. 898; *Canadian Bank of Commerce (CIBC) v. Molony*, [1983] O.J. No. 221 (H.C.J.) at para. 3; *Seaway Trust Co. v. Markle*, [1988] O.J. No. 164 (Master); *BASF Canada Inc. v. Max Auto Supply (1986) Inc.*, [1998] O.J. No. 3676 (Master) at para. 6. (See discussion below.)

- The scope of cross-examination in respect to credibility does not extend to a cross-examination to impeach the character of the deponent: *Moyle v. Palmerston Police Services Board* (1995), 1995 CanLII 10659 (ON SC), 25 O.R. (3d) 127 (Div. Ct.).

- The deponent for an application or motion may be asked relevant questions that involve an undertaking to obtain information, and the court will compel the question to be answered if the information is readily available or it is not unduly onerous to obtain the information: *Bank of Montreal v. Carrick* (1974), 1973 CanLII 381 (ON SC), 1 O.R. (2d) 574 (Master), aff'd *ibid* p. 574n (H.C.J.); *Mutual Life Assurance Co. of Canada v. Buffer Investments Inc.* (1985), 1985 CanLII 1940 (ON SC), 52 O.R. (2d) 335 (H.C.J.) at paras. 9-13; *Caputo v. Imperial Tobacco Ltd.*, [2002] O.J. No. 3767 (Master) at paras. 42, 56; *BOT Construction (Ontario) Ltd. v. Dumoulin*, [2007] O.J. No. 4435 (S.C.J.) at para. 8; *Hinke v. Thermal Energy International Inc.*, 2011 ONSC 1018 (Master) at paras. 36-37.

- The deponent for a motion or application who deposes on information and belief may be compelled to inform himself or herself about the matters deposed: *Rabbiah v. Deak*, [1961] O.W.N. 280 (Master); *Caputo v. Imperial Tobacco Ltd.*, [2002] O.J. No. 3767 (Master) at paras. 42, 46.

[22] One of the more important principles to be applied on a refusals motion is the principle that the scope of the cross-examination will vary depending upon the nature of the motion or

application. Thus, questions about the merits of the action or application may not be within the scope of a particular motion. For example, questions about the merits were not proper for a motion to amend the statement of claim to add new parties: *Rothmans,* at para. 148.

Nature of the action and motions

[23] The plaintiff sues for unpaid rent and other amounts payable under the lease.

[24] The defendant pleads that the plaintiff sought to terminate the lease so that it would obtain a new tenant for higher rent. The defendant asserts the plaintiff did not negotiate in good faith. The defendant seeks set-off and counterclaims for damages for the plaintiff's conduct related to the CECRA application, for locking the defendant out of the two premises, for failing to comply with COVID-19 requirements, and for other alleged breaches of the lease including failure to repair the HVAC system, broken toilets, and a leaking ceiling.

[25] The plaintiff says it complied with COVID-19 requirements and denies breaches of the lease.

[26] In its motion for summary judgment commenced in 2021, approximately five months after the claim was issued and before discoveries, the plaintiff seeks $2,806,463.92 from the defendant for rent and other amounts payable for the remainder of the unexpired term of the lease of April 1, 2020 to March 31, 2025.

[27] In response to the summary judgment motion the defendant raises the alleged plaintiff's failure to act in good faith, including that the plaintiff did not want to include the defendant in the CECRA application and wanted to evict the defendant to obtain a tenant who would pay higher rent. The defendant asserts that the plaintiff notified the wrong people about the June memo and did not advise it of the real deadline for providing the information for the CECRA application. Further, the defendant relies on the alleged breaches by the plaintiff of its COVID-19 pandemic obligations and failure to repair.

[28] On a summary judgment motion, the plaintiff must establish that there is no genuine issue requiring a trial. The defendant must set out, in affidavit material or other evidence, specific facts

showing that there is a genuine issue requiring a trial. The Supreme Court of Canada set out the applicable framework in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87.

[29] In my view, while full discovery is not required on a summary judgment motion, the status of production and discovery can impact the determination of whether disclosure-type questions refused in a cross-examination on the motion are proper questions.

[30] As an aside, query how, on these facts, a summary judgment motion that takes four years to wind its way through the court, that has over 16 affidavits and cross-examinations, and includes a motion to strike portions of affidavits filed in the summary judgment motion is "a proportionate, more expeditious and less expensive means to achieve a just result than going to trial": *Hryniak*, at para. 4 (see also paras. 28 and 49). But that is not the issue before me today.

Questions refused

[31] The following refusals remain in issue:

1. Q. 139, p. 32: I want to know whether this witness [Ms. Drennan] has any evidence to dispute what is set out in the letter located at Exhibit F of her affidavit.

2. Q. 263, p. 59: Please produce the CECRA application.

3. Q. 266, p. 60: Please provide a copy of the CECRA application with redactions of whatever information you want that you deem to be of concern for privacy reasons.

4. Q. 306, p. 69: Did you draw any conclusions as to whether the termination of this lease in issue here was in contravention of Bill 192 – the *Protecting Small Business Act, 2020*, amending the *Commercial Tenancy Act*?

Q. 139, p. 32: Existence of evidence to dispute what is set out in the letter at Exhibit F

[32] In Ms. Drennan's May 27, 2021 affidavit, she states at para. 13:

> On April 22, 2020, Second received a letter from David Borts ("Mr. Borts"), Chief Operating Officer of S&P, which stated that S&P was unable to pay the rent in full, and requested that it remit only 20% of the monthly rent in light of the issues and lack of employees that S&P was facing during the COVID-19 pandemic. Attached as Exhibit "F" is a true copy of Mr. Borts' April 22, 2020 letter.

[33] Ms. Drennan has therefore raised the letter and its contents in her affidavit.

[34] The initial question to Ms. Drennan at her cross-examination was as set out above. It was not answered.

[35] The defendant then attempted to question Ms. Drennan on whether she had evidence to dispute each statement in the letter. After answering with respect to the first statement in the letter, counsel responded on behalf of Ms. Drennan that the letter "speaks for itself". That was not an answer to the question.

[36] The plaintiff submits that the question is improper and rhetorical. It is neither. The plaintiff submits it is not the plaintiff's obligation to prove the defendant's affirmative defences. While this may be so, the plaintiff is required to answer relevant questions.

[37] The cross-examination of Ms. Drennan is on affidavits filed on a motion for summary judgment. Therefore, relevant questions include those going to the merits of the action and addressing whether there is a genuine issue requiring a trial, matters raised in, or put in issue by Ms. Drennan in her affidavit, and questions which go to the credibility and reliability of Ms. Drennan's evidence.

[38] The letter is part of the key events the parties refer to that support or respond to the defences and crossclaims raised by the defendant. Therefore, the questions asked could elicit a response that the trial judge could rely on to resolve a matter in issue that goes to the merits of the action and whether there is a genuine issue requiring a trial.

[39] However, the plaintiff is not required to advise whether it has evidence that contradicts what the plaintiff was considering or thinking according to its directing minds. For example, statements in the letter such as: "We do want to contribute towards our monthly rent" and "we do

not want to be in a position where we are asking everything from you and providing nothing in return." The fact that these statements were made in the letter is clearly not in dispute. There is nothing Ms. Drennan could say about such statements that would assist the court in resolving the questions in issue. What the plaintiff's representative says about what someone else was thinking is not relevant.

[40] There are, however, assertions of fact in the letter that a judge could rely on to resolve a matter in issue. The factual assertions upon which Ms. Drennan may be examined are:

> While families and businesses have all been affected by the Covid19 virus, S&P Data has been especially affected. We are an employee dependent service business and as stay at home orders increase and continue in many communities, it has created a major attendance and employee attrition problem to our company. As a result, while our office is open and it appears we are operating as normal, there is, in fact, a much smaller staff on site. This has had a negative effect on our revenue and profitability numbers. Various government agencies in North America have deemed our company and the services we provide to be essential to the local community, especially, during this difficult and troubling time. Currently our workforce in this location is 20% of what we were when we began at your site and there has been a similar decrease in this office's revenues.
> …
> due to the circumstances raised, we are currently unable to meet the entire monthly rent amount.
> …
> We are actively pursuing any assistance that is available in Canada. While the Canadian government passed the 75% wage subsidy program into law this past weekend, they have been slow at and in fact have not yet begun opening the program for applications.

[41] The defendant is entitled to cross-examine on the letter as set out above.

Q. 263, p. 59 and Q. 266, p. 60: Providing a copy of the CECRA application

[42] The CECRA program is mentioned numerous times throughout the many affidavits sworn by Ms. Drennan.

[43] The CECRA application is a central issue in the defendant's defence, counterclaim and claim for set-off. The defendant asserts that it was an eligible tenant and that a CECRA application ought to have been submitted on its behalf by the plaintiff, and that if this had been done, it would have resulted in the plaintiff receiving most if not all of the difference between rent owing under the lease and what defendant was able to pay. The defendant anticipates that the plaintiff will argue that the defendant would not have qualified for CECRA. As noted, the defendant raises the lack of good faith on the part of the plaintiff.

[44] In paragraph 40i. of her May 27, 2021, affidavit, Ms. Drennan deposes that the defendant's allegation that the plaintiff failed to negotiate in good faith because the plaintiff wanted to offer the premises to a new tenant at a higher rent lacks evidence.

[45] The plaintiff then refuses to allow Ms. Drennan to produce the CECRA application which is central to the failure of the defendant to pay the full rent and the subsequent termination of the lease by the plaintiff, as well as the defendant's lack of good faith defence and counterclaim. The CECRA application is a relevant document.

[46] The plaintiff submits that it has admitted the date the application was made and that it did not include the defendant in the application, so production of the application is not required. The defendant has never seen a copy of the CECRA application and, accordingly, cannot not know whether it was in fact included in the application or what kind of information was included in the application by the plaintiff. The defendant is not required to accept the plaintiff's evidence on this central point, especially when it is based on a relevant document that the plaintiff controls and which was not produced to the defendant. The defendant is entitled to a copy of the document in some form to test the plaintiff's evidence and Ms. Drennan's credibility.

[47] The plaintiff also refuses the question on the basis that the CECRA application contains the confidential information of other tenants, which it asserts would be improper to produce, and which is irrelevant. Even accepting the plaintiff's position, the plaintiff has not shown why there is no other information in the application that is relevant.

[48] The plaintiff submits that the CECRA application is done through an online portal supplied by the Government of Canada. As such, a comprehensive report cannot be easily generated. The plaintiff could not point to any evidence to support this assertion.

[49] The plaintiff submits the information is highly prejudicial. That is not the test for answering relevant questions.

[50] The plaintiff submits that even with the redactions, the information requested is highly confidential, but does not tender evidence to establish this.

[51] The CECRA application is relevant and must be produced. Given the defendant's willingness to receive a redacted copy of the application, the plaintiff is to produce a copy of the CECRA application but may redact any financial, banking or similar confidential information provided by the other tenants. The plaintiff is to provide a summary of the types of information it has redacted from the application. The names of the tenants and the date of the application are not to be redacted as they are not confidential. The questions posed on the form are not to be redacted.

[52] If, after receiving the redacted CECRA application, the defendant is of the view that the redacted information should be produced, the defendant may bring a motion for production.

Q. 306, p. 69: Conclusions as to whether the termination of the lease contravened the *Protecting Small Business Act*

[53] In prior questions, Ms. Drennan had confirmed that she was aware of the *Protecting Small Business Act*.

[54] The defendant submits that this question is relevant because it goes to its argument that the eviction was illegal based on the *Protecting Small Business Act*. The defendant submits that whether the plaintiff evicted the defendant with a belief or understanding that to do so would contravene the eviction ban imposed by the *Protecting Small Business Act* is relevant to the defendant's counterclaim and claim for set-off, particularly its allegation that the plaintiff negotiated in bad faith. It is relevant to whether the termination was legal and whether rent is owing.

[55] The plaintiff submits that this is a question of mixed fact and law "which leans to a legal inference". In my view, the question does not call for a conclusion of law. It does not call for Ms. Drennan to interpret the legislation. It calls for the plaintiff's understanding at the time the lease was terminated, and the defendant evicted. In submissions, the plaintiff conceded this may go to the issue of good faith/bad faith on the part of the plaintiff.

[56] However, the plaintiff submits that when it terminated the lease, counsel was involved and legal advice was sought. The plaintiff submits that the legal advice is subject to solicitor-client privilege. Therefore, the plaintiff submits, answering this question would violate such privilege. However, the plaintiff is not able to point to any evidence to support this position.

[57] The question asked is relevant to the defence, in particular the issue of the whether the plaintiff was acting in good faith. The question asked could elicit a response that the summary judgment motion judge could rely on to resolve a matter in issue on the motion. The question is to be answered.

Disposition

[58] I make the following orders:

1. the Plaintiff shall, within thirty (30) days of the date of this order, answer questions 139, 266, and 306 subject to the directions in this decision;

2. within sixty (60) days of the plaintiff's delivery of the answers pursuant to paragraph 1 above, Allison Drennan shall attend at a continued cross-examination to answer questions reasonably arising from her answers to the undertakings, questions taken under advisement, and/or questions refused;

[59] If the parties are unable to resolve the issue of costs, they may submit a bill of costs and make written submissions consisting of not more than two double-spaced pages in length, together with any relevant offers to settle and excerpts of any legal authorities referenced, according to the following timetable:

1. The defendant shall serve its costs submissions, if any, by no later than January 20, 2025;

2. The plaintiff shall serve its costs submissions, if any, by no later than February 3, 2025.

[60] All submissions are to be filed with the court and uploaded to Case Centre, with a copy sent to the trial coordinator by end of day February 3, 2025. If no submissions or written consent to a reasonable extension are received by the court by February 3, 2025, the matter of costs will be deemed to have been settled.

Bordin J.

Released: January 2, 2025

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COURT FILE NO.: CV-20-74788
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- and -

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