

Leave Nothing Behind

1083994 Ontario v. Kotsopoulos and the Defence of Abandonment

By: Daniel Wiener

At the expiry or earlier termination of a lease, tenants and landlords have a number of financial and legal considerations and obligations. While tenants typically take steps to recover their property, when faced with so many end of term concerns, this task is often neglected, forgotten or intentionally avoided. The landlords will then want to dispose of any abandoned equipment and chattels as quickly as possible, regardless of whether the exercise proves profitable. Before any such steps are taken, a landlord must be satisfied that a tenant has relinquished any claim to the property, or else run the risk of being exposed to an action for conversion.

The Defence of Abandonment

The tort of conversion consists of a wrongful interference with the goods of another, which results in damage accruing to the harmed party. The tort is one of strict liability and, accordingly, it is no defence that the wrongful act was committed innocently.

Abandonment is a recognized defence to an allegation of conversion. The Ontario Court of Appeal has defined abandonment as a “giving up, a total desertion and absolute relinquishment” of goods by the former owner. The party relying on the defence bears the onus of proof and must demonstrate, on a balance of probabilities, that the owner intended to abandon the chattels. This analysis is a question of fact and, in determining whether a party has truly abandoned their property, the judiciary will consider factors such as: (1) the passage of time; (2) the nature of the transaction; (3) the owner’s conduct; and (4) the nature and value of the property.

1083994 Ontario v. Kotsopoulos

The case of 1083994 Ontario v. Kotsopoulos 2012 ONCA 143 (“Kotsopoulos”) provides a relevant case study for both landlords and tenants.

In January 2006, Ronald James Dean and 1083994 Ontario Inc. (“Tenant”) leased premises from Steve Kotsopoulos (“Landlord”), in order to operate a restaurant. The Tenant also purchased previously owned restaurant equipment from the Landlord for \$40,000.00 (the “Equipment”). In June 2006, the Landlord sent notice to the Tenant that no insurance had been obtained and that the lease would be terminated on June 30, 2006 if this default was not rectified.

On July 1, 2006 the Tenant vacated the premises and began to remove the Equipment, making four separate trips to the premises with a truck. On July 2, 2006, the Tenant claimed to have returned to the premises to remove the remaining Equipment, but found the locks to the premises changed.

On July 6, 2006 the Landlord put a “For Rent” sign in the window of the premises and placed an advertisement in the Toronto Star newspaper stating: “restaurant and equipment for sale”.

On July 13, 2006, the Tenant’s lawyer notified the Landlord that the Tenant wanted an opportunity to access the premises to remove the Equipment.

On August 30, 2006, the Landlord entered into a new lease for the premises, which included the Equipment.

On November 10, 2006, the Tenant’s solicitor notified the Landlord that the Tenant required access to the premises to claim the Equipment. The Landlord’s solicitor responded on November 15, 2006, stating that the Equipment had been abandoned and the Tenant had no claim.

Decision of the Trial Judge

At trial, the Landlord defended the Tenant’s claim for conversion on the grounds of abandonment. Justice Pitt (the “Trial Judge”) considered each of the four factors and determined that the Tenant had made minimal efforts to recover the Equipment (as evidenced by the sending of only two letters to the Landlord). Justice Pitt also noted that the Equipment was a part of the business which the Tenant had left when they abandoned the premises on July 1, 2006. In addition, Justice Pitt stated that there was no evidence to demonstrate that the Equipment had any significant value. When taken together, the Trial Judge concluded that the Tenant had indeed abandoned the Equipment and dismissed the Tenant’s claim.

Court of Appeal

Justice Feldman found that the Trial Judge had erred in his decision, and that there was sufficient evidence to demonstrate that the Tenant had not abandoned the Equipment and, accordingly, awarded the Tenant damages for conversion.

In making this determination, Justice Feldman found that the Trial Judge had failed to take the following evidence into consideration:

- the Tenant obtained an auctioneer to inspect and appraise the Equipment with a view to having it sold;
- the Tenant had begun moving the Equipment out of the premises and only stopped when the locks were changed;
- the Tenant caused its solicitor to write two letters to the Landlord asserting its right to the Equipment; and
- the Landlord failed to make efforts to contact the Tenant prior to disposing of the Equipment.

In addition, Justice Feldman found that the Trial Judge had erred in finding that the Equipment had no significant value, as the Tenant had paid \$40,000.00 for the Equipment only five months earlier. Further, the fact that the equipment was included in the Landlord’s lease to the subsequent tenant also demonstrated that the Equipment still retained value.

Conclusion

Kotsopoulos provides both landlords and tenants with a roadmap as to how to handle the issue of a tenant’s equipment and chattels in the case where such items are left on the premises. A tenant must

always be diligent in asserting its right of ownership by taking steps to recover the items, by notifying the landlord of its ongoing interests and by preparing all relevant documentation to demonstrate the value of its items. A landlord should take care to provide notice to the tenant of what items are in its possession and provide periodic updates as to the landlord's intentions in respect of those items. Ultimately, situations such as these can be very difficult to navigate. If there is only one lesson to be learned ...
"Leave Nothing Behind!"