

CITATION: A Dinner Concept Inc. v. Simpson et al, 2025 ONSC 308
BRAMPTON COURT FILE NO.: CV-20-00001298-0000
DATE: 20250114

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: A DINNER CONCEPT INC., Plaintiff / Defendant by Counterclaim

AND:

LEROY SIMPSON, PAULINE SIMPSON, and SIMPSON ENTERPRISES LTD., Defendants / Plaintiffs by Counterclaim

BEFORE: RSJ E. Ria Tzimas

COUNSEL: Adam Jarvis, for the Plaintiff / Defendant by Counterclaim

Craig Aitken, for the Defendants / Plaintiffs by Counterclaim

HEARD: June 19, 2024

ENDORSEMENT

- [1] The Plaintiff brought a summary judgment motion seeking full judgment and a dismissal of the Defendants' counterclaim. The Defendants ask that the motion be dismissed.
- [2] The claim arises out of the alleged breach of the terms of a ten-year commercial lease between the parties. The Plaintiff alleged that the Defendants' breaches included the non-payment of rent, damages to the leased premises, failure to remit HST as required by the lease, failure to obtain a WSIB certificate, and unlawfully operating the business without a liquor licence. The Plaintiff advised the Defendants of the noted breaches on February 5, 2020 and exercised its right of re-entry on March 1, 2020.
- [3] Before this court, the Defendants disputed the Plaintiff's allegations in their entirety. They denied the alleged breaches and submitted that the Plaintiff wrongfully terminated the lease and then proposed an Agreement of Purchase and Sale with terms that were non-negotiable and specific payment requirements on a very tight timeline. In their view, the Plaintiff repudiated the terms of the lease because the Plaintiff's director, Ms. Pauline Dinner did not wish to continue to be a landlady.
- [4] For the reasons that follow the Plaintiff's motion is dismissed with costs in favour of the Defendants fixed at \$24,000 on a partial indemnity scale.

BACKGROUND FACTS

- [5] The parties in this litigation entered a commercial lease agreement for a period of ten years on October 1, 2019 for the premises located at 15 Main Street North, Brampton, Ontario. During the material period, A Dinner Concept Inc, (Dinner Concept), was the owner of the said premises and Pauline Dinner was its director. Until the summer of 2019, Dinner Concept operated the restaurant and lounge known as “Carve on Lot 5.” In accordance with the lease’s terms, the Defendants were to assume the operation of “Carve on Lot 5.”
- [6] The Defendant, Leroy Simpson executed the Lease Agreement and a General Security Agreement for the said premises and business operation on October 2, 2019. His mother, Pauline Simpson, signed a Guarantee for the Lease. Simpson Enterprises Ltd. is a corporation and is named in these proceedings. Leroy and Pauline Simpson are its directors and officers. The company was not a party to the Lease. The Simpsons state that their company should not be a named party to these proceedings.
- [7] Very regrettably, Pauline Dinner passed away in 2021. The evidence on behalf of the Plaintiff was put before the court by Martyn Bowman, who is the sole owner and director of Dinner Concept and Ms. Dinner’s conjugal partner.
- [8] There is no dispute that Ms. Dinner was the only person to have had direct communications, interactions, and exchanges with Mr. Simpson. Mr. Bowman thought he may have been in the background, at the premises on a couple of occasions but his involvement with the Lease Agreement was limited to maintaining an accounting of the rental payments. He learned of Mr. Simpson’s late rental payments and difficulties related to the operation of “Carve on Lot 5” from Ms. Dinner.
- [9] Ms. Dinner and Mr. Simpson began their discussions about the operation of “Carve on Lot 5” in the summer of 2019. Mr. Simpson understood that he was negotiating a lease to own arrangement. He thought that he would be stepping in to operate “Carve on Lot 5.” The only difference to the operation of the restaurant and lounge would be his introduction of live jazz music.
- [10] At some point in September of 2019, and before any commercial lease was concluded, Ms. Dinner provided Mr. Simpson with the key and access to the premises. In what counsel for Mr. Simpson’s counsel described as “keys for cash”, Mr. Simpson gave evidence that he gave Ms. Dinner a cash payment of \$55,000 in exchange for the keys to the premises. The sum of \$50,000 was to be applied to the purchase of the “Carve on Lot 5” Trademark and intangible assets, and the sum of \$5,000 was a rent deposit. In his evidence, Mr. Bowman denied that Ms. Dinner received any such funds, though he agreed that Mr. Simpson advanced an initial payment of \$5,000.
- [11] From his September discussions with Ms. Dinner, Mr. Simpson understood that the lease would include terms relating to: “Lease to Own with Trademark”, a “Lease to Own Blended Rental Amount”, Chattels, tenancy improvements, and the transfer of the liquor

license. In his evidence he said that the terms contained in the actual lease that he signed were different from what he negotiated.

[12] The Lease Agreement of October 1, 2019 included the following material terms:

1.03 – Lease and Chattels: “As Is”;

1.04 – Lease Term: 10 years

2.01 – Deposit of \$65,000

2.02 – Minimum Rent of \$180,000 per year, plus HST

2.06 and 2.07 – Taxes to be paid

3.04 – Purchase of Assets for the sum of \$650,000

3.05 – Payment for Purchased Assets – monthly instalments of not less than \$5,525.

7.01 – Default / Right to Re-Enter

7.02 – Right to Relet

7.04 – Remedies

8 – Landlord’s Covenants

8.01 – Quiet Enjoyment

8.02 – Alterations by Tenant

[13] Mr. Simpson gave evidence that Ms. Dinner presented him with the terms of the lease on October 2, 2019. He felt pressured to sign then and there, without the opportunity to obtain any legal advice. His mother, who attended with him on October 2, 2019 signed the Guarantee. She did not obtain any independent legal advice. She also did not file any evidence in response to this motion.

[14] Mr. Simpson included in his evidence an email message from Ms. Dinner, which she sent to him following their meeting and where she purported to confirm the following specific terms:

Hi Lj

Like I said today, overall the lease to own structure is \$5000 towards the business ownership/assets and \$10000 pending taxes to rental. I will include the trademark for Carve on Lot 5. Call me if you have any questions.

Thank you

Pauline

This breakdown was not included in the specific terms of the lease agreement. Although the communication may or may not have legal significance, it purports to capture Ms. Dinner's understanding or expectations for this transaction.

- [15] There is no dispute that difficulties with the tenancy relationship emerged almost immediately. If the Plaintiff's evidence were to be accepted, Mr. Simpson encountered financial difficulties almost immediately that resulted in late rental payments. Simply put, in Mr. Bowman's view, Mr. Simpson had difficulties getting the business off the ground and cash flow, at least in December was a problem. In cross, Mr. Bowman conceded that Mr. Simpson paid the rent for October and November in full, though not on the first day of each month.
- [16] If Mr. Simpson's evidence were to be accepted, apart from his admission that he was not earning any significant profits, his main complaint was that Ms. Dinner repudiated the terms of the lease almost from the get-go because she would not let go of the operation of "Carve on Lot 5" and she interfered with Mr. Simpson's staff. She maintained full control of the of the security system and refused to relinquish control over "Carve on Lot 5's" online presence. This conduct, in its totality, impacted Mr. Simpson's ability to operate the business. Flooding in November 2019 compounded his difficulties.
- [17] By late December of 2019 or early January of 2020, Ms. Dinner told Mr. Simpsons that she would not allow him to operate "her" "Carve on Lot 5." Then in early February, she advised Mr. Simpson that she no longer wanted to be a landlady and wanted out of the lease. Instead, she advised Mr. Simpson that she was prepared to discuss the outright sale of the business and premises. Ms. Dinner was terminally ill, and she thought that the sale would be the best way to go about leaving something to her daughter.
- [18] Dinner Concept issued a letter of non-compliance to the Defendants on February 5, 2020. On March 1, Dinner Concept exercised its right of re-entry. It issued its Statement of Claim on March 24, 2020.
- [19] According to Mr. Simpson, Ms. Dinner promised him a meeting for early March. Its purpose would have been to resolve their multiple issues. Although Mr. Simpson wanted to meet, such a meeting did not take place. Instead, Ms. Dinner presented Mr. Simpson with a non-negotiable Agreement of Purchase and Sale for \$3 million.
- [20] Specifically, on March 5, Ms. Dinner sent Mr. Simpson an email proposing that he could access the premises for that night if he were to deposit \$20K into her account. Further payments of \$150K would have to be deposited in her account by no later than March 19, 2020, towards the purchase price. On March 10, Ms. Dinner and Mr. Bowman sent Mr. Simpson a proposed APS with a fixed payment schedule. No sale was ever concluded.
- [21] In his evidence, Mr. Bowman outlined the shortfall in rental payments and enumerated various efforts that were made to mitigate the Plaintiff's losses and damages.

ANALYSIS

a. Legal Principles

- [22] A summary judgment motion is used to eliminate claims that have no chance of success at trial. It also provides a judge with fact-finding powers, see Rule 20 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and *Hryniak v. Mauldin*, 2014 SCC 7.
- [23] Most recently, *Joshi v. Chada*, 2022 ONSC 4910 and *1942091 v. Tatomirovic*, 2023 ONSC 4614 provided a more current and comprehensive review of the governing legal principles for summary judgment motions. For the purposes of this motion, it is useful to highlight the following legal principles.
- [24] To begin with, the moving party is the one who initially bears the evidentiary burden to demonstrate that there is no genuine issue requiring a trial. If that burden is met, the onus shifts to the responding party to show that the claim has a real chance of success that there are genuine issues requiring a trial, *Sweda Farms Ltd. Et al. v. L.H. Gray & Son Limited et al.*, 2013 ONSC 4195.
- [25] The responding party is required to put its best foot forward and cannot simply assert a bald denial. In its response, it must set out relevant evidence with specific facts and coherent evidence to demonstrate that there is a genuine issue for trial.
- [26] Summary judgment is not appropriate if the credibility of the parties is squarely in issue and requires a trial, *Demetriou v. AIG Insurance Company of Canada*, 2019 ONCA 855. The more important credibility disputes are to determining key issues, the harder it will be to fairly adjudicate those issues solely on a paper record. If it cannot be done, that should be a sign that oral evidence or a trial is required, *Cook v. Joyce*, 2017 ONCA 49 at para. 92,
- [27] Finally, it is essential that the court take “great care” when it assesses credibility and reliability on affidavit evidence since “[e]vidence by affidavit, prepared by a party’s legal counsel, which may include voluminous exhibits, can obscure the affiant’s authentic voice”. The motion judge must ensure that “decontextualized affidavit and transcript evidence does not become the means by which substantive unfairness enters in the way that would not likely occur in a full trial where the trial judge sees and hears it all,” *Baywood Homes Paternership v. Haditaghi*, 2014 ONCA 450.

b. Applying the Legal Principles to this Case

i. Evidentiary Flaws

- [28] With these governing principles in mind, I turn to the difficulties that are present in this motion. To begin with, the evidentiary record raises significant admissibility, weight and credibility concerns that makes this case unsuitable for a summary judgment motion. This difficulty is caused in no short measure by Ms. Dinner’s unfortunate passing and therefore the lack of any direct evidence from her. The evidence regarding her communications, be that to Mr. Bowman or Mr. Simpson is hearsay and therefore raises admissibility issues that were not addressed by either side.

- [29] This very material difficulty is compounded by concerns over the reliability of Mr. Bowman's evidence, thereby compromising the Plaintiff's ability to meet its onus of proving that there is no genuine issue for trial. To be more specific, if one were looking for an example of a "decontextualized affidavit" that could raise the risk of a substantive unfairness to the Defendants, Mr. Bowman's evidence in his two affidavits and his cross-examination transcripts are it.
- [30] Although Mr. Bowman's efforts to reconstruct the commercial relationship and the alleged difficulties took time and effort, in his cross-examination, it was evident that he could not overcome the fact that he never had any direct interactions with Mr. Simpson and did not participate in any of the exchanges between Ms. Dinner and Mr. Simpson.
- [31] In the result, his evidence amounted to little more than a recording of his recollections of what Ms. Dinner may have reported to him about her difficulties with Mr. Simpson. The recollections were not contemporaneous to the events in question. Other than the recordings of the various payments, Mr. Bowman did not have any contemporaneous notes of his conversations with Ms. Dinner about the situation with Mr. Simpson. He said he recorded the payments as Ms. Dinner brought the funds home and he undertook a reconciliation of accounts. He could not report on the context for the difficulties because he was not part of that context. His description of the difficulties with Mr. Simpson were his best recollection at the time he swore his affidavit of Ms. Dinner's complaints, that swearing being three years from March 1, 2020, when Mr. Simpson was locked out of the subject premises. The resulting decontextualized evidence enabled Mr. Bowman to advance a very simple theory: the Defendants entered into a commercial lease, they ran into financial difficulties, they were unable to pay the rent, and therefore they were terminated.
- [32] But Mr. Bowman's cross-examination surfaced several difficulties with this theory. In no particular order, Mr. Bowman's answers in his cross-examination revealed differences between his and Ms. Dinner's assessment of what was going on with the Simpsons and how they might resolve the alleged defaults in the payment of the rent. Consistent with his thesis and evidence, Mr. Bowman was most troubled by the alleged non-payment of the rent. In his answers on cross, he was clear that if the Simpsons paid their rent, there wouldn't be any problem. However, the communications attributed to Ms. Dinner suggested a different objective. Reportedly, she wanted to walk away from the lease, sell Dinner Concept and the premises.
- [33] To illustrate this divergence in views, and therefore a variation in the relevant context, I refer to the following exchanges. When asked about Ms. Dinner's interest to sell, Mr. Bowman was non-committal. He said "we're always open to anything. Like, you can [sell] someone anything and anything I own is for sale". A few minutes later, when pressed about Ms. Dinner's position about selling Dinner Concept, (referred to in the cross-examination as the "Premises"), Mr. Bowman repeated: "Like I said before, sale of an asset is always optional to us."

[34] In an earlier part of his examination, the following exchange revealed his own thinking about the situation but also suggested that he may not have been certain about Ms. Dinner's thinking on the subject:

Q. Okay. And so, the closing thought here is that there is to be a meeting in early March of 2020 to discuss exactly what was happening with the lease or the asset purchase or – or what- what was going on. Does that sound familiar Marty?

A. I don't know if a meeting was scheduled, I know Leroy was inquiring to – he had an event coming up that he wanted to fulfill, and again, after so many times of us being disappointed, we gave him another opportunity. Pay some of your *back rent*, we will let you in. (my emphasis).

Q. Temporarily?

A. Temporarily. Pay all your *back-rent*, we're back to normal, (my emphasis).

[35] On the strength of the transcript, and without the benefit of observing Mr. Bowman's demeanour or hearing his statement, Mr. Bowman was presenting his own view of the situation. But here are the problems with this exchange. First, he did not appear to know anything about Ms. Dinner's communications with Mr. Simpson about a meeting. Second, he was clearly not aware of Ms. Dinner's email communication of March 5 (after the lock-out), with Mr. Simpson, marked as Exhibit I to Mr. Simpson's affidavit that made it clear that payments to be made in March would go towards the purchase of the business, and not be applied to any *back rent*. In fact, in her communications concerning the potential APS, Ms. Dinner was silent on any default in rental payments:

Hi Lj

Just for your records, I would like to clarify the agreement we made.

In order for you to have access to 15 Main Street North today, you will deposit 20K into our account now and we are willing to unlock the doors to allow you access to use the premises. We will be back later this evening when you call us to let us know you are finished and lock the doors. We are willing to do the same tomorrow so you can hold your event.

After that you will no longer have access to the building.

If you would like us to give you a new set of keys to the property so you can continue to do business from today, it will require you to also deposit 150K towards the agreed purchase price of 3 million dollars with no conditions attached and the building in [as is] condition.

50K will be deposited into our account today in addition to the 20K and the remaining 100K will be deposited no later than Thursday March 19th 2020 to go towards the purchase price. This 150K total will be held in trust by our lawyer, Douglas Hancock and is non refundable. Your closing date will be the 30th of April.

The deposit goes towards the purchase price.
Please respond to this email if you understand and agree.
Thank you
Pauline.

- [36] Assuming that an exception to the hearsay rule would allow for the admission of this communication, its content suggests a range of inferences that might be available to draw at trial concerning Ms. Dinner's actual intentions, which would be directly relevant to whether or the extent to which she repudiated her end of the bargain with Mr. Simpson. However, for the purposes of illustrating the differences between Mr. Bowman's and Ms. Dinner's perspectives on how Mr. Simpson's alleged difficulties might be resolved, the contrast is stark. More to the point, for the purposes of a summary judgment motion it underscores the dangers that are associated with Mr. Bowman's ability to give evidence concerning Ms. Dinner's exchanges, and negotiations with Mr. Simpson, never mind the reliability of such evidence.
- [37] Even more illustrative of the differences between Mr. Bowman's perspective on the situation and Ms. Dinner's perspective and communications with Simpson is the following exchange:
- Q. But before closing for lunch, I'm going to put to you, Martyn, that – that Pauline approached Leroy and told him that she wanted the lease to end under all circumstances?
- A. At a certain point, I wanted the lease to end. I don't want to give anything away for free. I's paying the bills on the property. If I'm not collecting rent, I'm not doing my job.
- Q. Yeah, but Pauline did not describe this as a rental issue. She said she didn't want to be a landlady. She wanted an asset purchase so that she could essentially liquidate her estate and provide her adult children or there's a few respondents, I understand that – with assets.
- A. *What she may or may not have wanted to do was totally different from what was happening. And I submit you find an e-mail or text saying that, I'd be very surprised because the bottom line was, if rent is being collected and we had income, that's all we wanted.* (my emphasis).
- [38] Except that this excerpt from the cross-examination brings into sharp contrast potential differences between what Mr. Bowman wanted, and what Ms. Dinner may have wanted.

Quite remarkably, Mr. Bowman does not address Ms. Dinner's concern to liquidate her estate for the benefit of her adult children. Against this and other passages in the evidence, the court cannot ignore that in her communications with Mr. Simpson, Ms. Dinner did not complain about any rental arrears; she was focused on the sale of the business.

- [39] The divergence in viewpoints is significant because they point to two very different scenarios and explanations for the Plaintiff's conduct. As I discuss more fully below, if the difficulties were only about late payments, then the termination of the lease may be legally justified. However, if Ms. Dinner changed her mind, then the allegation by the Defendants that she repudiated the terms of the lease are equally plausible. Mr. Bowman's dismissal of what Ms. Dinner may have wanted, especially when it was Ms. Dinner who was communicating with Mr. Simpson is disconcerting and cannot be ignored. ``
- [40] Similar difficulties are revealed in relation to Mr. Bowman's understanding about Mr. Simpson's ability to use the Dinner Concept Trademark. In his reproduction of the lease, Mr. Simpson said he was given a copy of the Trademark, Carve on Lot 5. The lease, at paragraph 3.01, required Mr. Simpson to operate under the Carve on Lot 5 Trademark. And yet, it was not disputed that Ms. Dinner did not permit Mr. Simpson to operate under that name. She denied him access to the Trademark and all related IT and social media accounts.
- [41] In his reproduction of the lease, Mr. Bowman did not include the Dinner Concept trademark Certificate. In his cross-examination, Mr. Bowman described Mr. Simpson's understanding that he had to operate under the Dinner Concept trademark as the initial agreement. He also referred to it as "common ground." He then suggested that the deal changed when Mr. Simpson stopped paying rent: "when rent slowed down, something had to be adjusted." Except that the rent was not outstanding in October and November when Ms. Dinner refused Mr. Simpson access to the trademark.
- [42] To "change the deal" could be interpreted as a repudiation of the lease. Without making any express finding, I am concerned that Mr. Bowman may have effectively admitted to Ms. Dinner repudiating the terms related to Mr. Simpson's use of the Trademark. His evidence, especially on this subject, but also on the question relating to the transfer of the liquor licence and giving access to an appraiser, serves to underscore the frailties in his evidence, caused in large measure by the fact that he was not present in the discussions between Ms. Dinner and Mr. Simpson. Mr. Bowman, no doubt has views about the situation, but those views seem perilously incongruent with the evidence describing Mr. Simpson's and Ms. Dinner's exchanges and interactions.
- [43] Mr. Bowman's evidence was further compromised by the degree to which his counsel interfered with the cross-examination. In my review of the transcript, there are numerous instances where Mr. Bowman's counsel pre-empted him answering a question. Although on occasion the objections were warranted, where they were not, the interference undermined answers or left certain questions unanswered, with no particular justification.
- [44] Curiously, counsel's most pronounced interference was in relation to the questions about Ms. Dinner's alleged promise to Mr. Simpson to meet with him after the lock-out to discuss

a buy-out. It also related to questions about Ms. Dinner asking Mr. Simpson to buy the premises. The following exchange captures best the concern:

Q. Okay. And – but at that meeting, there was both going to be discussions about two items, one, payment for rent, yes?

A. Most likely. ‘Cause that was always an issue.

Q. And two, Leroy moving forward with plans to purchase the building?

A. Another option Leroy presented to us.

Q. Well, that’s not Leroy’s position, he – in his sworn testimonies, Pauline asked him to buy the building.

Mr. Jarvis (Mr. Bowman’s counsel): What’s the question?

Q. I am saying this was Pauline’s idea as well, to sell the building.

A. Like I said before, sale of an asset is always an option to us.

Q. Okay. I think we’ve – so what I’m saying is that – or putting to you –, as – as the representative of Dinner Concept, is Pauline, Dinner Concept’s director, had promised to have a meeting about these things without...

MR. JARVIS: He rejected the promise, he rejected the promise, I’m not aware of a promise, we met with him regularly, Yes.

Mr. Aitken (Mr. Simpson’s counsel): Adam?

Mr. Jarvis: Yes

Mr. Aitken: You just quite literally gave an answer for your – Martyn here. Marty, here.

Mr. Jarvis: No, I object – I objected to your question. You erroneously put statements in the witness’ mouth that he actually said the contrary. So when you review the February 25th email and were asking the witness questions on them, you put it to the witness that there was a promise to meet, and his answer, in his own words, was that, no, there was no promise made. So a moment ago, you asked the question and you – and you went back again and asserted that there was a promise, so you are starting off the question with a false premise that was already rejected by Marty. I’m not giving evidence, I’m not putting words into his mouth, I’m clarifying your erroneous premise.

- [45] Counsel continued back and forth for two full pages on how the question was stated, eliminating any prospect that after witnessing that exchange, whatever Mr. Bowman's answer, could be considered reliable. The reality is that had Mr. Bowman been allowed to answer, he could have cleared up whether or not he knew anything about a promise to meet, keeping in mind that even if the parties did not meet, Ms. Dinner sent out two communications following the lockout concerning the buy-out. A promise to meet might enhance Ms. Simpson's evidence that Ms. Dinner changed her mind about their existing lease arrangement. The absence of any promise might strengthen Mr. Bowman's theory of what occurred. Mr. Jarvis' passionate objection to the existence of any promise only served to shine a greater spotlight on the question of what was actually going on, what were Ms. Dinner's objectives and communication, and how they might support the Defendant's repudiation theory.
- [46] Next, the text messages attached to Mr. Bowman's Reply affidavit that purport to be copies of communications and exchanges that he attributed to be occurring between Ms. Dinner and Mr. Simpson raise serious authenticity and therefore admissibility concerns. Absent a full consideration of their probative over their prejudicial value, in the context of a summary judgment motion, they are inadmissible.
- [47] Mr. Bowman agreed that he extracted the text messages from the phone that Ms. Dinner used and forwarded them using email. But he also agreed that he tampered with them to indicate who the speakers were. Mr. Bowman said he no longer had the phone and could not speak to how the messages were preserved or whether they were the actual true records.
- [48] In my review of the messages, given the changes to the formatting, the editing, and the cutting and pasting, there is no way of knowing if they represent the complete communications, if relevant portions have been deleted or simply omitted, or if they have otherwise been compromised. In the face of such fundamental shortcomings, and in the absence of a probative / prejudicial analysis, it would be most unfair to the Defendants to rely on such evidence for any finding of fact. While I am inclined to believe Mr. Bowman when he says that he could not have "made all this stuff up," he did not share the complete exchanges. For example, he did not submit any of the emails that Ms. Dinner sent to Mr. Simpson, included in Mr. Simpson's evidence.
- [49] Finally, on the mitigation and damages, the evidentiary record is woefully inadequate. To begin with, the calculations are incomplete, represent approximations and do not allow any comprehensive analysis. In addition, missing from the record before the court are source documents relating to the alleged damages and post-lease-term mitigation issues. Given that Mr. Bowman's answers to undertakings were not tested even if there were no genuine issue for trial, as that relates to whether there was a breach or a repudiation of the lease terms, damages would have to be proven at trial, likely with the assistance of expert evidence.

ii. Is there a genuine issue to be tried?

- [50] In light of the forgoing concerns with the Plaintiff's evidence, Dinner Concept has failed to meet its onus of proving that there is no genuine issue for trial. To the contrary, in my view, on the record before me, I see a few genuine issues for trial.
- [51] First, I am far from certain that there was ever a true meeting of the minds between Ms. Dinner and Mr. Simpson. Everything about their communications and arrangements appears to have moved at lightning speed, with little to no evident legal advice. While counsel for the Plaintiff is correct to point to the implications of the parole evidence rule and the existence of an entire agreement clause in the lease, within hours of the lease being signed, Ms. Dinner supplemented the lease with her own additional explanations on what would constitute payment of rent and what would be applied to the purchase of the assets.
- [52] Related to this issue is a concern with the very basic contours of the parties' transaction. To the extent that both sides agreed that the commercial lease included an asset purchase agreement, it is curious that this aspect of the arrangement would have included little more than a reference to the asset purchase in section 3 of the lease, and then Schedule B. What about, for example, any potential liabilities of the vendor, or the satisfaction of bulk sales requirements? I raise these concerns because gaining a baseline for what the deal was supposed to be, when it was signed on October 2, 2019 is the starting point for assessing what may or may not have been breached or repudiated, and by whom. If there was no meeting of the minds, might that explain the difficulties, almost from the get-go?
- [53] The second genuine issue for trial concerns the landlord's conduct and whether there was a repudiation of the lease terms. The concerns raised by Mr. Simpson, especially in relation to the use of the Trademark, Ms. Dinner's presence and communications with him and his staff are probative. Her surveillance of the premises could be held to be a breach of the quiet enjoyment covenant. The ostensible divergence of views between what Mr. Bowman believes and recollects to be Ms. Dinner's views and Ms. Dinner's views, as reflected in email communications she sent to Mr. Simpson and in Mr. Simpson's evidence raise serious reliability and credibility concerns. To be clear, I am concerned about an apparent incongruence between what Mr. Bowman understood to be the arrangement between Ms. Dinner and Mr. Simpson, and what the actual communications may have been. Assuming that the parties can get over the difficulties associated with the hearsay evidence, the only way to test this concern is with *viva voce* evidence.
- [54] The third genuine issue for trial, which may feed into the landlord's conduct concerns the Defendants' conduct and whether their lease was wrongfully terminated. At the very minimum, given Mr. Simpson's admission that he encountered financial difficulties, what role, if any did those difficulties play in his discussions with Ms. Dinner? Did Ms. Dinner repudiate the lease agreement because she changed her mind and did not want to be a landlady, or was she fed up by the frequency of the late rental payments and saw the sale as way to mitigate the situation? Might there be something to Mr. Bowman's evidence in cross that if the rent had been paid, "we could have worked forward getting the other things corrected, and as long as this was done, the lease would still be in good standing."

- [55] The Plaintiff's failure to prove that there is no genuine issue for trial, avoided an analysis of the strength of the Defendants' evidence and the degree to which he put his best foot forward. The Defendants should not be comforted too much by this finding. Although, their responding evidence brought into focus the triable issues, some of Mr. Simpson's evidence, especially in relation to the initial payment of \$55,000 was rather dubious.
- [56] Against these genuine issues for trial, it would appear that having a rushed into a poorly structured commercial arrangement, the parties found themselves in a race to the bottom of the bargain. Is this a situation where Ms. Dinner's conduct would lead a reasonable person to conclude that by sometime in December or January Dinner Concept no longer intended to be bound by the asset and leasing contract of October 2, 2019, or was Mr. Simpson's failure to meet his obligations of such a magnitude that the termination of the lease became inevitable?
- [57] In this regard, it is essential to be reminded of the leading authorities on repudiation in the context of commercial leases. I refer specifically to the cautions in *Sandbanks Summer Village Resort Management Inc. v. Prince Edward Vacant Land Condominium Corporation No. 10*, 2021 ONSC 989, and specifically paragraphs 26, 29 and 30. I draw special attention to the recognition that contract interpretation requires consideration of the context and surrounding circumstances to give effect to the intentions of the parties, see *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 56-58; 2249778 *Ontario Inc. v. Smith*, 2014 ONCA 788, at para. 19. In a sense, these requirements bring together the three issues I identified for trial.
- [58] Even if the Plaintiff were to succeed in a finding that the lease was not wrongfully terminated the mitigation and quantum of damages is a genuine issue for trial. On this subject, apart from the current inadequacy of the evidence as already discussed, expert evidence may be required to address the present value of unpaid future rents for the unexpired period of the lease, less the actual rental value of the premises for that period. In addition, specific market analysis may also be required to evaluate what impact the shut downs caused by the COVID19 pandemic would have had on the rental values in the period between March 2020 and sometime in 2022.
- [59] The subject of mitigation may very well engage the implications of the Plaintiff's proposed APS and the manner in which Ms. Dinner cornered the Defendants. Some immediate questions that come to mind relate to whether the terms proposed in the March 5 and 10 communications were *bona fides* or having locked the Defendants out, were the Defendants at the Plaintiff's complete mercy, as Mr. Simpson suggested? What was Ms. Dinner trying to accomplish by proposing terms that would have been impossible to meet by many prospective purchasers? On what basis did she propose \$3 million as the purchase price? If the prospects for an agreement were undermined by impossible requirements, what are the legal ramifications on the Plaintiff's mitigation obligations and the quantum of damages? These are the types of questions that would have to be explored with very extensive evidence at trial before the court could pronounce on a judgment for damages.

CONCLUSION

- [60] To be clear, it will be up to the parties to give further shape to their case, their evidence, and the issues they decide to take to trial. However, the ultimate take away from this analysis ought to be that this case is far from a simple case to be determined on a summary judgment motion. There are genuine issues to be tried and there are very serious admissibility and credibility concerns that must be tested in the context of a full hearing. Fairness in this case, especially when one of the protagonists is no longer alive to provide her input requires special caution so as not to put words in her mouth. But at the same time, her absence cannot be used to eclipse what might otherwise be on a balance of probabilities a credible explanation of what happened between Ms. Dinner and Mr. Simpson and why their commercial aspirations and objectives imploded.
- [61] As for next steps, the parties are strongly encouraged to evaluate their respective challenges. If they are interested, given my familiarity with the file, I would be prepared to preside over a pre-trial conference. Alternatively, subject to counsel undertaking a full exchange of affidavits of documents, discoveries if necessary, and retaining experts, as may be necessary to address mitigation and damages, the parties should be setting the matter down for trial so that they may obtain a pre-trial and trial date.

COSTS

- [62] Insofar as costs are concerned, at the conclusion of the motion, the Plaintiff sought \$32,102.40 on a substantial indemnity basis and \$40,000 on a full cost basis. The Defendants suggested costs of \$24,000 on a partial indemnity basis.
- [63] In my consideration of this issue, I am satisfied that both sides expended significant effort on their respective motion records. The cross-examinations were detailed and resulted in transcripts of over 200 pages for each affiant. Counsel then prepared factums, and they made oral submissions in court. The numbers proposed by the parties are roughly equivalent if adjusted for scale.
- [64] The undeniable fact is that the Defendants are entirely successful in their opposition to the motion. Accordingly, I fix costs at \$24,000 payable by the Plaintiff to the Defendants.

Date: January 14, 2025

Regional Senior Justice E. Ria Tzimas