COURT FILE NO.: CV-21-00658132-0000
DATE: 20230508

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: PRIESTLY DEMOLITION INC. and THE JULIENT HOLDING CORPORATION, Plaintiffs

AND:

UNIVERSAL DESIGNS INC., Defendant

BEFORE: Dineen J.

COUNSEL: James Kitts and Michael Decsey, for the Plaintiffs

Anthony Gatensby, for the Defendant

HEARD: April 13, 2023

ENDORSEMENT

[1] The issue in this case is whether a commercial lease between the parties permits the landlord's insurer to bring a subrogated action against the tenant for damage sustained in a fire alleged to have resulted from the tenant's negligence, or whether the tenant's payment of a share of the landlord's insurance pursuant to the lease precludes such an action.

Factual background

[2] The plaintiff and defendant entered into a lease November 1, 2018, for a unit in a commercial building at 226 Edward Street in Aurora. The defendant designed replica clothing based on movies at this location, which had a warehouse and office space. On March 8, 2019, a fire in the unit caused damage to the building.

[3] The plaintiff's insurers bring this action against the defendant contending that the defendant was responsible for the fire, which the defendant denies. The defendant also submits that the action is barred by the terms of the lease.

[4] The critical terms of the lease include a provision for additional rent, which reads:

> It is intended that this Lease shall be completely net to the Landlord except for the obligations set out as being the responsibility of the Landlord. Without limiting the foregoing, the Tenant shall pay as Additional Rent in equal monthly installments, in advance, on the basis of the Landlord's reasonable estimates for a period no greater than 12 months, to be adjusted on an annual calendar year basis and on the basis of the Landlord's Statement.

> . . .
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> The Tenant shall pay its proportionate share of the costs and expenses incurred by the Landlord in insuring the building.
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> . . .
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> The Tenant shall pay jts proportionate share of the costs and expenses incurred by the Landlord insuring, repairing, (except where specifically provided elsewhere herein that the repairs are to be at the expense of the Landlord). operating, managing (on site), maintaining and administering the building and the Common Areas and Facilities of the building together with an administration charge in an amount equal to 15% of all such costs and expenses excluding only taxes and depreciation.

[5] The lease also required the tenant to maintain its own insurance:

> The Tenant agrees to maintain, at its own expense, normal Tenant insurance, including all risks on own property, comprehensive general liability, tenant's legal liability, and pollution liability if applicable having limits of not less than $2,000,000.00 per occurrence for bodily injury or property damage and, if required by the Landlord, will provide evidence of the same.
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> The Tenant will be responsible for replacement of broken glass only if such breakage is due to the Tenant's wrongful or negligent acts.

[6] The maintenance and repair portion of the lease included the following:

> . . . In the event of total failure of any of the mechanical units of the HVAC system thereby requiring replacement of same, the Landlord shall incur the cost of replacement as a capital cost at its sole expense. provided that such failure is not the result of misuse or negligence on the part of the Tenant
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> . . .
>
> The Tenant agrees to keep the Leased Premises in good and tenantable repair, reasonable wear and tear, damage by fire, lightning, tempest. Acts of God or the Queen's enemies, riots, insurrection. civil commotions and damage resulting from negligence or omission of the Landlord. its agents. assigns. invitees or employees, maintenance and repairs which are the responsibility of the Landlord and structural defects only excepted.

[7] The lease also contained an indemnity provision:

> Except in the event of the negligence of the Landlord or of those for whom is in law responsible, the Tenant covenants to indemnify the Landlord against all manner of claims, damages, loss, costs and charges, whatsoever, suffered by the Landlord or its property, either directly or indirectly, in respect of any matter or thing arising from the Tenant's occupancy or use of the Leased Premises and Premises or out of any operation in connection therewith.

Analysis and conclusions

[8] The defendant relies on the trilogy of Supreme Court of Canada cases on deemed tort immunity arising from commercial leases: *Agnew-Surpass v. Cummer-Yonge* [1976] 2 S.C.R. 221; *Pyrotech Products Ltd. v. Ross Southward Tire Ltd.* [1976] 2 S.C.R. 35; and *T. Eaton Co. v. Smith et al.* [1978 2 S.C.R. 749.

[9] As Juriansz J.A. summarized in *Royal Host GP Inc. v. 1842259 Ontario Ltd.* 2018 ONCA 467:

> The Supreme Court set out two principles in the trilogy. The first is that a landlord's covenant in a lease to insure the premises is a contractual benefit for the tenant, and the tenant would receive no benefit if the landlord could sue the tenant for the damages due to its negligence. The rationale for the principle is that since the landlord is free to insure the premises, the inclusion of a covenant to insure must be for the benefit of the tenant. If the landlord's insurer were allowed to bring subrogated claims against the tenant, the covenant "expressly running to the benefit of the tenant…would have no subject matter": *T. Eaton Co*., at p. 754.
>
> The second principle is that where the tenant pays for the insurance coverage, it should get the benefit of the insurance coverage. The logic is that the tenant having paid for the insurance should get the benefit of the insurance. As Laskin C. J. put it in *Pyrotech Products*, at p. 41, the tenant "has paid for an expected benefit, as between itself and its landlord which any standard fire policy would reflect in providing indemnity to the landlord".

[10] The defendant submits that its agreement to pay insurance premiums is sufficient to immunize it from liability to the insurer even in the absence of a covenant by the plaintiff in the lease to insure the property, on the basis that an insurer cannot bring a subrogated action against its own insured.

[11] The defendant relies on *Independent Tank Cleaning v. Zabokrzycki* [1997] I.L.R. I-3418 (Ont. Gen. Div.) and *Key Property Management 1986 Inc. v. Portokalis* (2000) 95 A.C.W.S. (3d) 1136 (Ont. S.C.J.), where Gillese J. (as she then was) held that:

> Even if a lease does not contain a covenant on the part of the landlord to insure but obligates the tenant to pay the cost of fire insurance premiums, and the tenant does in fact pay such costs, the risk of loss by fire passes to the landlord.

[12] She rejected an argument that a contractual obligation on the tenant to obtain all risks property insurance, also a feature of the lease in this case, amounted to an assumption of the risk by the tenant.

[13] The plaintiff contends in response that the lease read as a whole makes clear that the defendant remained liable for damage caused by its own negligence. The plaintiff relies on the decision of Chapnick J. in *Lee-Mar Developments Ltd. v. Monto Industries Ltd.* [2000] O.J. No. 133 (S.C.J.) as a factually similar case in which there was no express covenant to insure but the plaintiff had an additional rent requirement including insurance costs. Chapnick J. held for the landlord, relying on clauses obligating the tenant to repair the property if damages were caused by its negligence together with the tenant's covenant to take out legal liability insurance:

> In my view, these two clauses are clear and unambiguous; and they reflect the intention of the parties that the tenant assume the risk for any losses caused by the tenant's negligence. Indeed, the clause on repairs expressly takes priority over other provisions in the lease and calls upon the tenant to pay the landlord for damages to the premises caused "through the negligence, carelessness or misuse" of the tenant.

[14] The plaintiff argues that the lease in issue in this case has comparable clauses and, like Lee-Mar, is "net" to the landlord. The defendant responds that the maintenance clause in that lease expressly used "notwithstanding" language which is not found in the comparable term in our lease.

[15] The defendant points to *Orin Interiors Inc. v. State Farm Fire and Casualty Company* 2016 ONCA 164 and *JDC Ltd. et al. v. CAW Ltd. et. al.* 2022 ONSC 1611 for the proposition that, as Browne J. put it in the latter case:

> Repair covenants are generally not sufficient to alter the allocation of risk. In general, a party's repair obligations by themselves are not sufficient to allocate to that party the risk of loss associated with the failure to fulfil those obligations in cases where there is also an applicable covenant to insure. In other words, the covenant to insure will continue to bar the claim even where the loss was caused by the covenantee's breach of their covenant to repair. The parties may provide otherwise, but must use express language to do so.

[16] The plaintiff notes that the repair covenant in that case provided only that minor repairs were the tenant's responsibility. It argues that the most recent applicable Court of Appeal decisions (*Capital Sewer Servicing Inc. v. Crosslinx Transit Solutions* 2022 ONCA 10;

Paulin v. Keewatin Patricia District School Board 2019 ONCA 286) urge a broad and contextual reading of the contract that does not place undue weight on the payment of insurance in allocating risk. The defendant argues that these cases are distinguishable and that *Crosslinx* in particular features a much more complex contractual arrangement with clearer indemnification language.

[17] This lease was not drafted with great clarity. The key issue is whether the indemnification provision and other terms in the lease that provide that the tenant is responsible for certain damage arising from its conduct were intended to displace the assumption that would otherwise flow from the tenant contributing to the landlord's fire insurance that the risk of loss by fire would be borne by the landlord.

[18] I agree with the plaintiff that the lease must be read as a whole, but I accept the position of the defendant that the provisions on which the plaintiff relies do not reflect an intention that the tenant should not receive the full benefit of insurance to which it contributed. Unlike the lease in *Royal Host*, the indemnity provision in this lease says nothing to indicate that it operates notwithstanding the contribution of the tenant to the landlord's insurance.

[19] As the defendant observes, the lease does not expressly require the landlord to take out any particular form of insurance. There is accordingly no inconsistency between the tenant having the full benefit of any insurance paid for by additional rent, and the provisions in the lease holding the tenant responsible for some costs or damages including those caused by the tenant's negligence. In my view, the most sensible reading of the lease as a whole is that those provisions capture non-insured loss that may be suffered by the landlord, and do not capture loss compensated by insurance to which the tenant contributed. I would not conclude from the language chosen by the parties that they intended the tenant's liability to exist even in situations where the tenant contributed proportionately to insurance coverage and the insurer is bringing a subrogated claim.

[20] Accepting that this lease is not free of ambiguity on this issue, I find that the interpretation advanced by the defendant is most consistent with the lease read as a whole. I would hold that the subrogated action is barred by the lease.

[21] I thank both counsel for their efficient and persuasive submissions. If the parties cannot agree on costs, the defendant may make brief submissions within two weeks of the date of this judgment, and the plaintiff may respond within a further two weeks.

Dineen J.

Date: May 8, 2023