

Case Comments

ASSIGNMENT WITHOUT CONSENT - INCURABLE DEFAULT

Greenwin Construction Co. Ltd. v. Stone & Webster Canada

Reported: November 30, 2001
55 Ontario Reports (3rd) Part 5, Page 345
Superior Court of Justice

This case was published in the Ontario Reports distributed this week to subscribers. It is very important.

The largest tenant at the Yonge Eglinton Centre was having financial problems and the business was sold in insolvency proceedings to Shaw Industries. In the course of the sale, two leases, a 1995 100,000 square foot lease and a 1998 9,200 square foot lease were assigned to Shaw.

The 1995 lease permitted assignment without consent to "successors". The 1998 lease required landlord's consent and had a cross default clause that said a default under the 1998 lease (9% of the total space) was deemed to be a default under the 1995 lease (91% of the total space).

No consent was obtained. Greenwin gave notice of termination under both leases on the basis that the failure to obtain consent under the 1998 lease was an incurable default and was deemed to occur under the 1995 lease.

The Bad News:

Under S.20 (7) of the Commercial Tenancies Act ("Act"), a failure to obtain consent is incurable. Therefore the 1998 lease was terminated. Once a lease is assigned or sublet or possession parted with, the landlord can terminate. There is no relief from forfeiture under S.20 (1) of the Act.

More Bad News:

The Court failed to decide that the tenant was not entitled to relief from forfeiture under S.20 (1) of the Act with respect to the 1995 lease.

The Good News:

Despite the fact that S.20 (7) prevents relief from forfeiture under S. 20 (1) of the Act and despite the Court's refusal to invoke S.20 (1) with respect to the 1995 lease for breach of the cross-default, the Court did decide that when the breach is for failure to obtain consent, the Court's broader equitable jurisdiction to grant relief under S.98 of the Courts of Justice Act is available to grant relief from forfeiture despite S.20 (7) of the Act.

The Court in equity will look at:

- i. The gravity of the breach;
- ii. The conduct of the Landlord;
- iii. The conduct of the Tenant;
- iv. Whether forfeiture was sought to collect money;
- v. The disparity or disproportion between the damages suffered by the parties, if the forfeiture is granted or declined.

Conclusion:

1. Make sure you have proper assignment rights that do not require consent wherever possible.
2. Even if you don't have such assignment rights and you forget to get consent or it is denied, there is still hope for you if the Court decides to invoke its equitable jurisdiction.

What Really Happened:

In this case, the judge did not like Greenwin as Greenwin was trying to cancel its biggest lease via the back door in order to negotiate higher rents. The judge said "o.k." to the small space but "no" to the principal space. Ironically, Shaw was trying to get rid of the small space. Greenwin got the law and in equity, its just desserts

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