COURT OF APPEAL FOR ONTARIO

CITATION: 2505243 Ontario Limited (ByPeterandPaul.com) v. Princes Gates Hotel Limited Partnership, 2022 ONCA 859
DATE: 20221208
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MacPherson, Miller and Copeland JJ.A.

BETWEEN

2505243 Ontario Limited o/a ByPeterandPaul.com

Plaintiff (Respondent/
Appellant by way of cross-appeal)

and

Princes Gates GP Inc. in its Capacity as General Partner of Princes Gates Hotel Limited Partnership

Defendant (Appellant/
Respondent by way of cross-appeal)

Gavin MacKenzie, Peter Carey and Paul Martin, for the appellant/respondent by way of cross-appeal

Randy Sutton, Erika Anschuetz and Lauren Rennie, for the respondent/appellant by way of cross-appeal

Heard: November 29, 2022

On appeal from the judgment of Justice Cory A. Gilmore of the Superior Court of Justice, dated July 5, 2021, with reasons reported at 2021 ONSC 4649.

REASONS FOR DECISION

[1] The appellant, Princes Gates GP Inc. (“PG”), is the commercial landlord of the respondent tenant, 2505243 Ontario Limited (“250”). The appellant owns and operates Hotel X in Toronto. The respondent offered food services and operated

two restaurants, Petros and Maxx's, in the hotel. It did this pursuant to a food and beverage services agreement ("FBA") and two leases (the "Agreements"), executed on January 25, 2017.

[2] On March 20, 2018, Hotel X officially opened. At the same time, 250 opened the restaurant Maxx's. It opened Petros in September 2019.

[3] Almost immediately, the relations between PG and 250 became difficult and tumultuous. In its early days, the hotel had a low occupancy rate, which put stress on both parties. It was not long before PG became very critical of 250's management and food service. Also, in a crucial unilateral move in November 2019, PG changed the way it paid event deposits to 250, which had a serious impact on 250's cash flow.

[4] In the early months of 2020, there were several difficult and acrimonious meetings involving the principals and senior managers of the two companies. On February 13, 2020, the principal of 250 sent a letter to PG that said: "We would like to immediately begin the negotiation to dissolve our contracts."

[5] Following another difficult meeting on February 20, 2020, 250's principal sent another letter, proposing that the parties negotiate an amicable exit. In his trial testimony, PG's principal described this letter as "talking about nothing" and stated that 250's principal had "lost his way".

[6] In a second follow-up letter on February 27, 2020, PG's managing director wrote:

> **Negotiations to dissolve your contracts**
>
> We note from your letters dated February 15, 2020, and February 24, 2020, that you would like to immediately begin a negotiation to dissolve your contracts. We would prefer that you remain as Operator and Tenant in the hotel and focus on creating and sustaining a culture and management structure that enable you to perform the services at the level required. **This has always been our objective**. However, we are open to discussions if you insist. [Emphasis in original.]

[7] Two new and important events occurred in March and April 2020.

[8] In March, the pandemic arrived. PG shut down Hotel X on March 23 without consulting 250. However, PG insisted that the lease required 250 to continue to pay rent, even though its restaurants were closed.

[9] In April 2020, PG commenced discussions with a new food and beverage provider, Harlo Entertainment Inc. ("Harlo"), with a view to replacing 250.

[10] On May 30, 2020, PG sent a Letter of Intent ("LOI") to Harlo with respect to a food and beverage partnership with the hotel. PG did not inform 250 of this development.

[11] On June 3, 2020, the signed LOI was circulated to senior management at the hotel; it was to be kept confidential. The execution of the corollary agreements was conditional on the dissolution of PG's Agreements with 250.

[12] On July 2, 2020, PG's counsel wrote to 250 and terminated its Agreements with them, based on a breach by way of 250's failure to pay rent.

The Trial

[13] 250 brought an action against PG grounded in breach of contract. After an eight-day trial, the trial judge found in favour of 250. In para. 386 of her reasons, on the issue of liability, the trial judge said:

> In summary, I find that termination of the Agreements was done in bad faith for the following reasons:
>
> a. The Hotel permitted 250 to believe that it was "business as usual" all the while negotiating with Harlo with a clear intention to replace 250.
> b. The Hotel terminated the Agreements without notice which had drastic and foreseeable consequences including compensation for 250's 200 employees who were working at the Hotel at the time.
> c. The Hotel's reliance on 250's lack of response to the February 27, 2020 letter to justify all of its actions is disingenuous.

[14] On the question of damages, the trial judge reached three conclusions. Because 250 was in bankruptcy proceedings, she stated her conclusion in this fashion:

> The Defendant shall forthwith pay to the Trustee the sum of $7,124,524.92 in reliance damages forthwith.
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> Deducted from the Plaintiff's damages shall be the sum of $735,879.85 in damages owed to the Defendant.

> The Defendant shall, within 30 days, pay to the Trustee the sum of $2.063M in employee compensation damages to be used exclusively for the claims process set out in this judgment. These funds are impressed with a trust in favour of the employees and therefore do not form part of the bankrupt's estate and are not available to other creditors.

The Appeal Hearing

[15] At the appeal hearing, the panel had the benefit of an excellent factum and comprehensive and impressive submissions from PG's counsel. Nevertheless, because the panel saw no error in the trial judge's analysis or conclusions on liability or damages, it did not call on 250 to respond. The panel dismissed the appeal with reasons to follow.

[16] 250 had cross-appealed from the trial judge's decision on damages. It sought an order: (1) setting aside the award of $7,124,524.92 in reliance damages and replacing it with an award of $11,598,000 in expectation damages, and (2) an order setting aside the award of $735,879.85 owing to PG and directing PG to make a claim for those damages in 250's current insolvency proceedings. Once 250 heard that PG's appeal would be dismissed, it abandoned its cross-appeal relating to these issues. Hence, we will not address the cross-appeal.

The Appeal Issues

[17] PG advances seven issues on appeal.

[18] First, PG asserts that the trial judge erred by concluding that it had improperly terminated 250's lease because 250 refused to pay rent. According to PG, the lease was negotiated by sophisticated commercial parties and clearly and unambiguously stated that rent must always be paid, and that if rent was not paid within seven days of being due, default occurs, which could result in termination of the lease (ss. 17.15 and 16.1).

[19] We do not accept this submission. The trial judge was emphatic on this issue, concluding that PG contributed to 250's financial difficulties and owed 250 far more than 250 owed PG for missed rent payments after the pandemic set in:

> I prefer the position of 250 on this issue. Accounting for HST payments, an outstanding payable of $106,225, the wrongly withheld deposits of $582,000, a rental security deposit of $112,000, backing out the charge for additional rent which would not have been billed until mid-July, and accepting that the unearned deposits of $611,000 would not have been due to be repaid until termination, the amounts owed to 250 by the Hotel exceeded any outstanding rent as of June 30, 2020.
>
> The Hotel had its own version of these numbers but it cannot have things both ways. It withheld the payment of deposits and HST it owed 250 and accounted for deposits in 250's possession which 250 had every right to retain until termination.
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> In the end, I find that the Hotel took a high-handed approach to the situation with 250 on the issue of deposits. I find that it 1) wrongfully withheld them contrary to the FBA, 2) used the unpaid deposits to demand concessions to which it was not entitled under the FBA and 3) then used the deposits properly in the possession

> of 250 to justify amounts owing to it prior to and by way of justification for termination.

[20] We find no fault with this analysis, especially in the context of a pandemic, for which PG closed the hotel and restaurants. Accordingly, PG's own actions contributed to 250's inability to pay rent.

[21] Second, PG contends that the trial judge erred by concluding that, after the pandemic arrived and the hotel was closed, it was unreasonable for PG to refuse to assist 250 with a potential application for relief under the Canada Emergency Commercial Rent Assistance Program (the "CECRA").

[22] We disagree. At a moment of great difficulty for both the hotel and the restaurants, caused by the pandemic, the CECRA provided a golden opportunity for substantial economic relief for both entities. Under the CECRA, PG would have received 75 percent of the required rent which, presumably and in fairness, would have significantly reduced its concern that 250 could not and/or would not pay its rent once the pandemic hit and the hotel and restaurants closed.

[23] PG's reason for not making an application under this program, and/or not supporting an application by 250, was that 250 was not eligible for the CECRA because its income was above the $20 million threshold. In support of this position, PG insisted, in the middle of a pandemic and staring huge government financial support right in the face, that 250 obtain an independent CPA's opinion about its revenue. In light of 250's T2 filing for 2019, stating its revenue was $17,557,618,

PG's insistence on independent verification was grossly unfair. Accordingly, we agree with the trial judge that, by refusing to support a CECRA application, PG contributed to 250's failure to pay rent. We entirely agree with her ultimate conclusion on this issue:

> In summary, I find that the Hotel should have assisted 250 with its CECRA application. In hindsight, its reasons for not doing so were unjustified and it was resolute in its insistence that 250 did not qualify rather than finding ways in which it did. I further infer that part of the reason the Hotel did not want to assist 250 was that it had already decided that it wanted to dissolve the Agreements. By this point in June, the Hotel already had a signed Letter of Intent with Harlo. Committing to assisting 250 with CECRA meant further ties between the Hotel and 250. The Hotel had already moved on but had not told 250 this.

[24] Third, PG submits that 250 did not suffer damages as a result of the termination of the agreements approximately seven months before January 31, 2021, the end of the applicable statutory non-enforcement period: *Commercial Tenancies Act*, R.S.O. 1990, c. L.7, s. 82. PG submits that 250 would have lost money in this period and was, therefore, better-off for the early termination. We need not address this argument as it would only speak to expectation damages, which the trial judge chose not to award in favour of reliance damages, a decision which is unchallenged by the appellant.

[25] Fourth, PG contends that the trial judge erred by making a finding of bad faith against it. PG claims that it did not mislead 250, either actively or passively,

about 250's continuing obligation to pay rent. In fact, PG says that, over a period of several months, it consistently insisted that 250 was required to make its monthly rental payments.

[26] We are not persuaded by this submission. We find no error in the trial judge's finding that PG misrepresented its intention to continue the parties' agreements. In *Callow Inc. v. Zollinger*, 2020 SCC 45, Kasirer J. set out the context and contours for the role of good faith in contract interpretation. He said, at paras. 53 and 81:

> Good faith is thus not relied upon here to provide, by implication, a new contractual term or a guide to interpretation of language that was somehow an unclear statement of parties' intent. Instead, the duty of honesty as contractual doctrine has a limiting function on the exercise of an otherwise complete and clear right because the duty, irrespective of the intention of the parties, applies to the performance of all contracts and, by extension, to all contractual obligations and rights. This means, simply, that instead of constraining the decision to terminate in and of itself, the duty of honest performance attracts damages where the manner in which the right was exercised was dishonest.
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> …
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> [W]here the failure to speak out amounts to active dishonesty in a manner directly related to the performance of the contract, a wrong has been committed and correcting it does not serve to confer a benefit on the party who has been wronged.

[27] After an extensive review of PG's interaction with both 250 and Harlo in the March – July 2020 period, the trial judge stated, at paras. 362 and 369 of her reasons:

> There can be no doubt that the Hotel undertook the negotiations with Harlo with no intention of advising 250 that it was doing so. Its employees were told not to discuss the negotiations. The Hotel's position is that it had no choice but to undertake negotiations because 250 had never responded to its February 27, 2020 letter. I find this position to be a ruse intended to justify the Hotel's secretive and intentional steps to rid itself of 250 commencing in March 2020.
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> …
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> It is clear in this case that the Hotel knew that 250 intended to stay on and continue with its contract. Despite this, it continued with serious negotiations with Harlo even to the point of making staff introductions (Mr. Laksmono). The process was kept entirely secret from 250. The fact that the Hotel continued to communicate with 250 as late as the morning of July 2, 2020 as if nothing had changed was, I find, a breach of the duty of good faith in contract by way of misleading by inaction.

[28] In our view, this analysis and legal conclusion are entirely consistent with *Callow*.

[29] Fifth, PG submits that 250 was in such financial failure that it suffered no damages, even if PG wrongfully terminated their relationship. In support of this submission, at para. 126 of its factum, PG points to 250's trade debt and lack of assets and concludes:

> This all leads to the conclusion that even if 250 could have financially survived until the end of its Agreements, it would never have made a profit.
>
> It would have lost money. The trial judge put 250 in a better position than if it had completed its contracts. This is an error of law.

[30] We disagree. Again, PG accepts that the trial judge did not err by awarding reliance damages, rather than expectation damages.

[31] In *PreMD Inc. v. Ogilvy Renault LLP*, 2013 ONCA 412, at para. 66, Laskin J.A. said:

> In some breach of contract cases, an injured person cannot prove expectation damages or loss of profits, or the contract has been unprofitable. In those cases, an injured party may elect to claim reliance damages. In awarding reliance damages, the court recognizes that the injured party has changed its position in reliance on the contract. The court tries to put the injured party in the position it would have been in had it not entered into the contract at all. Thus, reliance damages amount to wasted expenditures – expenses that the injured party incurred in reliance on the contract but would not have incurred had it known that the contract would be or had been breached. [Citations omitted.]

[32] The trial judge was cautious in her calculation of 250's reliance damages. She said:

> The Court cannot be called upon to speculate when the effects of such unpredictable variables as the pandemic … will force the Court to simply guess at what the future profits of 250 could be. That is not acceptable.
>
> …
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> A more rational and reliable manner of assessing damages is by examining the lost capital which 250 expended in reliance on the performance of its contract.

[33] We find no fault in this methodology which led to an award of $7,124,524.92.

[34] Sixth, PG submits that the trial judge erred by awarding $2,063,000 in damages for claims to be potentially and consequentially made against 250 by its former employees, who lost their jobs when PG terminated its Agreements with 250.

[35] We do not accept this submission. As the trial judge said, “While 250 claims these damages under a separate heading, they form part of the overall compensatory damages claimed.” All the trial judge did was set up a potential process for considering these claims, together with a cap on the potential total award.

[36] Finally, PG contends that the trial judge erred by not declaring a mistrial when it became known that three of the respondent’s proposed witnesses had been watching the trial unfold for six days by Zoom, in one of its law firm’s boardrooms.

[37] Neither party sought an order excluding witnesses. In her mistrial ruling, the trial judge said that, although she found the situation concerning, it was not so egregious that it would require the extreme remedy of either a mistrial or the striking of evidence. After the trial, the trial judge noted in her judgment that, “in retrospect, while the issue was very concerning when first raised, in the end it is not one which would change this Court’s view with respect to the reliability of the testimony of the impugned witnesses”.

[38] In our view, the trial judge was in the best position to make this call, especially in the context of the absence of an order excluding witnesses.

Disposition

[39] The appeal is dismissed. The respondent is entitled to its costs of the appeal, fixed at $90,000, inclusive of disbursements and HST.

"J.C. MacPherson J.A."
"B.W. Miller J.A."
"J. Copeland J.A."