# COURT OF APPEAL FOR ONTARIO

CITATION: 911 Priority Corporation v. Murray, 2020 ONCA 171
DATE: 20200305
DOCKET: C67172

Feldman, Huscroft and Harvison Young JJ.A.

BETWEEN

911 Priority Corporation and Caleb Kalenuik

Applicants
(Respondents in Appeal)

and

Ernest Murray and Sandra Murray

Respondents
(Appellants in Appeal)

Spencer Toole, for the appellants

Jordan Moss, for the respondents

Heard and released orally: March 2, 2020

On appeal from the judgment of Justice Mary E. Vallee of the Superior Court of Justice, dated June 10, 2019.

REASONS FOR DECISION

[1] The appellants are the landlords of a commercial space that was leased to the respondent tenants. The written lease contained a provision in s. 17.1 *Right to Re-enter*, which in relevant part provides as follows:

> When
>
> > (a) the Tenant shall be default in the payment of any Rent whether lawfully demanded or not and such default shall continue for a period of Seven (7) consecutive days following written notice
> >
> > …
> >
> > Then and in any of such cases the then current month's Rent, together with the Rent for the three (3) months next ensuing shall immediately become due and payable, and at the option of the Landlord, the term shall become forfeited and void, and the Landlord without notice or any form of legal process whatsoever may forthwith re-enter upon the Premises
> >
> > …

[2] The respondents were in arrears of rent beginning in August 2018. The appellants served a written notice under s. 17.1 of the lease demanding the outstanding rent, as well as the September rent and giving seven days to pay.

[3] Although the respondents paid the August and September rent by October 9, 2018, they did not pay the accelerated rent provided by s. 17.1 of the lease. They continued in arrears until January 2019, when another written notice was sent. That notice gave only three days to pay.

[4] Payment was not made, and the appellant landlords re-entered after five days, not seven as required by s. 17.1 of the lease. The respondents then brought an application for a declaration that the notice of termination was void and for damages for wrongful termination.

[5] The application judge held that because the January notice was defective and the re-entry before seven days was wrongful, the landlord was in breach of the lease by wrongfully terminating it. She ordered a trial of the issue of the respondents' damages.

[6] We agree with the appellants that the trial judge erred in law by failing to find that the landlord was entitled to re-enter based on the failure of the tenant to comply with the August 2018 notice, by paying the arrears together with the accelerated rent, provided automatically under s. 17.1 of the lease. That breach continued up to the date of the re-entry. The appellants did not waive the respondents' breach by accepting some of the rent after August, as the parties had contracted out of waiver in the lease (para. 21.1).

[7] The order of the trial judge is therefore set aside and the application is dismissed. Costs of the appeal to the appellants fixed in the agreed amount of $9,750 inclusive of disbursements and HST. Costs awarded below in the amount of $27,000 to the respondents will now be paid to the appellants.

"K. Feldman J.A."
"Grant Huscroft J.A."
"Harvison Young J.A."