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Commercial Leasing Bulletin:

Claiming Rent Arrears Retroactively

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Introduction

On occasion, commercial landlords discover that they have been undercharging rent pursuant to the terms of the lease, whether as a result of inaccurate cost allocations, mismeasurement of the premises, or other errors. Under section 17 of the *Real Property Limitations Act*, RSO 1990, c L.15, landlords generally have six years within which to claim arrears of rent, unlike the two year limitation period that applies to most other claims. This time period could potentially be extended if the doctrine of discoverability applies.

In the recent case of *2059008 Ontario Ltd. v. C.M. Weicker*, 2022 ONSC 1637, Justice Fragomeni of the Ontario Superior Court of Justice applied somewhat creative reasoning to deny the landlord's entire claim for rent arrears, notwithstanding what appeared to be clear terms of the lease. The decision is a reminder that in any court case, three factors come into play: the facts, the law, and the equities of the situation.

This bulletin will briefly summarize the facts and results of the case, as well as the lessons to be learned by both landlords and tenants.

What Happened

The Plaintiff/Landlord, 2059008 Ontario Limited, brought an action for payment of the sum of $152,101.29, representing arrears of rent allegedly owing by the Defendants/Tenants, C.M. Weicker Medicine Professional Corporation and Jason Todd Black Medicine Professional Corporation.

In 2006, the Landlord and Tenants entered into a 10-year lease starting March 1, 2007. The leased premises consisted of approximately 1,689 square feet (subject to measurement pursuant to section 1.01(vi) of the lease) at a fixed annual rent calculated based on $19.95 per square foot of the "Rentable Area". Section 1.01(vi) of the lease specified that "Rentable Area of the Leased Premises" means "the floor area of the Leased Premises measured conclusively by the Landlord's Architect in accordance with the Standard Method For Measuring Floor Area in Office Buildings issued by the Building Owners and Managers Association (BOMA)."

For the next nine years and four months, the Tenants paid rent as calculated based on the approximate square footage set out in the lease. However, in December 2015, the Landlord retained a new property manager, who engaged the services of Extreme Measures Inc. to measure the premises and ensure that the Tenants were paying the correct rent. The measurement, applying BOMA, was 1,953.10 square feet, not 1,689 square feet. Accordingly, the Landlord sought payment of the differential. The Landlord offered to waive the arrears if the Tenants renewed the lease. The Tenants did not do so. The Landlord sued. Both parties agreed that the dispute was suitable for determination by summary judgment.

Ultimately, Justice Fragomeni sided with the Tenants on two grounds:

1. The claim was barred by the doctrine of promissory estoppel; and
2. The claim was statute-barred under the *Real Property Limitations Act*.

The principles of promissory estoppel, as set out by the Supreme Court of Canada in *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50, are as follows:

> The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position.

In this case, Justice Fragomeni held that, notwithstanding the strict interpretation of the terms of the lease, the negotiations leading up to the execution of the lease considered the square footage of the Leased Premises to be 1,689 square feet. This was repeatedly affirmed thereafter. The Tenants therefore bore no responsibility for the Landlord's decision to re-measure the premises nine years and four months into the lease.

On the limitation period issue, the Tenants argued that the Landlord "knew or ought to have known what the accurate measurements were at the time the lease was negotiated or at least at the time of the commencement of the lease, namely, March 1, 2007, or reasonably thereafter." Justice Fragomeni concluded, with minimal analysis: "I am satisfied that this action is statute-barred."

From a strictly legal point of view, both findings are somewhat problematic.

On the issue of promissory estoppel, the lease contained an "entire agreement" as follows:

> **Section 29.10. Entire Agreement:** This lease and the Schedules attached hereto and forming part hereof set forth all the covenants, promises, agreements, conditions, and understandings between the landlord and the tenant concerning the Lease Premises and there are no covenants, promises, agreements, conditions, or understanding, either oral or written, between them other than herein set forth. Except as herein otherwise provided, no

> subsequent alteration, amendment, change, or addition to this lease shall be binding upon the landlord or the Tenant unless reduced to writing and signed by them.

While Justice Fragomeni quoted this clause at the beginning of his decision, he did not discuss it later in concluding that the Landlord was barred from relying on the strict terms of the lease by the doctrine of promissory estoppel. What if the premises had been measured and certified after the lease was signed, as contemplated by the lease? Would the landlord still be estopped from charging rent based on the terms of the lease? It is also unclear what the Tenants could have done differently if they had been informed of the correct measurement earlier.

In finding that the action was barred by the limitation period, Justice Fragomeni did not explain why the Landlord was precluded from suing for rent arrears going back six years, or at least for the rent differential going forward (i.e., for the remaining eight months of the lease). Does this mean that a landlord cannot charge future rent in accordance with the terms of a lease, if the landlord discovers a mistake that could have been discovered with sufficient diligence at the beginning of the lease?

There were other factors peculiar to this case and the relationship between the Landlord and the Tenants that may justify the result. For example, the Tenants raised “bad faith” issues, which were not fully addressed. The legal findings on estoppel and the limitation period create an unfortunate precedent for future cases where a landlord discovers a mistake in the rent charges years after the fact.

Lessons Learned

From a landlord’s perspective, the main takeaway is that due diligence must be exercised at the beginning of a lease to verify the measurements and ensure that the tenant is being charged rent properly. Failing to do so may make it difficult to collect the shortfall at a later date.

From a tenant’s perspective, beware of a lease that provides for measurement and certification of the premises after the lease has been signed. Tenants can be in for a very unpleasant surprise and significant increase of rent beyond what they had anticipated. If the Landlord in this case had acted early on, the Tenant could have been stuck paying rent in an amount that was 15% higher than the Tenant thought it had agreed to.

One of the biggest lessons from this case is that in any landlord-tenant dispute, and any contractual dispute at all, the equities of the situation can trump a strict legal interpretation of the lease/contract. The outcome of litigation is almost always a roll of the dice. The court has a large toolbox of equitable-type remedies available to achieve what it perceives to be a just result, including doctrines of good faith, estoppel, unconscionability, and public policy.

We will continue to provide regular updates on commercial leasing issues in Canada. If you have any questions or would like to obtain legal advice on any leasing issues or commercial leasing litigation, please contact any lawyer in our Commercial Leasing Group.

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