

COURT OF APPEAL FOR ONTARIO

CITATION: FCP (BOPC) Ltd. v. Suzy Shier (Canada) Ltd., 2024 ONCA 227

DATE: 20240327

DOCKET: COA-23-CV-0679

Roberts, George and Monahan JJ.A.

BETWEEN

FCP (BOPC) Ltd., ARI FCP Holdings Inc. and CPPIB FCP Holdings Inc.

Plaintiffs (Respondents)

and

Suzy Shier (Canada) Ltd.

Defendant (Appellant)

Mordy Mednick and Jemark Earle, for the appellant

Brendan Jones, for the respondents

Heard and released orally: March 26, 2024

On appeal from the judgment of Justice Robert Centa of the Superior Court of Justice, dated May 30, 2023, with reasons reported at 2023 ONSC 3228, and the judgment respecting costs, dated June 15, 2023.

REASONS FOR DECISION

[1] This appeal concerns the parties' dispute over the amount of rent arrears owing by the appellant to the respondents under a commercial lease. It turns on the issue of whether the motion judge erred in rejecting the appellant's primary submission that there was a binding rent relief agreement in place between the parties.

[2] According to the appellant, the rent relief agreement lowered the amount of rent payable over a number of months during the COVID pandemic. The motion judge accepted the respondents' position that the appellant failed to accept the offered rent relief agreement before its expiry. He concluded that, as a result, part of the rent owing was only temporarily deferred during the pandemic and then became payable. The motion judge determined that the appellant owed \$367,668.44 to the respondents.

[3] The appellant submits that the motion judge erred in his approach to summary judgment. Specifically, the appellant says the motion judge erred in failing to find there were genuine issues for trial because of alleged inconsistencies in the evidence and an allegedly incomplete record because of the respondents' inadequate documentary production and inappropriate redactions of the documents produced.

[4] We are not persuaded that the motion judge made any reversible error.

[5] The motion judge's conclusions were based on his factual findings that were open to him based on the evidence that he was entitled to accept. They included those arising from his interpretation of the terms of the offered rent relief agreement, the correspondence and communications between the parties, and the parties' actions. Importantly, he determined that the respondents' offer of a rent relief agreement had expired before acceptance and that the appellant's

counteroffer was not accepted by the respondents, either expressly or implicitly, by word or action. Nor did the respondents say or do anything that would give rise to waiver or promissory estoppel.

[6] Absent error, which we do not see here, the motion judge's conclusions are owed considerable deference on appeal. We see no basis to intervene.

[7] With respect to the documentary production issues raised by the appellant, we see no error in the motion judge's legal analysis. Nor do we see any basis to intervene with the motion judge's exercise of his discretion not to draw an adverse inference against the respondents.

[8] Accordingly, the appeal is dismissed. The appellant shall pay the respondents their appeal costs on a substantial indemnity scale in accordance with the parties' lease, in the amount of \$20,000, all inclusive. The postjudgment interest on the costs awarded shall be at the postjudgment interest rate under s. 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

"L.B. Roberts J.A."
"J. George J.A."
"P.J. Monahan J.A."