

COURT OF APPEAL FOR ONTARIO

CITATION: Terrace Manor Limited v. Sobeys Capital Incorporated,
2012 ONCA 782
DATE: 20121116
DOCKET: C55599

Weiler, Juriansz and Hoy JJ.A.

BETWEEN

Terrace Manor Limited

Applicant (Appellant)

and

Sobeys Capital Incorporated

Respondent (Respondent in Appeal)

Stephen Longo, for the appellant

Jennifer McAleer and Sarah Jane Turney, for the respondent

Heard and released orally: November 7, 2012

On appeal from the judgment of Justice Patrick J. Flynn of the Superior Court of Justice, dated May 2, 2012, reported at 2012 ONSC 2657.

ENDORSEMENT

[1] Terrace Manor Limited appeals the judgment of the application judge dismissing its application for a declaration that the terms of the lease between it and its tenant, the respondent Sobeys Capital Incorporated, required that the amount of the property taxes payable by the respondent be calculated on a “proportionate share” basis, that is, based on the leased square footage in relation to the entire premises.

[2] The central issue on this appeal is whether the tenant's share of property taxes under the lease should be calculated on a proportionate share basis or whether there was "sufficient official information" to determine what the tenant's taxes would have been if they had been separately assessed by the Municipal Property Assessment Corporation ("MPAC").

[3] Prior to 1998, Ontario municipalities issued separate bills for business taxes to each tenant. As a result of amendments to the *Assessment Act*, R.S.O. 1990, c. A.31, effective in 1998, municipalities levy real property taxes based on a global assessment of the property by the MPAC. Tenants no longer receive separate assessments.

[4] The lease at issue was entered into before the amendments were enacted. The appellant argues that the application judge erred in his interpretation of the lease, particularly in light of several court decisions rendered since the amendments to the *Assessment Act*. These decisions interpreted various clauses in leases entered into prior to the amendments as requiring the tenant's share of property taxes to be calculated as a proportionate share of the taxes assessed against the landlord.

[5] We disagree. In our view, the application judge was correct in his interpretation of this lease and we would accordingly dismiss the appeal.

[6] As the application judge noted, what is at issue is the interpretation of the clause in this lease between the parties.

[7] The lease provides that if a separate assessment for taxes in respect to the leased premises is not available, the landlord and the tenant shall “use their reasonable diligent efforts to ... obtain sufficient official information to determine what such separate assessments would have been if they had been made.” It further provides that the tenant’s share shall be determined “by the landlord reasonably and equitably allocating a portion of the taxes levied, rated, charged or assessed against the Shopping Centre to the Leased Premises having regard to the generally accepted method of assessment and applicable elements utilized by the lawful assessment authority in arriving at the assessment of similar development if that method is known...”

[8] The application judge found that “MPAC’s assessment for the plaza was created from assessment data, on a unit by unit basis, as shown on the valuation records.” He concluded that “the valuation records are official because they emanate from and are authorized by MPAC, which produces them to record the assessment data it collects under the *Assessment Act*.” Having held that the records were official, he found that the information they contained was sufficient to determine what the taxes to the tenant would have been if a separate assessment had been made. He noted that the appellant had in fact used MPAC valuation records to apportion taxes to the tenant for the years 2004-2009.

Therefore, there was “sufficient official information” to determine what a separate assessment would have been. There is no basis for disturbing these findings.

[9] We agree with the application judge that the cases relied upon by the appellant are not of assistance. The wording of the lease in question differs from that of the leases considered in those cases in significant respects.

[10] The appeal is accordingly dismissed. The respondent shall be entitled to its costs on a partial indemnity scale in the amount of \$13,000, inclusive of disbursements and applicable taxes.

“K.M. Weiler J.A.”
“R.G. Juriansz J.A.”
“Alexandra Hoy J.A.”