

**CITATION:** Gabe Clothing v. Centura Real Estate Corp., 2023 ONSC 2790  
**COURT FILE NO.:** CV-23-00696511-0000  
**DATE:** 20230510

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** GABE CLOTHING DESIGNS & PRODUCTIONS LTD., Plaintiff

– and –

CENTURA REAL ESTATE CORP., Defendant

**BEFORE:** Justice E.M. Morgan

**COUNSEL:** *Fabian Otto*, for the Plaintiff

*Robert Macdonald and Alexander Evangelista*, for the Defendant

**HEARD:** May 9, 2023

**MOTION FOR INTERLOCUTORY INJUNCTION**

[1] The Plaintiff is a clothing manufacturer that leases premises at 101 Alexdon Road, Unit A, Toronto (the “Premises”), pursuant to a commercial lease entered into in August 2017 (the “Original Lease”), as renewed on June 6, 2022 (the “Renewed Lease”), and whose term will end in November 2027. The Defendant is the owner of the premises and the landlord under the Original Lease as well as under the Renewed Lease.

[2] The Plaintiff moves for an interlocutory injunction preventing the Defendant from terminating the tenancy and repossessing the Premises.

[3] The Plaintiff has what can fairly be called a litany of complaints. First and foremost, it states that the square footage of the Premises does not quite measure to the size the Defendant said it would be at the outset of the tenancy in 2017. The Premises was described as being “*approximately 25,230 square feet*” [emphasis added], and the Plaintiff was given an opportunity to measure it before signing the lease. The Plaintiff did not take those measurements, but accepted the lease with monthly rent based on the approximate rather than a precisely measured square footage. The Plaintiff paid rent during the five-year term of the Original Lease without raising any question about the square footage.

[4] The Renewed Lease signed June 6, 2022 sets out the renewal term and specifies the amount of rent payable each month, with several escalations up until its termination on November 30, 2027. The first period, for example, states: “December 1, 2022 to November 30, 2024 at the rate

of \$8.25 per square foot, Net, Net. Annually \$204,147.50, Monthly \$17,345.63.” Again, the Plaintiff took no issue with the monthly rental amounts and agreed to the Renewed Lease. It is in the record and is signed by both parties.

[5] Several months following the signing of the Renewed Lease, on August 25, 2022, the Plaintiff wrote to the Defendant and for the first time stated that it takes issue with the amount of square footage in the Premises. The Defendant responded by offering to measure the Premises, following which it offered to reduce the square footage on which the rent is based to 24,819 square feet. Defendant’s counsel explains that the difference in square footage between the approximation of 25,230 square feet at the outset of the tenancy and the measurement of 24,891 five years later at its renewal has to do with where the demising wall for the premises was ultimately placed.

[6] The Plaintiff did not accept this new measurement and continued to insist that the square footage is somewhat smaller than even the new measurement. Accordingly, the negotiations to potentially amend the Renewed Lease ended inconclusively and the Renewed Lease remains in force. It should be noted that the Plaintiff does not complain, and has never complained, that the Premises are too small. In fact, it claims that the Premises is not only suitable for its needs but necessary for its business. The Plaintiff’s entire point is that the approximate square footage which it had chosen not to verify are somewhat less than what the Defendant says it is.

[7] The Plaintiff also has had complaints over time about some leaks in the roof, issues with the door to the Hydro service room, problems with the HVAC system, etc. All of those issues are beyond the framework of what has been scheduled as a short motion. They will doubtless have to be canvassed at trial.

[8] What is certain about the relationship between the parties, however, is that the Plaintiff is in default of rent. Indeed, it has a long history of non-payment and partial payment of rent owing. Plaintiff’s counsel explains that this is due to the various disputes that the Plaintiff has with the Defendant – leaky roof, HVAC repairs, Hydro room door problems, etc.

[9] At the end of April 2023, the Plaintiff owed the Defendant rental arrears in the amount of \$87,323.95. On May 1, 2023 – i.e. last week – another month’s rent became due and payable. The arrears now comes to over \$100,000. The Defendant has issued seven notices of default since January 2023, and the Plaintiff has made partial payments, but the ongoing default has not been cured.

[10] As Plaintiff’s counsel explains it, the Plaintiff has actually been paying the rent each month, but it has reduced the amount that it says is owing based on its contention that the square footage of the Premises is somewhat smaller than was represented to then at the outset. With this in mind, the Defendant has not been accepting these partial payments and has returned the cheques to the Plaintiff.

[11] Clause 3.1 of the Original Lease, as reincorporated by the Renewed Lease, says explicitly that rent is due on a monthly basis “without any prior demand thereof and without any deduction, abatement, or set-off whatsoever”. Accordingly, under the terms of the tenancy which bind the Plaintiff, the rent is in arrears and the Plaintiff/tenant is in default.

[12] I divert briefly to observe that the Plaintiff's deponent took, during the course of his cross-examination, the awkward position that the Renewed Lease is not enforceable because it was signed late. That is, the Renewed Lease, which takes the form of a letter agreement, was written in early May 2022 and was presented to the Plaintiff as being open for consideration until May 28, 2022, but was only signed by the Plaintiff on June 6, 2022. The Plaintiff's deponent came up with this explanation as a form of "gotcha" argument during cross-examination.

[13] Along these lines, I also note that in paragraph 9 of the Statement of Claim the Plaintiff takes the position that the Original Lease has expired. The Plaintiff also takes the further position that the renewal terms – specifically the square footage and rent – are still under negotiation. As Plaintiff's counsel puts it at paragraphs 43-44 of his factum, the Plaintiff is "'stuck' on their request to state and accept the actual square footage". Although Plaintiff's counsel does not say it in precisely these terms, the point of being "stuck" is that the Plaintiff sees the negotiations for a renewal term of the lease as being inconclusive thus far.

[14] As Defendant's counsel points out, it is hard to take this argument seriously. After all, if the Renewed Lease is not in force, then the term of the tenancy has not been renewed.

[15] Both parties agree that the term under the Original Lease has expired. If there is no renewal in place then the Plaintiff is a monthly tenant without the protection of any lease at all. In that case, the Defendant can terminate the Plaintiff's monthly tenancy on 30 days' notice and is under no obligation to renew that tenancy. There would be no serious issue to be tried here and no conceivable grounds for an injunction by the Plaintiff as there would be no term of lease to preserve.

[16] In any case, assuming that the Renewed Lease is in force - as stated, it is signed and reflects a meeting of the minds at the time it was signed – and given that the Plaintiff is still a tenant of the Premises, the rent has been improperly abated. The Plaintiff is therefore in default. Under the terms of the Original Lease and Renewed Lease, there is no serious issue to be tried.

[17] For more than a year, the Plaintiff has consistently been in default of its obligation under the lease to pay rent. Instead of curing that default, the Plaintiff has opted to start a lawsuit with an interlocutory injunction in order to put off any full payment until a trial date can be arranged years from now.

[18] While the Plaintiff may or may not turn out to be justified in its many complaints about the Premises, it is axiomatic that under a commercial lease the tenant must pay rent in full. If not, the landlord is at liberty to exercise its remedies.

[19] In *1670672 Ontario v. Thunder Bay (VI) Newco*, 2010 ONSC 314, a case raising facts similar to those here, the court refused to grant an injunction to restrain a landlord from taking possession of a leased premises because of the tenant's longstanding arrears of rent. At para 28 of

that decision, the court articulated the problem succinctly and accurately, indicating that the injunction motion was, in effect, a negotiation strategy by the tenant:

The sustained refusal of the tenants to pay rent while continuing to profit from the restaurants suggests an attempt to use the court to extract terms of tenancy that were not available to them through negotiation.

[20] The court found that there was no serious issue to be tried given that the tenant was in default of its primary obligation to pay rent. Whatever else is in dispute between the two parties, the Plaintiff's obligation to pay rent, in full, is crystal clear. If the Plaintiff as tenant has a complaint with the Defendant as landlord, the Plaintiff's route is to pay first and sue later, not the other way around.

[21] The Plaintiff does not plead relief from forfeiture and, in any case, there would be no grounds for that kind of equitable relief. What the Plaintiff says is that it runs its business in the Premises and will suffer if it has to move. But, of course, that is true of every commercial lease; it does not excuse non-payment of rent, regardless of whether the square footage was or was not measured correctly at the outset of the tenancy.

[22] In addition, there is no evidence in the record before me that the Plaintiff will suffer irreparable harm if the Defendant is permitted to enforce its rights as landlord. The Plaintiff has a damages claim that it will be free to take to trial. There is nothing in the record to suggest that the Premises are special or that the Plaintiff needs these Premises and no other in order to stay in business.

[23] This is, at bottom, a money dispute, to be resolved at trial. There are no grounds for an interlocutory injunction.

[24] The Plaintiff's motion is dismissed.

[25] Both sides' counsel have submitted Costs Outlines. Defendant's counsel points out that clause 17.3 of the Original Lease calls for "reasonable costs" on a "solicitor and client" basis in the event that legal fees are incurred for non-payment of rent.

[26] The Defendant seeks a total of \$39,434.38 on a substantial indemnity scale. For his part, counsel for the Plaintiff would seek \$23,643.86 if the Plaintiff were to be awarded costs on a substantial indemnity scale.

[27] Rules 57.01(1)(0.a) of the *Rules of Civil Procedure* directs me to keep in mind the principle of indemnity for the successful party. On the other hand, Rule 57.01(1)(0.b) authorizes me to also keep in mind the reasonable cost expectations of the unsuccessful party. As can be seen, there is a considerable gap between the two sides' costs figures.

[28] I view a compromise figure as being one that will be most reasonable, as required by clause 17.3, and that under the circumstances best embodies this combination of Rules. I will therefore exercise my discretion under section 131 of the *Courts of Justice Act* to award the successful party the mid-point between the two requests.

[29] Using round numbers for the sake of convenience, the Plaintiff shall pay the Defendant costs of this motion in the all-inclusive amount of \$31,500.

A handwritten signature in blue ink, appearing to read "Morgan J.", is centered on a light blue rectangular background.

**Date:** May 10, 2023

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**Morgan J.**