COURT OF APPEAL FOR ONTARIO

CITATION: Rabin v. 2490918 Ontario Inc., 2023 ONCA 49
DATE: 20230126
DOCKET: C69364

Gillese, Tulloch and Roberts JJ.A.

BETWEEN

Dr. Arnold Rabin

Applicant
(Appellant)

and

2490918 Ontario Inc.

Respondent
(Respondent)

Marco Drudi, for the appellant

Paul Gribilas, for the respondent

Heard: December 12, 2022

On appeal from the judgment of Justice Paul M. Perell of the Superior Court of Justice, dated March 30, 2021, with reasons reported at 2021 ONSC 2388.

Roberts J.A.:

OVERVIEW

[1] This appeal involves the application of s. 23(2) of the *Commercial Tenancies Act*, R.S.O. 1990, c. L.7 ("CTA"), and, more particularly, the determination of whether a landlord refused or neglected to consent to an assignment of a

commercial lease, whether the tenant waived the landlord's defective performance, and whether the landlord's consent was unreasonably withheld.

[2] The appellant tenant appeals the dismissal of his application for an order under s. 23(2) under the CTA to require the respondent landlord to consent to the assignment of the lease. In sum, he submits that the application judge erred in finding that the appellant had waived the respondent's neglect or refusal to provide its consent within the 15-day deadline set out in the lease or at all, and in failing to find that the respondent had unreasonably withheld its consent to the requested assignment.

[3] For the reasons that follow, I would allow the appeal.

FACTUAL BACKGROUND

(1) Communications between the parties

[4] The appellant is 70 years old. He has practised dentistry for over 44 years. Since around 1977, he has been a tenant in the building acquired by the respondent in early 2017. He has run his dentistry practice from the leased premises throughout his tenancy. The respondent acquired the building with the view of demolishing it and redeveloping the property at some time in the future. The appellant's lease expires on December 31, 2025. There is a five-year option to renew.

[5] The appellant wishes to semi-retire and sell his practice to two younger dentists in the early years of their professional careers ("the new dentists"). The appellant and the new dentists started discussing the details of the sale in November 2020. By early 2021, they had agreed that the new dentists would purchase the practice for approximately $1.8 million and that the appellant would continue working, part-time, for three years after the sale closed. The new dentists would purchase the shares of the appellant's professional corporation and incorporate a new professional dental corporation for the dental clinic. As part of the sale of his practice, the appellant sought the respondent's consent, as landlord, to the assignment of the lease under article 11.1 of the lease.

[6] Article 11.1 of the lease provides that the appellant cannot assign the lease "without the prior consent of [the respondent] … which consent shall not be unreasonably withheld, subject to the provisions of Section 11.1(a)." Section 11.1(a) reads as follows:

> (a) Landlord's Option: If the Tenant intends to effect a Transfer of all or any part of the Leased Premises or this Lease, in whole or in part, or of any estate or interest hereunder, then and so often as such event shall occur, the Tenant shall give prior written notice to the Landlord of such intent, specifying therein the name of the proposed Transferee and shall provide such information with respect thereto, including without limitation, information concerning the principals thereof and as to any credit, financial or business information relating to the proposed Transferee as the Landlord requires, and the Landlord shall, within fifteen (15) days thereafter,

> notify the Tenant in writing either, that it consents or does not consent to the Transfer. [Emphasis added.]

[7] On December 3, 2020, the appellant sent a text message to Gil Shcolyar, the respondent's principal, advising that he was looking to sell his practice and assign the lease. The appellant advised "[i]f you need any information on the purchaser I can provide that". On December 10, 2020, the appellant sent Mr. Shcolyar an email, advising that he would call about the proposed assignment to the purchaser and that "time [was] of the essence". Although he looked at the lease and the assignment clause, and sent it to his real estate lawyer, Mr. Shcolyar did not ask for any information at that time.

[8] In accordance with article 11.1 of the lease, on February 2, 2021, the appellant, through his real estate lawyer, gave the respondent the requisite formal written notice of the assignment, specifying the names of the proposed transferees, and enclosing a copy of the proposed share purchase agreement. The respondent did not provide any response within the 15-day deadline established by s. 11.1(a) of the lease. On February 18, 2021, the appellant's real estate lawyer sent an email to the respondent's real estate lawyer, followed by a conversation with him on February 19, 2021, repeating the appellant's request that the respondent consent to the assignment.

[9] It was not until February 24, 2021, 22 days following the appellant's first request for its consent to the assignment, that the respondent provided the following response through its real estate lawyer:

> I have finally gotten instructions from my client. We will have no problem providing consent, provided however that the new principal provide his personal guarantee, that the old principal continue with his personal guarantee, and the lease be modified to include a demolition clause upon 24 months' notice, during the balance of the term or any renewal term. If that works, then please advise and we can move forward.

[10] The appellant did not accept the respondent's proposal. Instead, he engaged a litigation lawyer, Mr. Drudi, who responded on March 1, 2021 with the position that the respondent's "outright refusal to Consent without the added condition is in breach of the Lease and, if maintained, will lead to significant damages which damages would include the sale price" of the sale of the appellant's practice. A formal response consenting to the assignment was required from the respondent by March 2, 2021, failing which an application would be brought on an urgent basis "dealing with the conduct of the lessor".

[11] There was no immediate response to the March 1 letter. Conversations between the real estate lawyers for the parties followed. The respondent asked for the demolition clause to be in effect only during the renewal term, which was refused. A standard credit application form forwarded by the respondent was completed by the prospective assignee tenants and returned to the respondent's

real estate lawyer on March 4, 2021. On March 9, 2021, a signed copy of the share purchase agreement dated March 8, 2021 was forwarded to the respondent's real estate lawyer, again requesting the respondent's consent to the assignment of the lease.

[12] On March 11, 2021, Mr. Drudi wrote again, advising that if the respondent's written consent was not provided by March 12, 2021, an application would be commenced.

[13] On March 12, 2021, the respondent's real estate lawyer responded with a short email message that stated: "My client, the Landlord, has reviewed the credit application previously provided and is not satisfied with same, and therefore respectfully denies consent by the Landlord."

[14] On March 12, 15 and 17, 2021, Mr. Drudi sent email messages to the respondent's real estate lawyer, reiterating that it was imperative, because of the imminent closing date, to obtain the respondent's written consent to the proposed assignment. To obtain the consent, the appellant offered to acquire a GIC in the amount of the rent during the renewal term of 5 years and pledge the GIC as security to cover the future rent if the lease were extended by the assignee tenants. However, Mr. Drudi noted that it was expected that the respondent would reject the proposal because they knew that the respondent was "not concerned about

the future rent as [the respondent] wishes to rezone the property and demolish the plaza". A response was requested by the end of business.

[15] No response was received. The appellant commenced the present application on March 19, 2021.

[16] On March 23, 2021, the respondent's litigation counsel, Mr. Gribilas, sent "a preliminary list of documents/information the [respondent] requires to fully consider [the appellant's] request". A detailed list of 24 categories followed. A further email followed the same day with a request for further information.

[17] On March 24, 2021, Mr. Drudi responded with the appellant's position that the respondent "has no right, after the rejection was already announced to make the demands, which appear intrusive, at this time. He cannot find new reasons to reject. Moreover, sending a preliminary list just days before the hearing is not practical as the [respondent] must know the proposed Assignee cannot comply. They will therefore not be responded to."

(2) The dismissal of the application

[18] The application judge was critical of both sides. He concluded that they both were sending "mixed and confusing messages" because they "did not trust one another and were pre-judging one another". He stated that the difficulty of applying the law to the circumstances of this case was that "the conduct of the landlord – and of the tenant – has obscured the circumstances that the landlord has neither

consented nor refused to consent to an assignment and the tenant has been equivocal about whether or not to provide information or financial comfort to the landlord about the financial viability of the new tenants".

[19] The application judge concluded that the appellant had waived the requirement under article 11.1(a) of the lease that the respondent provide its consent within 15 days of receiving the appellant's notice of its intent to assign the lease. Although he found that the March 12 letter "reads as a denial of any consent by the landlord with the explanation that the landlord was not satisfied with the information being provided", he determined that Mr. Drudi's email messages of March 12, 15 and 17, 2021, "muddle the matter, because on the one hand, these messages appear to accuse the landlord of an unreasonable refusal to consent, while on the other hand, the messages renew the demand for the landlord's consent and specify that time is of the essence because of the scheduled closing on March 31, 2021". He found the respondent's request for financial information "ham-fisted from the outset", the request for the credit application "inapt", and the respondent's last-minute request for financial information in its litigation counsel's letter of March 23, 2021 "overreaching and unreasonable". He nevertheless determined that the appellant had failed to show that the respondent had either refused to consent to the assignment or unreasonably withheld its consent to the assignment.

[20] As a result, the application judge dismissed the application without prejudice to the applicant renewing his application before the application judge upon providing the financial information and documentation requested by the respondent in its litigation counsel's letter of March 23, 2021.

ANALYSIS

[21] In my view, the application judge made the following reversible legal errors.

(1) Waiver

[22] The application judge's determination that the appellant had waived the 15-day notice period under article 11.1(a) of the lease is problematic in two ways: the application judge applied the doctrine of waiver when it was not raised or argued by the parties; and he erred in his application of the doctrine of waiver.

[23] The application judge correctly found that the respondent had failed to respond to the appellant's request for its consent to the assignment of the lease within the fifteen-day period. However, he did not consider the consequences of the respondent's failure to provide a timely response. Rather, he went on to conclude that the appellant had waived the respondent's compliance, as follows:

> The conduct of the parties rather reveals that the fifteen-day period for a decision from the landlord was waived. In this regard, it should be recalled that in his letter to [the respondent's real estate lawyer], [the appellant's real estate lawyer] asked to be advised as to the process required to provide a consent to the assignment of the

> lease. There is no insistence here that the landlord was on the clock.

[24] It is well established that as a matter of natural justice and trial fairness, it is not open to a judge to dispose of a material issue in a proceeding on a basis that has not been raised or argued by the parties: *Iroquois Falls Power Corporation v. Ontario Electricity Financial Corporation*, 2016 ONCA 271, 398 D.L.R. (4th) 652, at para. 62, leave to appeal refused, [2016] S.C.C.A. No. 279; *Labatt Brewing Company Limited v. NHL Enterprises Canada, L.P.*, 2011 ONCA 511, 106 O.R. (3d) 677, at para. 6; *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74 (C.A.), at paras. 58-62.

[25] Here, on his own initiative, the application judge relied on the doctrine of waiver to dispose of the material issue of the respondent's compliance with article 11.1(a) of the lease without giving the parties the opportunity to make appropriate submissions. This alone warrants the setting aside of the application judge's decision.

[26] The application judge's error is further compounded by his erroneous application of the doctrine of waiver.

[27] The doctrine of waiver was explained by Major J. in the following oft-cited passages of *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490, at pp. 499-500:

> Waiver occurs where one party to a contract or to proceedings takes steps which amount to foregoing reliance on some known right or defect in the performance of the other party [citations omitted]. The elements of waiver were described in *Federal Business Development Bank v. Steinbock Development Corp.* (1983), 42 A.R. 231 (C.A.), cited by both parties to the present appeal (Laycraft J.A. for the court, at p. 236):
>
> > The essentials of waiver are thus full knowledge of the deficiency which might be relied upon and the unequivocal intention to relinquish the right to rely on it. That intention may be expressed in a formal legal document, it may be expressed in some informal fashion or it may be inferred from conduct. In whatever fashion the intention to relinquish the right is communicated, however, the conscious intention to do so is what must be ascertained.
>
> Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them. The creation of such a stringent test is justified since no consideration moves from the party in whose favour a waiver operates. An overly broad interpretation of waiver would undermine the requirement of contractual consideration.

[28] The application judge made no reference to this “stringent test”. He failed to consider whether the February 18 follow-up email by the appellant’s real estate lawyer amounted to an unequivocal and conscious intention to abandon the appellant’s right to insist on the respondent’s compliance with article 11.1(a) and to rely on the consequences when the respondent failed to respond. When the doctrine of waiver is correctly applied, the February 18 email cannot be construed as a waiver.

[29] That the appellant's real estate lawyer attempted to resolve the respondent's failure to respond in order to close the transaction for his client does not amount, without more, to a waiver of the appellant's rights or of the respondent's defective performance. Indeed, the March 1 and subsequent correspondence from Mr. Drudi can leave no doubt that the appellant was insisting on compliance and had not waived his rights. It is inconsistent to excuse the respondent's attempts as mere negotiation without extending the same consideration to the appellant's attempts to resolve the dispute so that the sale of his practice could close.

[30] When the appellant's actions are viewed through the lens of the correct test, the application judge's finding that Mr. Drudi's March 1 and 11, 2021 emails sent inconsistent messages is plainly unreasonable. So, too, is his finding that Mr. Drudi's March 12, 15 and 17, 2021 emails "muddle[d]" the clear denial of consent communicated in the respondent's real estate lawyer's March 12, 2021 email. There is no question that the appellant's lawyers repeatedly reiterated that it was "imperative" that the respondent provide its consent to the assignment, especially as the closing approached, and that the respondent's failure to do so constituted a breach of the lease provisions that its consent to the assignment would not be unreasonably withheld.

(2) Required analysis under s. 23 of the CTA and s. 11.1 of the parties' lease

[31] As neither party had raised the issue of waiver, the application judge's analysis should have focussed on the relevant lease provisions and s. 23 of the CTA to determine whether the respondent had neglected or refused to give its consent to the requested assignment, and, if so, whether consent was unreasonably withheld.

[32] Subsection 23(1) of the CTA stipulates that a landlord's consent to an assignment is not to be unreasonably withheld, unless the lease expressly provides to the contrary. Subsection 23(2) enables a tenant to apply to the Superior Court of Justice for a remedy where a landlord has neglected or refused to provide consent and that consent is unreasonably withheld. For the purposes of this appeal, the relevant provisions of those subsections concerning consent to lease assignments read as follows:

> **23** (1) In every lease made after the 1st day of September, 1911, containing a covenant, condition or agreement against assigning … the possession, or disposing of the land or property leased without … consent, such covenant, condition or agreement shall, unless the lease contains an express provision to the contrary, be deemed to be subject to a proviso to the effect that such … consent is not to be unreasonably withheld.
>
> (2) Where the landlord refuses or neglects to … consent to an assignment …, a judge of the Superior Court of Justice, upon the application of the tenant …, made

> according to the rules of court, may make an order determining whether or not the … consent is unreasonably withheld and, where the judge is of opinion that the … consent is unreasonably withheld, permitting the assignment … to be made, and such order is the equivalent of the … consent of the landlord within the meaning of any covenant or condition requiring the same and such assignment … is not a breach thereof.

[33] Article 11.1 of the parties' lease does not trigger the exception in s. 23(1). To the contrary, article 11.1 provides that the respondent's consent to any assignment by the appellant is required but that the respondent's consent is not to be unreasonably withheld, subject only to article 11.1(a), which requires the tenant to provide written notice of the assignment to the landlord and certain additional information if required by the landlord, and which requires the landlord to advise the tenant if it would consent or not within 15 days.

[34] The CTA does not define what amounts to a refusal or neglect to consent, nor an unreasonable withholding of consent. These terms are therefore presumed to be given their ordinary meaning: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 7th ed. (Toronto: LexisNexis Canada, 2022) at §3.01. As a result, what constitutes a refusal or neglect to consent, or an unreasonable withholding of consent, will depend on the facts of each case,

[35] The principles that apply in determining whether a landlord acted reasonably in withholding consent were helpfully summarized by Cullity J. in *1455202 Ontario Inc. v. Welbow Holdings Ltd.* (2003), 33 B.L.R. (3d) 163 (Ont. S.C.), at para. 9:

i. The burden is on the tenant to satisfy the court that the refusal to consent was unreasonable.
ii. It is the information available to – and the reasons given by – the landlord at the time of the refusal – and not any additional, or different, facts or reasons provided subsequently to the court – that is material.
iii. The question must be considered in the light of the existing provisions of the lease that define and delimit the subject matter of the assignment as well as the right of the tenant to assign and that of the landlord to withhold consent.
iv. A probability that the proposed assignee will default in its obligations under the lease may, depending upon the circumstances, be reasonable ground for withholding consent.
v. The financial position of the assignee may be a relevant consideration.
vi. The question of reasonableness is essentially one of fact that must be determined on the circumstances of the particular case, including the commercial realities of the marketplace and the economic impact of an assignment on the landlord.

See also *2197088 Ontario Limited v. Cadogan Corporation*, 2018 ONSC 3070, 97 R.P.R. (5th) 95, at para. 20.

[36] These factors are considered within the context of the “reasonable person” standard, namely, whether a reasonable person could have withheld consent. In determining the reasonableness of a refusal to consent, the court will look at the information available to, and the reasons given by, the landlord at the time the landlord neglected or refused consent. Any additional or different facts or reasons proffered subsequently are immaterial to the analysis. See *6791971 Canada Inc. v. Eli Messica*, 2020 ONSC 1642, at paras. 7-8; *Zellers Inc. v. Brad-Jay Investments Ltd.*, [2002] O.J. No. 4100 (Ont. S.C.), at para. 26.

[37] Applying these principles, the appellant met his burden to satisfy the court that the respondent neglected and also refused to consent and that the withholding of consent was unreasonable.

[38] I start first with the respondent's failure to respond to the appellant's February 2, 2021 request for its consent to the assignment of the lease within the 15-day deadline under article 11.1(a) of the lease. In my view, the application judge erred by failing to find that the respondent's failure to respond amounted to neglect and an unreasonable withholding of consent.

[39] The respondent provided no reasonable excuse for its failure to respond within the 15-day deadline other than its principal was away in Florida, had not seen a signed share purchase agreement, and wanted to see if he could negotiate the insertion of a demolition clause in exchange for giving consent to the assignment. Importantly, at that time, he did not, pursuant to article 11.1(a) of the lease, require any information from the appellant. In particular, he requested no financial information respecting the new dentists.

[40] The respondent clearly neglected to provide its consent within the requisite 15-day period. In determining whether that amounts to an unreasonable withholding of consent, I consider the reasons offered by the respondent for its failure to respond within the 15-day period provided for in the lease. Mr. Shcolyar admitted on cross-examination that he was in touch with the appellant by email

and cellphone, and that he looked at the lease, read the assignment clause, and sent it to his real estate lawyer while he was away. Given that the appellant had notified the respondent in December that he was going to seek the assignment and that time was of the essence, the formal request in February should have come as no surprise nor should the necessity of responding within the 15-day period. On the record, it appears that the respondent simply could not be bothered to respond in time. In the circumstances, in my view, the neglect to consent within time amounted to an unreasonable withholding of consent.

[41] While the respondent's unreasonable neglect in failing to respond within the 15-day period is sufficient to dispose of this issue, I am of the view that the application judge further erred by failing to find that the respondent had subsequently refused its consent and that its consent was unreasonably withheld, as indicated in its real estate lawyer's emails of February 24 and March 12 and by its unreasonable and last-minute request for financial information in its litigation lawyer's email of March 23.

[42] Article 11.1(a) of the lease permitted the respondent to request and required the appellant to provide "such information with respect thereto, including without limitation, information concerning the principals thereof and as to any credit, financial or business information relating to the proposed Transferee as the Landlord requires". However, the respondent was required to make such a request

within the 15-day deadline under article 11.1(a). The respondent failed to do so until well after the 15-day deadline had passed.

[43] Instead, the respondent's late response on February 24 made no mention of any request for financial or other information but sought only the insertion of a demolition clause. While each case turns on its own facts, it is significant that a landlord's attempts to obtain an amendment to the lease for its own benefit in exchange for providing consent has consistently been characterized as an unreasonable withholding of consent. See, for example: *Jo-Emma Restaurants Ltd. v. A. Merkur and Sons Ltd.* (1989), 7 R.P.R. (2d) 298 (Ont. S.C.); *Tradedge Inc. (Shoeless Joe's) v. Tri-Novo Group Inc.*, 84 R.P.R. (4th) 84 (Ont. S.C.), at para. 39, aff'd 2009 ONCA 855; *Quickie Convenience Stores Corp. v. Parkland Fuel Corporation*, 2020 ONCA 453, 151 O.R. (3d) 778, at paras. 43, 44.

[44] The respondent was not entitled to require a demolition clause as a precondition to giving consent. It would have amounted to a material amendment to the lease and would have seriously threatened the appellant's ability to conclude the transaction with the new dentists. A conditional consent is not a consent. In this case, it amounted to an unreasonable withholding of consent.

[45] Had he given effect to his own findings of fact, the application judge would have determined that the respondent's express refusal to consent in the March 12 email sent by its real estate lawyer amounted to an unreasonable withholding of

consent. His failure to do so flows from his erroneous conclusion that the appellant's subsequent insistence on the respondent providing its consent somehow "muddle[d]" this refusal. Given the application judge's determination that the credit application was "inapt", the March 12 refusal to provide consent can only be characterized as unreasonable.

[46] The application judge also failed to give effect to his findings that the respondent's last-minute requests for financial information and documentation in its litigation lawyer's March 23 email were "unreasonable" and "overreaching". It was not reasonably possible for the appellant to respond to the respondent's extensive last-minute requests for financial information, made mere days before the closing of the appellant's transaction with the new dentists. As such, those requests were unreasonable and amounted to an unreasonable withholding of consent.

DISPOSITION

[47] Accordingly, I would allow the appeal, set aside the application judge's order, and grant the appellant's application. I would make an order under s. 23(2) of the CTA declaring that the respondent unreasonably withheld its consent to the assignment of the lease, requiring the assignment to be made, and declaring the order to be the equivalent of the consent of the respondent within the meaning of the parties' lease.

[48] I would grant the appellant his costs of the appeal in the amount of $10,000, inclusive of disbursements and applicable taxes. In keeping with the application judge's approach to costs, the appellant seeks no costs on the application below.

Released: January 26, 2023. "E.E.G"

"L.B. Roberts"
"I agree E.E. Gillese J.A.
"I agree M. Tulloch"