

KNOW WHAT YOU ARE LEASING: CASE COMMENT ON *AUGUSTA STUDIOS INC. V 8699011 CANADA INC.*, 2024 ONSC 1905

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Introduction

Augusta Studios Inc. v 8699011 Canada Inc., [2024 ONSC 1905](#) (affirmed on appeal [2024 ONCA 906](#)) involved a dispute between the recent purchaser of a building and the tenant who had subleased parts of the premises. At issue was whether the tenant had any rights to the basement and whether the tenant had properly subleased the premises. The Court's reasons serve as a cautionary tale about accurately describing the areas that are or are not intended to be leased, as well as providing guidance on instances where a prospective landlord ought to know about a subtenancy.

Lease Facts

Description of the Leased Premises

The case involved a two-storey commercial building in Toronto containing a first floor unit, second floor unit, and basement premises. In 2017, the tenant, Augusta Studios Inc., entered into a five-year lease with the original landlord.

The original lease defined the "Leased Premises" as the whole of the premises known as 156 Augusta Avenue, Toronto, Ontario, and further described it in Schedule "A" as a "2-storey concrete building, located at 156 Augusta Avenue". Rent under the original lease was paid on an annual basis (not per square foot).

In 2022, the original lease was amended and the term of the lease was extended for five years. The lease amending agreement did not change the definition of "Leased Premises". However, the lease amending agreement stated that the approximate square footage of the Leased Premises was 3,400 square feet (being the total square footage of the first and second floor unit) and that the rent was based on a per square foot rate multiplied by the rentable area of the first and second floor units.

Permitted Use and Subleasing

The tenant's permitted use of the Leased Premises was "mixed usage", including sharing office space with

creative professionals and other professionals. The original landlord's consent was required for any sublease except to an affiliate, purchaser of tenant's business, or for "shared office space" (an undefined term) for creative or other professionals.

In 2021 and 2022, the tenant subleased each of the basement premises, the first floor unit, and part of the second floor unit to different subtenants. The tenant obtained the original landlord's consent to sublease the first floor unit to a retail store, but did not seek consent for subleasing the second floor or the basement premises. However, the basement sublease expired prior to the new landlord's purchase of the building.

Purchase and Early Termination

In August, 2023, the new landlord purchased the building from the original landlord. The new landlord met with the tenant in October, 2023 and asked the tenant to terminate the Lease prior to the expiry of the term, because the new landlord wanted to move its e-bike store from Montréal and operate it out of the Leased Premises. The tenant refused but agreed to consider an early termination in exchange for a certain amount of compensation, which the new landlord refused.

When an agreement could not be reached, the new landlord immediately sent out two notices of default to the tenant, alleging for the first time that: (i) the second floor was improperly subleased since the tenant did not obtain the landlord's consent; and (ii) the basement sublease was illegal and therefore the new landlord was entitled to all the previously collected sublease rent on the basement – even though such rent predated the new landlord's ownership of the building.

The tenant denied the breaches but out of an abundance of caution, the tenant requested the new landlord's consent to the second floor sublease. The new landlord provided no substantive response to the tenant's request and delivered a further notice of default and termination of lease soon thereafter.

Issues and Court Findings

This case considered several issues, two of which are discussed in this bulletin:

1. Whether the basement was included in the Lease; and
2. Whether the tenant required consent from the landlord to sublease the second floor to two other professional subtenants.

The Court found that the basement was included in the Leased Premises and therefore the sublease was lawful. Additionally, consent was not required for the second floor subtenant, as the tenant shared office space with a creative professional.

Legal Conclusions

1. Basement was included in the Lease and had been legally sublet

The Court's reasoning was based on the following:

- The Lease, including its amendments, did not exclude the basement. The original landlord was aware of the sublease and had not objected to it. The amendment revising rent was consistent with the basement continuing to be included in the premises.[1]
- The new landlord, prior to purchasing the building, ought to have known about the basement subtenant, based on the MLS listing and discussions with its real estate agent.
- The new landlord failed to provide evidence that the original landlord intended to exclude the basement from the Lease or that the tenant's sublease was improper.
- Since the basement was part of the Leased Premises and the tenant had legally sublet it, there was no breach of the Lease. Even if there had been a breach, the new landlord could not claim damages since they had not signed an assignment with the original landlord and there was no basement subtenant at the time of purchase.

Additionally, the Court emphasized the new landlord's ulterior motive to terminate the Lease in order to operate its own business out of the premises.

2. Consent was not required to sublease part of the second floor

The Court's reasoning included the following:

- The subtenant, an animation software company, qualified as a sublease of shared office space to creative professionals, and as such did not require the landlord's consent.
- The definition of shared office space should be interpreted broadly to include office sharing arrangements such as the one which took place, even if the subtenant did not have a desk in the premises. Interestingly, the required element of exclusive possession under a lease was not mentioned in this decision, despite this being a sharing of space.
- The new landlord was aware of the second floor subtenant before purchasing the building, as indicated in the MLS listing, yet only raised objections after tenant refused an early termination of the Lease.

Key Takeaways for Landlords and Tenants

- A part of a building not expressly described in the lease and for which no rent may be payable on a per square foot basis can, in some cases, be found to be included as part of the leased premises depending on the facts of the case.
- The Court interprets the term "shared workspace" broadly and in the context of the agreement as a

whole.

- The Court will inspect a landlord's ulterior motives for early termination of a lease.

Conclusion

This case illustrates that landlords and tenants are best served by clear and specific lease agreements. Landlords should ensure that any areas they do not intend to lease are explicitly excluded, while tenants should verify that all spaces are clearly defined in the lease. The Court's decision should serve as a reminder to landlords to act in good faith and respond promptly to sublease consent requests. Purchasers should be attentive to the existence of undisclosed subtenants as part of their pre-acquisition due diligence.

If you wish to obtain further information on the terms of your lease and their potential implications for your business based on this case, please do not hesitate to contact us.

[1] Per the Court of Appeal, "[i]t made no sense that the rent would increase under the amended lease agreement while the space rented would decrease dramatically if, as the appellant argues, the respondent was giving up the basement." (para 4).

by [Melodie Eng](#) and [Jacob Stucken](#)

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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