CITATION: Nimble Transportation & Warehousing Services Inc. v. Mantella Corporation, 2022 ONSC 4872
COURT FILE NO.: CV-22-684344
DATE: 20220824

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Nimble Transportation & Warehousing Services Inc., Applicant

AND:

Mantella Corporation, Respondent

BEFORE: W.D. Black J.

COUNSEL: *Jens Drees and Anthony Niksich,* for the Applicant

Robert Cohen and Meghan Rourke, for the Respondent

HEARD: August 11, 2022

ENDORSEMENT

Overview

[1] The applicant Nimble Transportation & Warehousing Services Inc. ("Nimble"), seeks an Order for relief from forfeiture of its lease (the "Lease"), and a lease "amending and extending agreement" (the "Lease Extension"), with its landlord Mantella Corporation ("Mantella"), for the premises at 75 Medulla Avenue in the City of Toronto (the "Premises").

[2] Nimble also seeks a Declaration that the Lease is in full force and effect and is not terminated, and a Declaration that the current extension term under the Lease, ending February 28, 2023, is extended for a further five-year period (from March 1, 2023 to February 29, 2028).

[3] Finally, Nimble seeks production of certain property tax records for the Premises.

[4] Mantella asserts that Nimble is in breach of various obligations under the Lease and that the Lease has been properly and justifiably terminated.

[5] Mantella also argues that Nimble does not come to Court with "clean hands" and that Nimble's conduct disentitles it to the equitable relief it seeks. It asks that I dismiss Nimble's motion for relief from forfeiture and require Nimble immediately to vacate the Premises.

Recent Attendance Before Justice Koehnen

[6] The matter was before Koehnen J. on July 22, 2022, on a partial record, at which time His Honour ordered that the motion would be dealt with on an "interim" basis on August 11, 2022, (the date the matter came before me) and, that a final hearing date to deal with any remaining

issues in the application would be scheduled for February 16, 2023, (just before the expiration of the current extension term). At the hearing before him, Koehnen J. ordered that Nimble be given keys to the Premises and be allowed to remain in operation there until the August 11 "interim" hearing date.

[7] I did not take Koehnen's J. use of the label "interim" as suggesting that the injunctive relief Nimble seeks is other than a full interlocutory injunction, and both parties in their materials relied on case law relative to interlocutory injunctions (suggesting that they understood it that way too). As discussed below, this has some bearing on the question of the undertaking required under R. 40.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194.

Nimble's Business

[8] Nimble operates as a logistics company, warehousing and transporting automotive products for some 300 customers in the automotive industry.

[9] It employs 14 administrative staff and a dedicated owner/operator trucking fleet with 15 drivers. In the warehousing component of its operation, Nimble would typically have approximately 5000 skids of goods passing through the Premises at any given time.

[10] As such, Nimble requires substantial space. The Premises consist of a 140,000 square foot building located on 9.2 acres in Etobicoke, including a paved entrance and front parking lot, an unpaved parking lot at the rear of the building, and various grass-covered areas. Within the building, in addition to the warehouse space, there is approximately 3000 square feet of office space.

Mantella's Business

[11] Mantella is described as a large and sophisticated landlord. It owns the Premises and operates it through property managers, (though Mantella's principal Robert Mantella appears to maintain a direct and "hands on" involvement and interest in the Premises).

Duration and Relevant Sections of Lease

[12] Nimble has been the tenant at the Premises since March of 2011. The original term of the Lease was from March 1, 2011 to February 28, 2018. The parties agreed to the Lease Extension dated May 2, 2017, extending the Lease from February 28, 2018 to February 28, 2023.

[13] Certain terms of the Lease feature prominently in the evidence and argument.

[14] Section 1(h) of the Lease sets out the "Permitted Use of Premises", providing that two purposes are permitted: "(i) warehousing and distribution of non-hazardous goods; and (ii) distribution of certain automotive products such as paint, batteries and other items as may be approved by Landlord in writing, to the extent permitted by all Laws and to the extent in keeping with a first-class industrial building".

[15] Under section 3.14 of the Lease, Nimble as tenant had the obligation to maintain and repair the premises:

> Tenant at its expense shall perform such maintenance, repairs and replacements (including, without limitation, all maintenance, repairs and replacements to the transportation, electrical, mechanical and drainage equipment and systems and maintenance and repairs to the roof) as required to keep the Premises, including the Building and all contents thereof and all services and equipment located in or primarily serving the Building and the parking lot and Lands on which the Building is situated, in first-class appearance and condition, and in accordance with all Laws and Landlord's reasonable requirements, subject only to the obligations of Landlord expressly provided in Section 4.2. For purposes of the Section the Premises shall include, without limitation, all leasehold improvements, perimeter walls, glass, doors (including without limitation all overhead doors, trucks level doors and system, dock levelling systems) and all lighting, electrical systems, and equipment exclusive serving the Premises. Landlord may enter the Premises at any time to view the state of repair and condition thereof and Tenant shall promptly perform according to Landlord's notice any maintenance, repairs of replacements in accordance with Tenant's obligations hereunder. At Landlord's option, Landlord may perform any of the obligations of Tenant hereunder and the costs thereof shall be included in the Operating Costs or charged directly to Tenant, as determined by Landlord.

[16] Section 3.27 of the Lease makes the Tenant responsible for cleaning the premises at its own expense "in accordance with prevailing standards" for similar buildings in the area.

[17] Article 6 of the Lease sets out specific restrictions on the ability of the Tenant to sublet the Premises. Specifically, section 6/1(a) provides that the "Tenant shall not effect a "Transfer" without the prior written consent of the Landlord in each instance, which consent may be unreasonably withheld…". The definition of "Transfer" in Schedule B of the Lease encompasses a sublease, and under section 6.4 of the lease "No consent of Landlord to a Transfer shall be effective unless given in writing and executed by Landlord."

[18] The definition of "Event of Default" in paragraph 6 of Schedule B of the Lease includes two circumstances of importance in this matter, namely: "(a) the Tenant's failure to observe or perform any obligation of the Tenant pursuant to the Lease, and such failure continues for fifteen (15) days after notice thereof;" and "(b) the Tenant shall purport to make a Transfer affecting the Premises, or the Premises shall be used by any person or for any purpose, other than in compliance with the Lease."

[19] With respect to events of default, section 7.1(a) of the Lease provides that the Landlord has various "cumulative and not alternative remedies," including the right to remedy the default on behalf of the Tenant at the Tenant's expense and to terminate the Lease.

[20] Consistent with Mr. Mantella's evident direct participation in matters impacting the Premises, subsection 1(k) of the Lease, dealing with required notices thereunder, provides that Tenant notices are to be sent the attention of "Robert Mantella" (CEO and President of the Landlord).

[21] Two other provisions of the Lease are pertinent with respect to the Tenant's obligations. Under Schedule "C" of the lease the Tenant's obligations to keep the Premises in a neat and clean

condition are set out, including an obligation not to permit overloading of the floors of the Premises and not to permit any part of the Premises to be used for other than their intended (and permitted) purposes.

[22] Finally, section 4 of the Rules and Regulations under the Lease provides that the Tenant shall not permit anything to be done to the Premises, or to keep anything there, that will in any way increase the risk of fire or violate any statute or municipal by-law.

Communications Regarding Breaches, 2019-2021

[23] Against the backdrop of these various provisions of and in relation to the Lease, there were a number of communications and notices exchanged between Mantella's then property manager Edwin Buonanno and the Tenant's president Gerry Arsenault during the period between August of 2019, and September of 2021.

[24] In that correspondence, Mantella advised Nimble of various "maintenance, repair and/or replacement obligations" required, and set out a number of safety concerns. Among other items, the communications referenced damage to internal structural beams, the need to clear electrical equipment and fire/sprinkler equipment areas, improper stacking of skids, and various required repairs including to a number of loading docks and to the exterior of the building.

[25] With respect to these items, as Nimble points out in submissions, Buonanno advised Nimble that, in the event that Nimble did not complete the required work within thirty (30) days, Mantella would exercise the option under section 3.14 of the Lease to undertake the work itself and charge Nimble for the costs of the work done. However, Arsenault confirmed under cross-examination that in each case he assured Buonanno that Nimble would attend to the repairs itself, and certain correspondence in evidence supports the conclusion that Arsenault/Nimble gave these assurances.

[26] Mantella alleges, and Nimble essentially concedes (as discussed in more detail below) that despite Nimble's assurances that it would deal with the various items raised in Buonanno's communications/notices, for the most part Nimble did not undertake and/or complete the necessary work to remedy its ongoing breaches of obligations.

June 2022 Inspection Report

[27] On June 16, 2022 Mantella's new property manager Adil Shareef completed a property inspection report (the "June Inspection Report") based on an interior and exterior inspection of the Premises on June 15, 2022.

[28] The June Inspection Report notes, among other items, defects in the northwest parking yard, including trailer support legs "melting into the asphalt", numerous oil spills, numerous potholes and loose gravel in various locations, several areas of penetration of both the block and brick wall of the building, the need for brick repointing in some areas, rusted metal awnings, certain doors blocked by significant obstructions, dock doors requiring repair and maintenance, significant damage to some of the interior steel columns caused by impact to those columns, some of those steel columns being used for unsafe purposes (for example to house breaker panels and compressed air lines, and for storage of tools), leaked oil, potentially unsafe storage and leaking

of corrosive and other chemicals, overloaded stacking of heavy materials, and number of aisles and exits blocked by various items including overloaded racks, components of the fire safety system overdue for inspection and/or service (and in one case "out of service"), and clutter and cobwebbing of electrical equipment.

[29] The June Inspection Report also noted the presence, within the Premises on a portion of the warehouse floor, of manufacturing operations, apparently (based on signage) being undertaken by a business called "Hansen Packaging".

[30] In the June Inspection Report, relative to the manufacturing operations, Shareef observed machinery, an assembly line and glue application apparently dedicated to manufacturing corrugated pallets, paper tubes and cardboard edge guards (the "Manufacturing Operations").

[31] It is clear (and uncontested) that Nimble never requested let alone obtained any written or other consent from Mantella for Nimble to use any portion of the Premises for Manufacturing Operations or to sublet a portion of the Premises to a third party to do so.

[32] Robert Mantella's affidavit, on which he was not cross-examined, attests that he (who as noted above was the person to whom any notices were required to be sent) never received a request for approval for subletting a portion of the Premises to any third party (or otherwise), and that he was unaware of anyone using a portion of the premises for the Manufacturing Operations and likewise never received any request for consent to do so.

June 2022 Notice of Default

[33] Immediately on the heels of the June Inspection Report, Mantella delivered to Nimble, also on June 16, 2022, a Notice of Default, providing that Nimble was in default of the permitted use provisions under the Lease by permitting the Manufacturing Operations within the Premises, and citing various breaches by Nimble of section 3.14 of the Lease, referencing various interior and exterior deficiencies described above and included in the Buonanno correspondence during the August 2019 through September of 2021 timeframe.

[34] The June 16, 2022 Notice of Default provided Nimble, in accordance with section 6(b) of Schedule "B" of the Lease, fifteen (15) days to cure the various defaults identified. It expressly set out Mantella's right to terminate the Lease if Nimble did not remedy these defaults within the time specified.

July 7, 2022 Inspection Report Noting Ongoing and Additional Defaults

[35] After the 15 days specified in the June 16, 2022 Notice of Default had passed, Shareef conducted a further inspection, on July 7, 2022. He prepared a report of that date setting out his observations.

[36] For the most part, the July 7, 2022 report noted no repairs or effort to remedy any of the interior and exterior problems identified in the June 16, 2022 report and the June 16, 2022 Notice of Default.

[37] Among other observations, the July 7, 2022 report confirmed that the Manufacturing Operations had not been discontinued but remained in "full swing" and that in fact additional electrical services had been newly installed to increase or enhance the Manufacturing Operations.

[38] Shareef also noted in the July 7, 2022 report that there was a new and significant oil spill in one of the aisles in the building, as well as other chemical spills. He saw and photographed many aisles blocked with overflowing stored materials between racks impeding in some cases access to fire exit doors, and many racks that appeared to be overloaded with stock.

Mantella Serves Notice of Termination

[39] In the circumstances, Mantella decided to terminate the Lease, and served a Notice of Termination on Nimble dated July 8, 2022 (on or shortly after that date). The Notice of Termination gave Nimble until July 31, 2022 to remove the contents from the building and vacate the premises.

[40] Nimble did not do so, but instead brought the matter before Koehnen J. on July 22, 2022, which in turn led to the matter coming before me on August 11, 2022.

Further Inspection and Compliance Audit Report

[41] Of significant note, in the meantime, on July 19, 2022, Mantella arranged a further inspection in the nature of a comprehensive environmental and health and safety compliance audit and delivered a report (the "Compliance Audit Report") also dated July 19, 2022.

[42] The Compliance Audit Report, and certain supplementary affidavit material filed by Mantella on this motion (in the nature of expert evidence), confirm a significant number of violations by Nimble of the Ontario Fire Code and workplace safety regulations, including improper stacking of pallets, presence of various combustible materials in a haphazard configuration, concerns about electrical safety, possible environmental contamination, obstructed fire exits, and various deficiencies of components of the fire safety and suppression equipment and system.

[43] An engineering report arranged by Mantella also confirmed that the integrity of a number of steel columns within the building was compromised, and that 50% of the columns that the engineer was able to access and inspect required repair or replacement.

Supplementary Notices of Default and Termination

[44] Having regard to these and various other environmental and health and safety concerns identified after serving its initial Notice of Default and its initial Notice of Termination, Mantella served, on July 25, 2022, a supplementary default notice (the "Supplementary Default Notice") and by the time of the hearing of the motion before me had served a supplementary notice of termination in relation to the issues set out in the Supplementary Default Notice.

Discussion of Nimble's Positions

[45] In its materials and submissions, Nimble takes positions which in my view are underwhelming and somewhat lackadaisical in the serious circumstances at hand.

[46] Dealing with the list of defaults set out in the June 16, 2022 Notice of Default, Nimble's position is first to assert that many of the items are not very significant or serious, and that, as the series of communications authored by Buonanno during 2019 to 2021 confirms, items about which Mantella has known for at least a couple of years.

[47] Even allowing that some of the items on the June 16, 2022 list are more significant than others, there is fundamentally no denial by Nimble that the items reflect, in each case, breaches by Nimble of its obligations under the Lease.

[48] To that end, the second part of Nimble's position in response to these items is to propose a schedule for completion of the work required to affect the necessary repairs in each case. For the most part Nimble proposes repairs by dates in September and in at least one case, by October of this year.

[49] While it may seem technical, in my view Mantella has the right to insist on compliance with the terms of the Lease within the time provided by the Lease. In particular, once Mantella reached the stage of having to deliver a Notice of Default, which it did on June 16, 2022 after correspondence raising these items and requesting compliance over the course of two years, Mantella was entitled to insist on compliance within the 15 days provided by the Lease for those circumstances.

[50] Nimble's other position, articulated in its written submissions and essentially abandoned in oral submissions, is that it relied on Mantella's statements, repeated from time to time in Buonanno's communications, that Mantella would do the work and charge Nimble the costs thereof.

[51] This position, which as I say was essentially abandoned during oral submissions, is undermined by the uncontradicted evidence that Arsenault, on behalf of Nimble, provided assurances to Buonanno in response to the ongoing requests, that Nimble would in fact undertake the work and that Mantella need not do so. Again, Nimble's position before me, that it would undertake the work over the course of September and October, seems at odds with any genuine reliance on Mantella's suggestion that it would itself do the work and charge Nimble for expenses incurred.

[52] If the only matters between the parties concerned this initial list of items, I might, against the backdrop of 11 years of tenancy and rental payments by Nimble (and I note that there is no suggestion that Nimble has ever defaulted on its payment obligations), be prepared to take a less technical view of these defaults.

[53] For a number of reasons though, I am not inclined to do so in this case.

Concerns re Nimble's Conduct

A. Serious Health and Safety Issues

[54] First, the supplementary list of items identified and reported by Mantella on July 19, 2022, and which are the subject of the Compliance Audit Report and incorporated into the Supplementary Default Notice, are in a whole different category.

[55] The identification of extensive and significant health and safety concerns is in my view a very serious matter and one which both causes concern about Nimble's conduct and requires an immediate response.

[56] There are many photographs in Mantella's record showing the state of various items of concern. They clearly show for example materials stacked up in aisles blocking passage down those aisles and in some instances, blocking egress to emergency exits.

[57] The photographs also show materials, including electrical equipment and other flammable materials, arrayed haphazardly on floors, in aisles and elsewhere. They also show materials and pallets stacked precariously, and spills or remnants of spills on various spots on the floors.

[58] The engineer's report about many structural steel columns being compromised and in need of repair - which it is essentially agreed in the evidence, is a consequence of repeated collisions by forklifts used in Nimble's operations - is also of considerable concern.

[59] In the materials before me, Mantella's reports attesting to the serious danger associated with these various unsafe configurations, authored in one case by an engineer, and in other cases by obviously well-qualified professionals, are unanswered.

[60] Nimble's counsel advised that Nimble is in the process of consulting an engineer of their own and that the preliminary advice Nimble is getting is that only "some" of the reported safety concerns are justified. I was somewhat uncomfortable about receiving this submission, given that Nimble put no evidence before me to this effect and given that I was told, in Mantella's submissions, that Nimble had refused all questions on cross-examination about its position on remedying the defaults alleged in the Supplementary Default Notice (which could have the effect, by analogy to r. 31.09(3), of precluding or curtailing Nimble's ability to adduce evidence about its plans to remedy these defaults). Even if that evidence was properly before me, it does not frankly sound sufficiently reassuring.

[61] I am very concerned that to allow Nimble's operations to continue unabated risks putting the health and safety of Nimble's employees and others who may visit the Premises in jeopardy.

[62] Given the nature of these allegations, I would have expected Nimble to obtain and put before me at least some evidence to respond to Mantella's stated concerns, even if, as Nimble's counsel maintained, Nimble has had insufficient time to put together a full response. Nimble's failure to do so redoubles the concern expressed above about Nimble's lackadaisical approach to Mantella's evidence.

B. The Ongoing Unauthorized Manufacturing Operations

[63] Moreover, in my view, Nimble's position regarding and in response to Mantella's expression of concern that there are unauthorized Manufacturing Operations ongoing on the Premises, is problematic. As set out above, the initial response to Mantella's observation that there are Manufacturing Operations ongoing in the Premises was to do nothing other than ostensibly to increase and enhance those operations.

[64] As it turns out, the disconnection between Mantella's expressed concerns and the response may have to do with the fact that the Manufacturing Operations are in fact those of an independent third party, to which Nimble has subleased space in the Premises for that purpose. Through cross-examinations, it emerged that a company called AFA Corrugated (which may have been operating in part as Hansen Packaging – the evidence is not clear), was the entity that was subleasing from Nimble and carrying on the Manufacturing Operations. There is evidence that an owner of AFA Corrugated may have had a 10% stake in Nimble, but no documentary evidence to that effect, which would in any event make no difference to the relevant analysis.

[65] Nimble's response on this issue is essentially threefold.

[66] First, it says that since the Manufacturing Operations had been carried out in the Premises for some time, Mantella should have been aware, and should be taken to have known, that the Manufacturing Operations were ongoing.

[67] The difficulty with this submission is that the uncontradicted evidence of Robert Mantella is that he was not aware of any manufacturing being undertaken in the Premises. Having seen the photographs of the Manufacturing Operations in place in the warehouse, I accept that it would be difficult to distinguish at a glance between the Manufacturing Operations and regular warehousing and distribution activity. While Mantella, in the person of its new property manager Shareef, clearly was aware at the time of the June 16, 2022 Inspection Report, of the presence of the Manufacturing Operations, there is no evidence in the record that Mantella was aware of the Manufacturing Operations before taking what was clearly a detailed look at all aspects of Nimble's occupation and use of the Premises at that time.

[68] The second part of Nimble's response is to say that since at some point there were "Hansen Packaging" signs in place in a couple of spots in and outside the warehouse, Mantella must have known about the Manufacturing Operations and, because the "Hansen" name is different than Nimble, must have known there was a sublease to a third party.

[69] With respect to this argument, I am hard-pressed to understand how Mantella could have known simply by virtue of signs that there were Manufacturing Operations ongoing, let alone that they were being undertaken by a third party. It would be conceivable, for example, that Nimble operated a line of business under the "Hansen Packaging" name, or that one of Nimble's customers for its warehousing and distribution business was an entity called Hansen Packaging. Mantella would have no particular way of knowing the import of the Hansen Packaging signs unless it made specific observations and inquiries.

[70] To put the onus on Mantella to do so, however, ignores clear provisions of the Lease.

[71] First, Nimble's permitted uses under the Lease are warehousing and distribution. It is fair for Mantella to assume, absent evidence to the contrary coming specifically to its attention, that Nimble is complying with the permitted use parameters under the Lease. Nimble's argument to the contrary effectively boils down to saying "you should have caught us" and, since you did not catch us, what we did was acceptable.

[72] Nimble makes the related argument, its third argument, that manufacturing is not specified as a "prohibited use" under the Lease, and that therefore it must be permissible. In the absence of the permitted use clause, this argument might in isolation cut some ice. However, in the face of the twin permitted uses allowed under the Lease, warehousing and distribution, to point to the absence of a prohibition against manufacturing strikes me as disingenuous. One could imagine all manner of activities not specifically enumerated among prohibited uses. In my view, the much better and more reliable barometer of what is allowed is to look at the permitted uses, which are clear, and which do not countenance manufacturing.

[73] The most significant problem for Nimble on this front, however, is the ironclad requirement of the Lease that in order to enter into a sublease Nimble was required to obtain Mantella's written consent.

[74] Nimble does not attempt to say that it obtained any consent, let alone written consent, and the evidence of Robert Mantella, again uncontroverted and unchallenged, is that he, as the person from whom such consent would have to be sought, received no request, in writing or otherwise.

[75] In effect Nimble acknowledges that it breached this requirement under the Lease, gives no explanation or justification for the breach, and offers, in its materials and argument, that the independent third party conducting the Manufacturing Operations, AFA Corrugated, will wrap up its operations and vacate the Premises by the end of the current Lease term in February of 2023. Again, in circumstances in which there is an acknowledged ongoing breach of the Lease, the proposal to discontinue the breach some seven months down the road seems not to appreciate the stark illegality of Nimble's position.

C. Misrepresentation in Nimble Affidavit

[76] Most troubling of all on this issue, however, is a representation in Arsenault's affidavit about the Manufacturing Operations.

[77] In paragraph 25 of his affidavit, Arsenault deposed that:

> Since 2015, Nimble has been operating an associated or related small, light manufacturing business in the Premises, which has been in plain sight and ongoing, and which takes kraft cardboard paper and turns it into hollow cardboard tubes. This small, light manufacturing business takes approximately 10% of the square footage of the Premises and is located in the south-west corner of the Premises adjacent to the loading docks.

[78] First, I note in passing Nimble's pains to characterize the Manufacturing Operations as "small" and "light", and to note they are limited to "10% of the Premises", as if to suggest that a "small, light" and confined breach is no breach at all. Second, I note that Nimble's efforts to

characterize the Manufacturing Operations as small, light, and unobtrusive, would seem to undercut the force of its argument that those operations were evident and in plain sight.

[79] Much more troubling, however, is the affirmative statement that "Nimble has been operating" the Manufacturing Operations. This is simply untrue. Mantella alleges, and it is difficult not to conclude, that this representation was intended to conceal the fact that Nimble was subletting a portion of the Premises without Mantella's knowledge or consent in flagrant contravention of the Lease. Arsenault only admitted under cross-examination that in fact AFA Corrugated, which was not a subsidiary or affiliate of Nimble, had been subletting the space since 2015 and paying substantial monthly rent to Nimble for such use.

[80] Nimble's explanation for the misrepresentation, offered by counsel in oral submissions, was that the materials were "put together quickly" and that Arsenault did not appreciate the significance of the statement in paragraph 25 of his affidavit when he attested to it under oath.

[81] I do not accept the "put together quickly" explanation, which if upheld would risk yielding a slippery slope. It is frequently the case that parties are called upon to assemble materials relatively quickly and, while I appreciate that that can sometimes lead to inaccuracies and errors, the representation in question, tied as it is to a significant alleged breach of the Lease, was one for which the Court has a right to expect considerable care would be taken. I do not accept the purported explanation for the misrepresentation, and as will be seen below my finding on this issue has implications for the equitable relief Nimble seeks.

Grounds Asserted for Relief from Forfeiture

[82] Nimble seeks relief from forfeiture under two heads.

A. Injunctive Relief

[83] First, it seeks that relief by way of interlocutory injunction.

[84] The parties agree that in that context, the three-part test established under *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311, applies.

[85] Nimble points to Bielby's J. expression of the *RJR-MacDonald* test in *2179042 Ontario Inc. v. 2142314 Ontario Ltd.*, [2009] O.J. No. 2841 (S.C.), para. 47 as follows:

> 1. Has the applicant demonstrated a serious question to be tried? The threshold is a low one and the court at this stage need only to make a preliminary investigation into the merits of the case.
>
> 2. The applicant must demonstrate irreparable harm if the relief is not granted. This is a harm that cannot be quantified in monetary terms. The court is not concerned with the magnitude of the harm, but the nature of the harm. The loss of a business and livelihood can be considered an irreparable harm (*Sheehan and Rosie Ltd. v. Northwood* [2000] O.J. No. 716 (Ont. S.C.J.) and *Mah v. Truscan Realty Ltd.* [1996] A.J. No. 603).

3. The applicant must demonstrate that the balance of convenience favours him. The test requires me to determine which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction.

[86] On the first part of the test, Nimble argues that the bar is low, and that all that is required is for the Court to be satisfied that the case is not frivolous or vexatious. It argues that it has raised serious issues about whether or not it breached provisions of the Lease, whether or not, if it breached the Lease, Mantella waived any breach, and whether Nimble's conduct was sufficiently serious to entitle Mantella to terminate the Lease. It also argues that Mantella's Notice of Default did not comply with section 19(2) of the *Commercial Tenancies Act*, R.S.O. 1990, c. L.7, but I will address that submission in the context of Nimble's asserted second broad basis for relief from forfeiture under that Act.

1. No Undertakings as to Damages

[87] Mantella points out, in its argument relative to the "serious issue to be tried" requirement, that Nimble has failed to provide an undertaking as to damages in accordance with R. 40.03. Mantella cites recent authority confirming the need for compliance with this Rule, particularly in the context of a dispute between two commercial parties. In *Loan Away Inc. v. Western Life Assurance Company*, 2018 ONSC 7229, 86 B.L.R. (5th) 281, Sachs J., in rejecting the moving party Loan Away's argument that it ought not to be required to provide the undertaking, wrote at para. 34:

> Unlike Cardinal or Batty, this is not a Charter case or a case which has public interest significance and concerns human rights. This is a dispute between two commercial parties. In such cases, as McEwen J. noted, an undertaking ought to be filed, absent extenuating circumstances. As Glustein J. found in *Catalyst Capital Group v. Moyse*, 2015 ONSC 4388, at paras. 10 and 1, in commercial cases, an undertaking as to damages is almost invariably required and in the absence of such an undertaking the court will dismiss the motion for an injunction… . In my view, Loan Away's failure to provide an undertaking is a sufficient basis on which to dismiss its request for interlocutory injunctive relief.

[88] Consistent with its apparently unconcerned attitude about the various breaches of the Lease alleged by Mantella, Nimble's position as to the need for the undertaking was that, because Koehnen J. had labelled the attendance before me as "interim" it had not thought an undertaking was necessary, but if Mantella and the Court felt it necessary, Nimble would be willing to provide it.

[89] In my view, this late-breaking and half-hearted expression of a willingness to provide an undertaking at some point if others insist, misses the point. The obligation to give the undertaking as to damages is set out in the Rules and is not optional to the extent that one commercial party seeks interlocutory injunctive relief against another commercial party. Like Sachs J., I find that the failure to do so disentitles Nimble, in and of itself, to the equitable relief it seeks.

2. Clean Hands Requirement

[90] In addition, on the topic of entitlement to equitable relief, Mantella cites a number of cases in which courts, including this one, have found a tenant disentitled to the equitable protection of relief from forfeiture where the tenant has not come to court with "clean hands".

[91] Mantella argues that this consideration should be weighed at the "serious issue to be tried stage". It says, "There are a number of cases which have set out the applicable principles and/or held that a court should not exercise its equitable jurisdiction to grant relief from forfeiture in analogous cases to the case at hand, which demonstrates that the Tenant has not raised a serious issue to be tried."

[92] Among the cases to which Mantella points in this context are the following:

(a) *Barlow v. 1137089 Ontario Inc.* (1996), 5 R.P.R. (3d) 304 (Ont. Ct. General Div.), in which the Court refused to grant relief from forfeiture "because the tenant sublet the premises without the landlord's consent or knowledge, contrary to the provisions of the lease. The court noted that the tenant had also come to court with unclean hands, having fraudulently altered a copy of the lease which he provided to the subtenant. He pretended he was paying the landlord more rent and charged more rent to his subtenant than he was paying to the landlord;

(b) *Premji v. Millettte* 1981 Carswell BC 242 (BCSC). In *Premji*, the tenant had full knowledge of a covenant not to assign the lease, but deliberately assigned, nonetheless. This was found to be not a case of inadvertence, misunderstanding, or special circumstances, but rather, a total disregard for the covenants in the lease. Relief from forfeiture was denied on this basis;

(c) *Jeans West Unisex Ltd. v. Hung* (1975), 9 O.R. (2d) 390 (ONSC) in which, in addition to non-payment of rent, which the court said would not alone prevent relief from forfeiture, the tenant breached various other provisions of the lease, including a covenant not to assign or sublet without consent, and created an unsafe condition in respect of fire, breached bylaws, and when the city inspector inspected the property, only 1 out of 6 repair items were completed. In the circumstances, the court refused to exercise its discretion.

[93] To similar effect, Mantella points to and relies on *Ryan v. Turner* (1904), 14 Man. R. 624 (Q.B.); *O'Malley's In The Beach Ltd. v. 2422 Queen Street Investments* (2009), 87 R.P.R. (4th) 266 (Ont. S.C.); *Bagshaw and O'Connor, Re.* (1918), 42 O.L.R. 466 (C.A.); *1927838 Ontario Inc. (cob Astro Cold Storage) v. Taing*, 2019 ONSC 4612; *Michele's Italian Ristorante Inc. v. 1272259 Ontario Ltd.*, 2016 ONSC 4888, 76 R.P.R. (5th) 164; and *Airside Event Spaces Inc. v. Langley (Township)*, 2021 BCCA 306, 55 B.C.L.R. (6th) 56.

[94] Based on factors overlapping, to various degrees, with features of Nimble's conduct in the case before me, the courts in each of these cases declined to grant a tenant relief from forfeiture where the tenant's conduct did not entitle it to equitable, discretionary relief.

[95] In my opinion, various concerns about Nimble's conduct disentitle it to relief from forfeiture. It has largely failed to remedy its various breaches of the Lease and has approached its breaches in a desultory, half-hearted way. It clearly views its breaches as inconsequential and in its conduct has demonstrated that it is only prepared to remedy these breaches in its own time, and not within the timelines mandated by the Lease. This attitude is particularly concerning as it relates to the very serious and dangerous health and safety concern, including fire safety concerns, that have recently surfaced.

[96] Nimble has also failed to give the undertaking as to damages required as a pre-condition to the equitable relief it seeks, again apparently not regarding the undertaking as a serious requirement, and only grudgingly and belatedly expressing a willingness to give the undertaking if the Court insists.

[97] Finally and most critically, Nimble in its materials misrepresented the party involved in the Manufacturing Operations, which in my view was intended to deflect attention from Nimble's knowing breach of the clear requirement under the Lease that any proposed sublet would have to be with Mantella's knowledge and written consent.

No Relief from Forfeiture on Equitable Grounds

[98] I am not prepared, in light of this conduct, to exercise the Court's equitable discretion to grant Nimble relief from forfeiture.

[99] As such, I find that Nimble fails the *RJR-MacDonald* test at stage one.

Discussion of Second and Third Aspects of RJR-MacDonald Test

[100] Nimble's evidence for purposes of the second stage of the *RJR-MacDonald* test is also somewhat thin.

[101] It asserts that if it is required to relocate, that will be a death knell for its business and that there are no similar properties available in the City of Toronto. It says also that the interruption (or cessation) of its business will cause it not to fill an order for its largest customer, Toyota Canada, which will in turn cause an interruption of Toyota Canada's business leading to "astronomical damages".

[102] The difficulty, again, in upholding Nimble's positions in this context is a lack of evidence.

[103] Nimble simply asserts, in the affidavit of Arsenault and in its submissions, that there are no similar or suitable properties available in Toronto to which Nimble could relocate. There is no evidence to show that Nimble has made inquiries about available property let alone definitive evidence to support Nimble's assertion. While I can readily imagine that it might be difficult to find a replacement property, an issue of that significance ought not to be left to my imagination, and ought to be the subject of affirmative evidence.

[104] Similarly, while referring in Arsenault's affidavit to a penalty clause in its agreement with Toyota which will give rise to the "astronomical damages" Nimble says it will incur, Nimble has refused to produce and has not put in evidence before me its contract with Toyota or even the

excerpts that Nimble alleges will give rise to the damages it asserts. While I appreciate that there may be customer confidentiality concerns at work, there was no effort before me to devise a solution to put the evidence before me, nor really any explanation as to why such evidence could not be adduced.

[105] Even if Nimble had presented evidence of the "astronomically" high damages incurred, such damages are monetary in nature, and not within the concept of "irreparable harm" contemplated by the *RJR-MacDonald* test.

[106] As stated at para 64 in *RJR-MacDonald*:

> "'Irreparable' refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured (…)"

[107] The Court explains that "Examples of the former include instances where one party will be put out of business by the Court's decision; where one party will suffer permanent market loss or irrevocable damage to its business reputation (…)".

[108] Again, in the absence of affirmative evidence, I am not prepared to find irreparable harm for purposes of the second component of the *RJR-MacDonald* case.

[109] The third and final aspect of the *RJR-MacDonald* test, the weighing of the balance of convenience, is in my view a closer call.

[110] Doubtless it will be significantly inconvenient for Nimble to shut down operations at the Premises and to relocate (assuming alternate premises can be found).

[111] On the other hand, Mantella will be left with an abandoned warehouse riddled with health and safety defects that will have to be addressed.

[112] In my estimation, requiring Nimble to vacate the premises will therefore be inconvenient for all concerned and, while I appreciate the impact on Nimble, the balance does not weigh more heavily on one side than the other.

[113] For these reasons, I decline to grant relief from forfeiture by way of injunctive relief.

B. Alternative Argument Under Commercial Tenancies Act

[114] Nimble argues in the alternative, that it is entitled to relief from forfeiture pursuant to sections 19 and 20 of the *Commercial Tenancies Act*.

[115] The argument is that:

(a) forfeiture of a lease is a serious event and one in respect of which a Court should consider whether the forfeiture would be out of proportion to the harm suffered by the landlord;

(b) that a landlord can only rely on defaults specified in its notice of default, and not on other "tenant failings" identified after the termination;

(c) that Mantella's ongoing acceptance of rent after identifying defaults constitutes a waiver of Mantella's right to rely on the identified conduct as a basis for termination/forfeiture; and,

(d) that Mantella has provided insufficient time for the default(s) to be remedied.

[116] Dealing with these arguments in turn, I have indeed considered, in analyzing the components of the *RJR-MacDonald* test, the proportionate impact of the Order I am asked to make. In my view, for the various reasons set out above, Nimble is in large measure the author of its own misfortune and, while again I accept that the impact on Nimble will be considerable, I do not view it as disproportionate having regard to the various shortcomings evident in Nimble's conduct, both as tenant and as litigant.

[117] With respect to the notion that a landlord can only rely on defaults pre-dating its notice of default, I note that Mantella served its Supplementary Default Notice and Supplementary Notice of Termination as soon as it became evident that Nimble would not deal expeditiously with the serious health and safety concerns identified. Moreover Nimble was already in default with respect to an array of items by that point. Finally on this argument, I cannot ignore the very serious health and safety concerns that are the subject of the Supplementary Default Notice, and in my view, given the gravity of those concerns, it does not lie in Nimble's mouth to assert that these concerns cannot be taken into account.

[118] I deal with items (c) and (d) together. A fair description of the relevant sequence of events is that in 2019 through 2021, Mantella identified a number of breaches of the Lease and put Nimble on notice of Mantella's requirement that Nimble address them.

[119] Nimble, in each case acknowledged the breaches, and undertook to make the necessary repairs.

[120] When, by June of 2022, Nimble had largely failed to honour its commitments to address the acknowledged breaches, Mantella escalated its approach, putting Nimble specifically on notice of the defaults, and giving Nimble the time provided under the Lease to cure these defaults.

[121] When Nimble again largely failed to do so by July of 2022, Mantella gave notice of termination and required Nimble to vacate the premises, as was Mantella's right under the Lease.

[122] Dealing with Nimble's arguments on (c) and (d), it is unreasonable to expect Mantella to forgo rent in circumstances in which Nimble is repeatedly representing that it will address its breaches.

[123] In terms of the amount of notice, Nimble cannot in my view, legitimately complain about lack of time having regard to the ongoing communications described above. The notice of termination was merely the final step in the continuum; Nimble has ample and ongoing notice of Mantella's concerns.

[124] Finally in this category, I note that the language of section 20(1) of the *Commercial Tenancies Act*, and of section 98 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, on which Nimble relies in this part of its argument uses permissive language, stating that the Court "may" grant relief, as "the Court thinks fit" (under the *Commercial Tenancies Act*) or "on such terms…as are considered just" (under the *Courts of Justice Act*). It is clear that these decisions are discretionary. For the same reasons spelled out in more detail above concerning Nimble's conduct, I decline to exercise discretion in favour of the relief Nimble claims under this head.

[125] I must deal with two other items raised in Nimble's submissions.

Alleged Agreement to Extend Lease

[126] First, Nimble alleges that a deal was reached, verbally, in discussions between Nimble's real estate agent, John LaFontaine of CBRE Limited and Robert Mantella, pursuant to which it was agreed that the Lease would be extended past February of 2023, at considerably higher rents.

[127] There are several difficulties with this position.

[128] First, Robert Mantella denies that any such agreement was reached.

[129] Second, and again on the evidentiary front, there is no affidavit from Mr. LaFontaine in the record. There is a brief email from him attached to Arsenault's affidavit, but on such an allegedly significant item one would expect direct evidence.

[130] The discussion described in Mr. LaFontaine's email in any event, appears to have taken place sometime in June or perhaps earlier in 2022. Mr. LaFontaine's email does not specify the timing or circumstances of the alleged verbal agreement with Robert Mantella. In the absence of that context, and therefore not knowing at what stage in the evolving discussions of Nimble's defaults these discussions were occurring, it is hard to know what if any weight to attribute.

[131] In any event, as noted, Robert Mantella denies any such discussions and in the absence of affirmative evidence to the contrary, I cannot give effect to the alleged agreement.

Alleged Excessive Rent Charges

[132] The other argument that Nimble makes is that based on certain tax information it obtained, it believes that Mantella was overcharging it for rent, specifically to the extent the rent was based on taxes owing throughout the term of the Lease. It seeks an Order compelling production of relevant tax documents from Mantella, and asserts an entitlement to a refund.

[133] The record suggests that Mantella may acknowledge some overpayment, but subject to being offset against the cost of a roof repair or replacement that Mantella necessarily undertook during Nimble's tenancy, and for which it alleges Nimble is responsible.

[134] On this issue, Mantella's counsel agreed to produce to Nimble, the relevant tax information and documents to allow Nimble to understand the calculation of rent referable to that item, and, to the extent a refund is owing, Mantella will pay it. I assume this will be subject as well to whatever

relevant information is provided concerning Nimble's alleged offsetting obligation for costs associated with the roof (if indeed Mantella is asserting an offset).

[135] Given Mantella's willingness to produce the information requested, it strikes me that this issue can readily be addressed within the next few weeks. I take Mantella's counsel up on the offer to have Mantella produce the relevant information to Nimble so that Nimble can determine whether or not to seek a refund.

Framework for Orderly Departure from Premises

[136] Regardless of that issue, which in my view is peripheral to Nimble's claim for relief from forfeiture, it now remains, given my findings, to put in place an orderly means by which Nimble can vacate the premises in a fashion which best protects health and safety, and is as minimally disruptive as possible.

[137] What I have in mind is along the following lines (and I am open to receiving submissions about fine-tuning some of the proposed items if the parties agree that other or additional procedures and/or adjustments to timing are warranted or necessary.)

[138] In my view, the most important immediate concern is to ensure that the building is safe for ongoing use, and for the events that will follow (as discussed below). To that end, the parties are to arrange within one week a joint inspection, by a professional engineer and/or other qualified personnel on each side (i.e. one or more representatives of Nimble and one or more representatives of Mantella), to determine what immediate steps are necessary to ensure that the building is safe for the activity described below.

[139] If during the one week allotted for this joint inspection Nimble requires access to the Premises to collect material for customer orders, it may do so, but only with a representative of Mantella present, and only in a fashion which is mindful of health and safety concerns.

[140] After the joint inspection, and flowing from it and authored by the qualified participants, a joint report is to be provided identifying any immediate health and safety repairs, cleaning or remediation required to make the Premises safe for the activity described below. Again, if during the period that the joint report is being prepared Nimble requires access to the Premises to fill customer orders, it may do so in the same fashion (including the presence of a representative of Mantella), described in the paragraph above.

[141] So long as Nimble cooperates in the joint inspection and joint report contemplated above, it may have until November 30, 2022, to deliver up vacant possession of the Premises. In order to maintain access to the Premises for the purpose of vacating the Premises and the related purpose of distributing and relocating its stock and materials therein, Nimble must continue to pay rent up to November 30, 2022, and must continue to cooperate in affecting necessary repairs and remediation to the Premises relative to all items identified in the Notice of Default and Supplementary Default Notice. All such repair and remediation shall be at Nimble's expense (relating as it does, to Nimble's defaults under the Lease), and so Nimble shall have the option of undertaking such repairs or remediation at its own expense, in a fashion to be approved by Mantella, acting reasonably, or of instead having Mantella undertake such repairs and remediation and charging the reasonable costs thereof to Nimble.

[142] My assumption is that the time between now and the end of November should be sufficient for Nimble to fill any existing customer orders, to remove any and all stock and material from the warehouse either to fill such orders or to relocate to alternate premises if the stock or material is not subject to a customer order within that timeframe.

[143] It is my hope and expectation that the necessary repairs and remediation can also largely be competed in this timeframe with the parties working cooperatively.

[144] It is also my hope and expectation that the time provided will also prove sufficient for Nimble to identify and secure alternate premises from which to run its operations. I appreciate that the alternate premises Nimble locates may not be the same as the Premises, but I expect Nimble can nonetheless identify and secure premises which will allow it to operate its business.

[145] If Nimble fails or refuses to cooperate with respect to these items, and/or fails or refuses to vacate the Premises in a responsible and orderly fashion, it will forfeit its right to access the Premises for the purposes described above.

[146] To the extent that serious difficulties arise in the orderly execution of the plan outlined above, I may be spoken to. It is clear that there may be some accounting exercises and reconciliations required in the near term, both with respect to the costs associated with the health and safety steps outlined above, and in relation to the refund Nimble seeks relative to its rental payments in relation to property taxes. If the parties are unable to agree on those items, again I may be spoken to.

[147] Inasmuch as the parties are sophisticated commercial entities, I expect that all such matters will be undertaken in good faith and with appropriate conduct. I do not wish for relations between the parties to further degenerate. While I appreciate that this scenario will present difficulties all around, there is no need for chaos to ensue.

Costs

[148] As the successful party, Mantella is entitled to its costs of the motion. I propose to defer deciding costs until the parties have discussed and come to a landing on the potential refund of rent Nimble seeks, and until such time as the orderly delivery of vacant possession that I envision has been completed.

[149] In the meantime, Mantella should provide to Nimble its bill of costs, and the parties should attempt to agree on costs, subject to the additional items that I have noted should be completed before costs are finally determined. My hope is that the parties will agree on all costs, but if not, then we can devise a plan to address that issue.

W.D. Black J.

Date: August 24, 2022