

THE TIMELY EXERCISE OF LEASE RENEWAL RIGHTS

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Introduction

The recent Ontario Superior Court of Justice decision in *Velouté Catering Inc. v Bernardo, 2016 ONSC 7281* indicates that all may not be lost when a tenant fails to exercise its right to renew its commercial lease within the time period provided in the lease document.

Facts

Velouté Catering Inc. (the “Tenant”) was the tenant of Frank Bernardo Ciddio (the “Landlord”) pursuant to a lease (the “Lease”) with a five year term that expired April 20, 2016. The Lease had a very typical renewal right that required the Tenant to exercise such right by notice to the Landlord at least six full calendar months prior to the end of the current term, so by October 20, 2015.

The principal of the Tenant and the Landlord had been long time personal friends and, as a result, conducted their business affairs in an informal manner.

The Landlord and the Tenant had many discussions about renewing the Lease beginning in July, 2014. The evidence was clear that during the course of all those discussions both parties were under the mistaken impression that the Lease ran until April 20, 2017, rather than April 20, 2016. The evidence demonstrated that the mistaken belief was perpetuated by misstatements that the Landlord had made to the Tenant.

It was not until just before the notice date of October 20, 2015 that the Tenant realized its mistaken belief that the Lease term ended on April 20, 2016, and not April 20, 2017. While the Tenant immediately attempted to make arrangements to renew the Lease, the Landlord refused to engage in any such discussions until after the date for providing notice had passed. Accordingly, the Tenant did not deliver a notice of renewal in time, as required by the Lease.

Once the Tenant realized what had occurred, it attempted to arrange an appointment with the Landlord to discuss the extension. No response was received and eventually an action was commenced.

The evidence indicated that the Landlord had plans to redevelop the property and in the first week of November, 2015 met with a real estate agent to explore the possibility of doing so. The Landlord also made

contact with an architect to prepare preliminary drawings. The development could proceed only if the Lease was not renewed.

The Tenant's Application

The Tenant sought to enforce the renewal option even though it had not delivered a written notice of renewal in time.

Historically, courts have required tenants to strictly comply with any preconditions to exercising renewal or extension options. Renewal rights only benefit the tenant and courts have typically held tenants to a high standard for that reason.

The Tenant first argued that the Landlord waived its right to receive notice of the renewal of the Lease by October 20, 2015. The court rejected this argument. The principle of waiver requires the one party, by its conduct, to lead the other party to believe that the strict rights arising under the contract will not be insisted upon and intending that the other party act on that belief. The court here held there was no waiver as the Landlord's conduct did not recognize the right to renew after the expiry of the option.

The Tenant argued, in the alternative, that the court should exercise its discretion to grant relief from forfeiture in relation to the Tenant's failure to deliver the notice in time. The court accepted this argument. Relief from forfeiture under the *Commercial Tenancies Act* is available at the discretion of the court and allows a tenant to cure its default and be relieved from forfeiture of its rights. There have been a series of cases distinguishing between situations where a tenant asks for relief from a loss of an existing right as a result of not observing its obligations and relief from a failure to comply with a condition precedent to a right (here the requirement to deliver a notice of renewal by a date specified in the Lease). One line of cases has held that the court has power to relieve against forfeiture (loss) of a right, but not to excuse performance of the conditions precedent required to crystallize a right.

However, in this case the court held that on the weight of authority the court does have the power to grant relief for failure to properly renew a lease. The court found that the circumstances favoured granting the relief from forfeiture for the following reasons:

1. the Landlord knew that the Tenant wished to renew the Lease before the October 20, 2015 deadline;
2. both the Landlord and Tenant had the mistaken belief that the time for exercising the renewal right had not yet passed and the Tenant's belief was as a result of the Landlord's misstatements;
3. once the Tenant became aware of the actual deadline, it made reasonable and diligent steps to secure the renewal, but the Landlord refused to engage in any discussions until after the deadline had passed; and

4. the Tenant had made a significant investment in improvements and repairs to the leased premises which would be lost due to the failure to provide the timely written notice, unless relief was granted.

Conclusion

Exercising a renewal right, as with any other right, within the strict timelines provided in the contract is obviously of critical importance. This case does, however, indicate that where proper facts exist, there may be other options available to protect such a right.

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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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