Cassels

Much Needed Relief: Ontario Courts Address Anti-Black Racism in the Context of Relief from Forfeiture

Ardy Mohajer, Kwaku Tabi, Sabah Kalim

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In a decision recently upheld by the Ontario Court of Appeal,[1] the Ontario Superior Court of Justice in *Elias Restaurant v. Keele Sheppard Plaza Inc.*[2] took judicial notice of anti-black racism and factored in racial prejudice on the part of a landlord to grant a tenant the equitable remedy of relief from forfeiture.

The tenant, Elias Restaurant, operates a family-run restaurant serving African and Caribbean food from its premises in a shopping plaza in Toronto under a lease with the landlord, Keele Sheppard Plaza Inc. The term of the lease was originally for five years and the lease held that the tenant had two renewal options to extend the term by written notice to the landlord at least six months prior to the expiry of the relevant term. Although the tenant failed to strictly adhere to the terms of the notice provision, the tenant made significant efforts both before and after such notice deadline to contact the landlord and communicate its intention to extend the term. The landlord kept the tenant in an overholding position from August 2, 2017 to May 28, 2020, at which time it issued a notice of termination to the tenant. The tenant then sought relief from forfeiture from the court.

Relief from forfeiture, originally an equitable form of relief, is also found in Ontario legislation under section 20 of the *Commercial Tenancies Act* and more broadly under section 98 of the *Courts of Justice Act* (CJA). A court may grant relief against a forfeiture that, although consistent with the terms of an agreement, would nevertheless cause an inequitable consequence on the party that breached the agreement. Generally speaking, courts have found it appropriate to utilize their discretionary power to grant such relief where the interests of the party pursuing forfeiture, in this case the landlord seeking re-entry into the premises, can be vindicated without upholding the right of re-entry.[3] The court's power to provide such relief is fact-specific. In the event that parties do not act in good faith in accordance with reasonable commercial standards, the court under its CJA discretion may grant relief based on: (1) the conduct of the applicant seeking relief, (2) the gravity of the breaches, and (3) the disparity between the value of the property forfeited and the damage caused by the breach,4 provided the court has determined that it is possible to avoid future breaches.

The Superior Court found that the tenant made significant efforts to reach the landlord both before and after the notice deadline to negotiate an extension, including via correspondence from the tenant's lawyer, which Justice Morgan found were purposefully ignored by the landlord and its property manager. In its affidavit, the landlord states that it sought to replace the tenant with a more "suitable" business, as the tenant did not attract "like minded family-oriented customers," and submitted that the tenant was operating a "liquor bar" which "detracts from the appeal of the Plaza," though as the judge noted, the tenant itself was a family-run

business.[5] At the hearing, the landlord attempted to focus less on the character of the tenant's business and argued that from an economic perspective a medical office in the subject premises would benefit the plaza and pay substantially more rent pursuant to an agreement to lease that the landlord submitted with a prospective new tenant. The Court remained unconvinced with this argument, citing that the tenant had never missed a payment and had even offered to pay more than both the current overholding rental rate it was paying (at 125% of the lease rate) and the rent that the landlord estimated the prospective tenant would pay under a medical office lease. The tenant testified that the landlord's failure to renew was not a standalone occurrence, and that in at least one other recent instance, the landlord had failed to renew the lease of another tenant who was a person of colour.

Reviewing the evidence from the respective parties, Justice Morgan found the tenant had shown good faith in attempting to communicate their desire to renew their lease. The Court further found that, given the tenant was not in breach of the lease and had made substantial improvements to the premises worth approximately $150,000, the equities and the balance of convenience weighed in the tenant's favour to have relief granted under section 98 of the CJA. The judge reasoned that the landlord had failed to show it would suffer any real financial loss from the tenant's continued tenancy. Rather, when taking into account the landlord's statements about the character of the tenant's business, the landlord's decision not to renew the tenant's lease, whether conscious or not, was racially prejudicial to the tenant and "point to a mindset that condemns the minority population for what is considered normal behavior for the majority population."[6] Justice Morgan went on to state that irreparable harm would be done to the tenant had the lease been terminated given the tenant would lose the premises, the goodwill associated with its well-established location, and its owners and customers would suffer the indignity of being excluded from the premises based on what can be seen as a form of bias which violates the law in Ontario (i.e., the Ontario *Human Rights Code*). In its decision, the Court deemed the lease to continue until what would have been the end of the first 5-year extension term prior to the overhold period (i.e., July 31, 2022), and confirmed that all other terms and conditions of the lease were to remain the same including the second option to extend the lease. The Court further enjoined the landlord and property manager from terminating the tenancy and repossessing the premises except in strict accordance with the terms of the lease and respecting all rights of the tenant.

In June 2021, the Superior Court's decision was upheld at the Ontario Court of Appeal, where it was acknowledged that the application judge was entitled to find anti-Black racism as a relevant factor behind the landlord's refusal to renew the lease and declined to interfere with the lower court's discretion to grant relief from forfeiture.

Key Takeaways

In the Superior Court decision, Justice Morgan states that, "*While a single adjudication dealing with a discreet conflict between a commercial Landlord and Tenant cannot possibly address society's many challenges with respect to racial injustice, it equally cannot ignore them.*"[7] This case is noteworthy as it

illustrates a court's willingness to view legal disputes within the context of systemic and interpersonal racism, at least when it comes to considering equitable remedies. The Court found that the landlord's stereotypical portrayal of a Black community restaurant fit an established pattern of discrimination in society at large, and that it would be inequitable and prejudicial for the tenant to have the premises forfeited. Both landlords and tenants, and franchisors and franchisees, should take notice of a court's discretion to factor in societal realities and racial motivations when considering equitable remedies, and ensure best practices without racial bias in their dealings.

The Ontario Court of Appeal decision can be found here.

The Ontario Superior Court's decision can be found here.

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[1] *8573123 Canada Inc. (Elias Restaurant) v. Keele Sheppard Plaza Inc.*, 2021 ONCA 371.

[2] *Elias Restaurant v. Keele Sheppard Plaza Inc.*, 2020 ONSC 5457.

[3] *Ontario (Attorney General) v. McDougall*, 2011 ONCA 363, 2011 CarswellOnt 3107.

[4] *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.,* [1994] 2 SCR 490.

[5] *Supra,* note 2, at paras. 12 and 17.

[6] *Supra,* note 2, at para. 34.

[7] *Supra*, note 2, at para. 38.
