IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Delta Automotive Ltd. v. 4846 Elliott St Ltd.,*
2024 BCSC 2246

Date: 20241108
Docket: S254989
Registry: New Westminster

Between:

Delta Automotive Ltd.

Petitioner

And

4846 Elliott St Ltd. and 4846 Elliott Holding Ltd.

Respondents

Before: The Honourable Justice J. Hughes

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:	S.E. Potter, appearing as agent for J.J. Kinghorn
Counsel for the Respondents:	M.G. Swanson S.M. Gallagher
Place and Date of Hearing:	Vancouver, B.C. November 1, 2024
Place and Date of Judgment:	Vancouver, B.C. November 8, 2024

[1] **THE COURT:** In this petition, the petitioner, Delta Automotive Ltd., seeks relief from forfeiture under s. 24 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253.

[2] The petitioner operates an automotive repair shop at 4846 Elliott Street in Delta, British Columbia (the "Premises"). The petitioner leases the Premises under a lease agreement dated January 17, 2019 (the "Lease").

[3] The petitioner has been operating its automotive repair business from the Premises for over 30 years, the bulk of which time was prior to an assignment of the Lease to the current landlord. The respondent, 4846 Elliott Holding Ltd., became the landlord under the Lease by way of an assignment in 2022.

[4] The initial term of the Lease expired on October 31, 2023. The petitioner was entitled to renew the Lease for a further five-year term on the same terms, with new fair market rent to be negotiated or arbitrated.

[5] The petitioner exercised the option to renew the Lease in June 2022, but failed to negotiate a new fair market rent for the renewal term or pursue arbitration. The petitioner then began experiencing issues paying rent on time. It missed multiple additional rent payments in 2023, and failed to pay basic rent on three occasions in 2024. This ultimately led to the landlord terminating the Lease on July 16, 2024, and repossessing the Premises.

[6] After the Lease was terminated, the petitioner requested that the landlord agree to a short-term lease to permit the petitioner to wind up its business. The landlord agreed, but the petitioner then reversed course and advised that it would instead pursue relief from forfeiture. This petition was brought, and the application came on for hearing before me.

[7] It is undisputed that the Lease was terminated in accordance with its terms. The only issue before me is whether the petitioner ought to be granted relief from forfeiture under s. 24 of the *Law and Equity Act*. The petitioner says such relief ought to be granted because otherwise it will not be able to operate its business from the Premises where it has been located for the past 30 years.

[8] For the reasons set out below, I find the petitioner has not met its burden of establishing that it is entitled to relief from forfeiture.

Background

[9] The Lease was entered into between the petitioner as tenant, the petitioner's principals, Murray and Kendra Coleman, as indemnifiers, and Doreen Barker as landlord. The Lease had a five-year term from November 1, 2018, to October 31, 2023. The basic rent in the last year (year five) of the first term was approximately $13 per square foot.

[10] In late 2021, Ms. Barker sold the Premises to the respondent, 4846 Elliott St. Ltd. As part of this transaction, in January 2022, Ms. Barker assigned her interest in the Lease to the current landlord.

[11] The petitioner had the option to renew the Lease on the same terms with the new basic rent at fair market rent. The petitioner exercised this right in June 2022, but did not provide its position on what a new fair market rent would be.

[12] Over the ensuing seven months, the landlord attempted to negotiate basic rent for the renewal period with the petitioner. In May 2023, the landlord provided a draft lease renewal agreement with a proposed new basic rent of $30 per square foot, which the landlord viewed as a discount on fair market rent, as it had other prospective tenants willing to pay $35 per square foot. No response was received from the petitioner to the landlord's correspondence.

[13] Only after the landlord said it would need to start showing the property to new prospective tenants did the petitioner respond on July 12, 2023, indicating that it would sign a lease at $30 per square foot. However, the petitioner never signed the new lease.

[14] In August 2023, the petitioner took the position that it would seek to arbitrate the new basic rent and advised the landlord that it was engaging an appraiser. No

counter offer was provided. The day before the Lease expired, on October 30, 2023, the petitioner provided an unfiled notice to arbitrate to the landlord.

[15] Over a year later, the petitioner has not taken any further steps to pursue arbitration. The landlord continued to accept rent at the year five basic rate from the previous Lease, with the caveat that the petitioner would be required to top up rent once a new basic rent was determined by agreement or arbitration.

[16] In addition to failing to negotiate basic rent, over the course of 2023, the petitioner was also repeatedly late in paying the additional rent required in accordance with the Lease. When the Lease expired on October 31, 2023, approximately $22,647 in additional rent remained unpaid. A partial payment towards the outstanding additional rent for Q1 and Q2 of 2023 was made. However, the petitioner remained in default, and a notice of default was issued on January 17, 2024. The petitioner did not pay the outstanding additional rent, and a second notice of default was issued on February 20, 2024. The petitioner finally paid the outstanding additional rent in response to the February 2024 notice of default.

[17] In May 2024, the petitioner failed to pay basic rent and a notice of default was issued on May 9, 2024. The rent was not paid. The petitioner failed to pay basic rent for June 2024. Another notice of default was issued. The petitioner again failed to respond or pay the rent. The petitioner then failed to pay the July 2024 basic rent. A notice of default was issued on July 4, 2024. The petitioner failed to respond or pay rent.

[18] On July 16, 2024, after three months of non-payment of basic rent, three notices of default, and no response from the petitioner, the landlord exercised its right to terminate the Lease. The landlord engaged bailiff services to regain access to the Premises.

[19] After this occurred, the petitioner resumed communicating with the landlord and paid the outstanding basic rent on July 21, 2024. The petitioner proposed terms for a new two-year lease with a 3.5% basic rent increase. This was not acceptable to

the landlord, who felt it was not reflective of fair market rent. By this point, the landlord was also unwilling to enter into a further lease with the petitioner because of the petitioner's conduct, including non-payment of basic and additional rent, and what it viewed as failing to negotiate in good faith after exercising the right to renew.

[20] The petitioner then requested a short-term lease to allow it to sell equipment, remove possessions, and close wind-up its business. The landlord was willing to enter into a 30- to 60-day lease for this purpose. The landlord proposed and the petitioner agreed to terms for a short-term lease. A lease was drafted and provided to the petitioner in mid-August of 2024. The petitioner did not sign the lease. Two weeks later, the petitioner informed the landlord that it would be bringing this application seeking relief from forfeiture.

Petitioner’s late affidavits

[21] When the matter came on for hearing, the landlord objected to two of the petitioner's affidavits—the affidavit #2 of Mr. Coleman and the affidavit #1 of Ms. Barker—on the basis that they were filed late, and did not constitute proper reply, contrary to Rules 16-1(6) and (7) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*].

[22] The petitioner was unable to articulate any basis upon which these affidavits constituted permissible reply, other than attempting to rely on Rule 22-1(4)(d), which has no application here. Having reviewed the contents of the disputed affidavits, I am satisfied that the respondents' position is meritorious.

[23] The discretion to admit late affidavits under Rule 16-1(7) is to be applied sparingly and only in cases where excluding the evidence would result in a substantial injustice: *Sea House Restaurant Ltd. v. One West Holdings Ltd*., 2023 BCSC 1993 at para. 54 [*Sea House*]. This rule is not intended, and should not be used, to permit a party to split its case: *Sea House* at para. 55.

[24] The evidence in the petitioner's two late affidavits is not new, and no explanation has been provided for why that evidence was not provided in

accordance with the *Rules*. In my view, this amounts to an attempt by the petitioner to impermissibly split its case. I am satisfied that no injustice will result from excluding the affidavits further and I decline to admit them. Further and in any event, and having reviewed the disputed affidavits, the evidence contained therein, even if admitted, would not have changed my decision.

Analysis – Should relief from forfeiture be granted?

[25] The applicable legal principles are not in dispute. The petitioner relies on s. 24 of the *Law and Equity Act*, which gives the court broad remedial powers:

> **Relief against penalties and forfeitures**
>
> **24** The court may relieve against all penalties and forfeitures, and in granting the relief may impose any terms as to costs, expenses, damages, compensations and all other matters that the court thinks fit.

[26] The power to grant relief against forfeiture is an equitable remedy and is purely discretionary. The factors to be considered by the court in the exercise of its discretion are the conduct of the applicant, the gravity of the breaches, and the disparity between the value of the property forfeited and the damage caused by the breach: *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co*., [1994] 2 S.C.R. 490 at para. 32, 1994 CanLII 100 *[Saskatchewan River Bungalows*].

[27] Relief from forfeiture is granted sparingly, and the party seeking relief bears the onus of establishing a sufficient basis for it: *Airside Event Spaces Inc. v. Langley (Township)*, 2021 BCCA 306 at para. 73 [*Airside*], citing *Ontario (Attorney General) v. 8477 Darlington Crescent*, 2011 ONCA 363 at paras. 86-87.

[28] The various factors to consider in determining whether relief from forfeiture should be granted are set out in *Sechelt Golf & Country Club Ltd. v. District of Sechelt*, 2012 BCSC 1105 at para. 139:

> (a) whether the sum forfeited is out of all proportion to the loss suffered (*Pope v. Potter*, 2011 BCSC 697 at para. 23);
>
> (b) whether it would be unconscionable in the traditional equitable sense for relief not to be granted (*Pope* at paras. 24-25);

(c) the applicant's conduct, the gravity of the breaches and the disparity between the value of the property forfeited and the damage caused by the breach (*Saskatchewan River Bungalows* at [para. 32]);

(d) whether there are any collateral equitable grounds which exist including the party coming to court with "unclean hands" (*600433 B.C. Ltd. v. XJ Motors Ltd.*, 2011 BCSC 1144 at para. 34);

(e) whether the applicant is "prepared now to do what is right and fair, but must also show his past record in the transaction is clean" (*Snell's Equity* (29th ed., 1990) at 31 and 541-542.).

See also *Peninsula (Kingsway) Seafood Restaurant Inc. v. Central Park Developments Ltd.*, 2021 BCCA 93 at para. 9; *Airside* at para. 22; and *Cherry Lane Shopping Centre Holdings Ltd. v. Hudson's Bay Company ULC Compagnie De La Baie D'Hudson Sri*, 2021 BCSC 1178, at para. 69.

[29] With respect to the first factor, relief from forfeiture is generally available where "the sum forfeited is out of all proportion to the loss suffered". However, it must also be "unconscionable" for the other side to retain the corresponding benefit: *Airside* at para. 72.

[30] The petitioner accepts that it has engaged in repeated breaches of the terms of the Lease, including non-payment of rent. The petitioner also accepts that there is no evidence before the Court establishing that it will not be able to operate its business at all, if relief is not granted. At best, the evidence confirms that, as a result of termination of the Lease, if relief is not granted, the petitioner will not be able to operate the businesses at the Premises and will need to find a new location. As counsel submitted in reply, the petitioner's position ultimately rests solely on the loss of use and enjoyment of the Premises, namely the loss of the ability to operate its business at the location where it has done so for 30-plus years.

[31] The petitioner relies heavily on *H.Y. Louie Co. Ltd. v. Whistler Noodle House Ltd.*, 2002 BCSC 1120 [*Whistler Noodle*]. In that case, the plaintiff landlord sought a declaration that the defendant tenant had failed to renew the lease and sought possession of the property. The tenant sought relief from forfeiture. The Court found that the lease had been renewed, but also concluded that had it not ruled in the

tenant's favour on that issue, it would nonetheless have found that relief from forfeiture was warranted.

[32] The tenant in *Whistler Noodle* was running a successful restaurant that employed seven to ten people seasonally and, if relief was not granted, would have been forced to close and put people out of work due to the lack of alternative premises: at para. 22. In finding relief from forfeiture was warranted, the Court concluded as follows at para. 34:

> [34] As mentioned previously, the consequences of forfeiture of right of renewal are severe against the Defendant, which would result in the shutting down of its business, and a substantial loss of recovery on its equipment and tenant's fixtures. Further some 7-10 employees would lose their employment. Given that there was no serious financial loss or prejudice suffered by the Plaintiff and the lease was in good standing for some period prior to the expiration of the lease term, this is a proper case in which the Court should exercise its discretion to grant relief from forfeiture.

[33] In my view, the petitioner's reliance on *Whistler Noodle* is misplaced because the key facts in that case that rendered relief from forfeiture appropriate there are not present here. None of the circumstances that were present in *Whistler Noodle* are present here, including in particular:

a) the Lease was not in good standing prior to termination, the landlord had issued multiple notice of default for non-payment of basic rent and additional rent over the past two years;

b) there is no evidence of how many people, if any, the petitioner employs or that its employees would be out of work if relief is not granted. Indeed, any employees the petitioner may have had, have presumably not worked for the petitioner for at least three months, since the landlord terminated the Lease and took possession of the Premises in mid-July 2024; and

c) there is no evidence of the petitioner's financial position or the viability of its business.

[34] While I recognize that the petitioner's tenancy at the Premises has been longstanding, that fact alone is insufficient to entitle the petitioner to relief from forfeiture. The petitioner has not established that this loss is disproportionate to the benefit to the landlord of its contractual entitlement to end a tenancy—an entitlement that is not disputed—or that it would be unconscionable if relief from forfeiture was not granted.

[35] The petitioner had multiple opportunities to secure its continued tenancy at the Premises but failed to negotiate fair market rent for the renewal period and failed to pay rent as required during the Lease in the interim. Ultimately, the petitioner's current circumstances arise from its own conduct, and it has no one but itself to blame.

[36] The petitioner's conduct also weighs against granting relief from forfeiture. First, the petitioner's conduct in repeatedly failing to pay both basic and additional rent, which as outlined above ultimately resulted in termination of the Lease, weighs against granting relief: *Triple Holdings v. Kontzamanis*, 2004 BCSC 394 at para. 49. This was the case in *Triple Holdings*, where the Court declined to grant relief in similar circumstances to the present case, including as follows:

> [49] However, I have concluded in this case that relief from forfeiture should not be granted. In my view the landlord cannot be completely compensated by money for rent. The tenant's past breaches involving failure to obtain and/or confirm insurance, failure to pay utilities, failure to maintain the premises, and failing to physically occupy the premises, are more than the landlord should have to bear. In addition the failure to pay rent on this lease has been so numerous that I do not think the landlord should have to put up with the tenant any longer.

[37] Further, there is no evidence that the petitioner can pay fair market rent once determined, which is also a relevant consideration: *B.C. Rail v. Peace River Lime Ltd.*, 1991 CanLII 1124 (B.C.S.C) at para. 27. The petitioner says that I can infer the ability to pay rent from the fact that it paid the August and September rent into counsel's trust account. I decline to draw any such inference on the record before me. The petitioner could have adduced evidence of its financial circumstances but did not do so.

[38] To the contrary, the landlord's evidence suggests that the petitioner has been experiencing financial difficulties in recent years and that these difficulties persisted. Mr. Coleman told the landlord that he was experiencing financial difficulties and was going to seek refinancing back in 2023. The petitioner was unable to pay additional and basic rent on multiple instances in 2023 and 2024, and as recently as August 2024, Mr. Coleman told the landlord that he intended to wrap up the business. In the circumstances, the fact that the petitioner paid basic rent of $13 per square foot under the expired Lease into trust does not establish an ability to pay fair market rent under a new lease, which the petitioner accepts may well be over double at approximately $30 per square foot.

[39] Second, over the course of 2023, the petitioner's conduct in failing to remedy conditions at the Premises created a fire risk and jeopardized renewal of the landlord's insurance policy. In March 2023, the petitioner was notified by the insurer that it needed to discontinue the use of extension cords to reduce the risk of electrical fires and maintain proper clearance of materials from sprinkler heads, among other issues. The tasks to remedy these circumstances were supposed to be completed by early May 2023. The petitioner failed to do so and consequently, the landlord had to obtain extensions from its insurance provider.

[40] The matter became urgent as the tasks needed to be complete in order for insurance to be renewed in February 2024. On January 17, 2024, the landlord issued a notice of default due to the petitioner's failure to complete tasks necessary to enable the insurance to be renewed and gave 10 days to remedy the default. The petitioner did not do so. It was not until mere days before the insurance came up for renewal on February 4, 2024, that the petitioner completed the necessary tasks to ensure insurance could be renewed.

[41] The petitioner's pattern of non-payment of rent and failure to promptly remedy circumstances that posed a fire risk to the Premises and put its ongoing insurability at risk constitute additional factors militating against an exercise of discretion under s. 24 of the *Law and Equity Act* in this case.

[42] Third, I am satisfied that the business relationship between the petitioner and the landlord is at an end, as a result of the petitioner's failure to:

a) pay basic rent and additional rent, and ignoring the landlord's request for payment;

b) remediate the Premises for nearly 10 months, thereby putting insurance at risk;

c) respond to multiple notices of default;

d) negotiate new basic rent over a year after exercising the option to renew;

e) proceed with arbitration after delivering a notice to arbitrate; and

f) sign the short-term lease the landlord agreed to at the petitioner’s request.

[43] As in *Airside*, I find that the petitioner's conduct has irreparably damaged the business relationship between the landlord and the petitioner, to the extent that the landlord cannot trust that the petitioner will perform its obligations under the Lease: *Airside* at para. 69; see also *Sea House* at paras. 70-71. I find that this is a further factor that militates against granting relief from forfeiture in the present circumstances.

[44] Considering the evidence as a whole, the petitioner has not met its burden of establishing that it is entitled to relief from forfeiture under s. 24 of the *Law and Equity Act*.

Conclusion

[45] In the result, the petition is dismissed.

[46] The respondents seek solicitor-and-client costs in accordance with Clause 13.4 and 5.1 of the Lease. The petitioner did not dispute the landlord's entitlement to costs in accordance with either of these provisions. The petitioner's position was that

if costs were to be granted, then they should be subject to review by the registrar for reasonableness.

[47] Accordingly, I award costs on a solicitor-client basis in accordance with the Lease to be assessed by the registrar. This concludes my reasons for judgment.

"Hughes J."