

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: CF/Realty Holdings Inc., CF Sherway Holdings I Rec Inc., CF Sherway Holdings II Rec Inc., and CF Sherway Holdings III Rec Inc., Plaintiffs

AND:

Shop With Safe Inc., Defendant

BEFORE: Justice A. P. Ramsay

COUNSEL: *Gasper Galati and Latisha Cohen*, for the Plaintiffs
The Defendant, Self-Represented

HEARD: In-writing

ENDORSEMENT

[1] The plaintiffs commenced this action against the defendant for alleged breach of two commercial leases in respect of premises located at CF Sherway Gardens in Toronto, Ontario and CF Masonville Place in London, Ontario. The plaintiffs are the landlords of the two shopping centres.

[2] The plaintiffs noted the defendant tenant in default and now move for an order for default judgment against the plaintiff, pursuant to r. 19.05 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[3] The total damages being claimed amount to \$2,050,634.37, plus judgment interest in the amount of \$192,974.11. The plaintiffs also seek their costs in the amount of \$7,500.

[4] The plaintiffs' claims include unliquidated damages, which must be proven. In *Elekta Ltd. v. Rodkin*, 2012 ONSC 2062, at para. 14, Justice Brown sets out the inquiry that must be undertaken by the court on a motion for default judgment. In my view, the deemed admissions which flow from the facts pleaded in the statement of claim do not entitle the plaintiff, as a matter of law, to judgment on the claim for damages.

[5] The plaintiff is entitled to damages for the entire unexpired period of the lease, but the quantum of damages is not simply the balance of unpaid rent for the remainder of the lease term.

The proper measure of damages for a terminated lease is the unpaid rent to the date of the breach, plus the present value of the unpaid rent for the unexpired period of the lease less the actual rental value of the premises for that period: *Morguard Corporation v. 6753060 Canada Inc.*, 2018 ONSC 4910, at para. 22, citing *Highway Properties Ltd. v. Kelly, Douglas & Co.*, [1971] S.C.R. 562, at p. 570; see also *Morguard Corporation v. Bramalea City Centre Equities*, 2013 ONSC 7213, at para. 34.

[6] In the result, the plaintiffs must adduce admissible evidence which, when combined with the deemed admissions, entitles the plaintiffs to judgment on the pleaded claim. At its highest, the defendant is deemed to admit that the CF Sherway Gardens landlord suffered damages for arrears of rent to the date of termination of \$23,178.88, the CF Lime Ridge Mall landlord suffered damages in the amount of \$11,386.45, and the CF Masonville Place landlord suffered damages in the amount of \$38,016.82. Each plaintiff claims that they have also suffered damages from the date of termination to the end of the lease. The plaintiffs also claim miscellaneous costs incurred because of the termination of the leases, with particulars to be provided prior to trial.

[7] On a motion for default judgment, the facts going to liability are deemed to be true but unliquidated damages cannot be said to be assumed: *Umlauf v. Umlauf* (2001), 53 O.R. (3d) 355 (C.A.), at para. 9. The plaintiffs must adduce evidence to support their claims. The court must make a judicial determination with respect to the quantum of damages to be awarded against the defendant in default: *Umlauf*, at paras. 8-9. The facts going to damages must be proven: *Umlauf*, at para. 9, *Beals v. Saldanha* (1998), 42 O.R. (3d) 127 (Gen. Div.), at p. 142, *aff'd* (2001) 54 O.R. (3d) 641 (C.A.), *rev'd* on other grounds 2003 SCC 72, [2003] 3 S.C.R. 416.

[8] In this case, the claim for damages is supported by evidence from Maria Iaquina-Pukas, the Senior Director, Finance Services for the Cadillac Fairview Corporation Limited. The company is not a party defendant. Ms. Iaquina-Pukas is a property manager.

[9] A significant portion of Ms. Iaquina-Pukas' affidavit is lifted from the statement of claim, almost verbatim. Ms. Iaquina-Pukas deposes that the plaintiffs claim damages against the defendant for the loss of the benefit of the leases from the date of termination to the end of the term of each lease. A bald statement that the landlord has suffered damages or has mitigated their damages is not evidence. Conclusions of law, and of mixed law and fact, are not to be deemed admitted under r. 19.02(1)(a) where a defendant has been noted in default: *Paul's Transport Inc v. Immediate Logistics Limited*, 2022 ONCA 573, 472 D.L.R. (4th) 359, at para. 77. In *Alfonso Izzo v. Tonnina Ministro*, 2020 ONSC 6703, Justice Sanfilippo noted, at para. 8, that the plaintiff must tender affidavit evidence in compliance with r. 19.06, notwithstanding r. 19.05(2).

[10] A determination of the 'actual rental value' of the premises will depend on whether the plaintiff has found a new tenant at the date of the motion for default judgment. If the plaintiff has already found another commercial tenant, then the 'actual rental value' is whatever the new tenant pays: *Morguard v. 6753060*, at para. 24. The court will decline to award damages for future rent where the plaintiff fails to tender evidence of actual rental value: *A.B. Investments Ltd. v. Khan*, 2011 ONSC 449; *Morguard*, 2018 ONSC 4910, at para. 32. The claim for damages must be proven on a civil standard of proof: *Fuda v. Conn*, [2009] O.J. No. 188 (S.C.).

[11] Ms. Iaquina-Pukas' deposes that a tenant has been secured for the CF Sherway Gardens premises. She states that it is a short-term lease. She deposes that the landlord has been unable to secure a replacement tenant for the entire unexpired term of the lease. The lease is set to expire on October 31, 2029. Where the plaintiff has not found a tenant at the motion date, the landlord must adduce evidence regarding the rental value of the premises as well as how long it would reasonably take to find a new tenant: *Morguard* 2018 at para. 28. The record before me does not include any evidence of the "actual rental value" of the premises.

[12] There is no evidence before me about steps the plaintiffs are taking to mitigate their damages, nor any evidence about how long it would take the plaintiffs, acting reasonably, to find a replacement tenant. I make the same comments regarding the evidence before me regarding the damages and mitigation efforts for the CF Masonville Place premises. The reasonableness of any mitigation efforts "is a question of fact to be decided on the basis of all relevant market circumstances": *100 Main Street East Ltd. v. W.B. Sullivan Construction Ltd.*, 20 O.R. (2d) 401 (C.A.). Once the plaintiff shows that they have taken some steps to mitigate their losses, the onus is on the defendant to show that those efforts were not reasonable: *Michaels v. Red Deer College*, [1976] S.C.R. 324.

[13] Much of the balance of Ms. Iaquina-Pukas' affidavit with respect to damages and mitigation is based on hearsay evidence and is not admissible evidence on a motion for judgment. There are other significant issues with her affidavit. Rule 39.01(4) permits evidence in an affidavit "for use on a motion [to] contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit". However, in many cases, Ms. Iaquina-Pukas does not identify the source of the information or the fact of her belief. While an affidavit on a motion may contain statements made on information and belief, the affidavit must specify the source of the information: *Cardenas v. Toronto (City)*, 2017 ONCA 237, 66 C.C.L.I. (5th) 179, at para. 10; r. 39.01(4).

[14] Rule 4.06(2) provides that an affidavit "shall be confined to the statement of facts within the personal knowledge of the deponent or to other evidence that the deponent could give if testifying as a witness in court, except where these rules provide otherwise". And, while r. 39.01(4) provides that evidence on a motion may be provided by way of information and belief, the jurisprudence mirrors the *Rules* and makes clear that the affidavit should be confined to facts which are not contentious. While hearsay is admissible on a motion, the closer the hearsay evidence is to being dispositive of an important issue, the more important it is that the evidence is not hearsay: *Jacobson v. Atlas Copco Canada Inc.*, 2015 ONSC 4, at paras. 27-35.

[15] In *Alfonso Izzo*, which was a motion for default judgment, Justice Sanfilippo stated, at para. 8:

The use of hearsay evidence on a motion is permitted by *Rule* 39.01(4). However, the inclusion of hearsay evidence on a central point in issue is not proper: *Beach v. Toronto Real Estate Board*, 2010 ONSC 30001, 97 C.P.C. (6th) 127, at para. 5; *Shah v. LG Chem, Ltd.*, 2015 ONSC 2628, 125 O.R.

(3d) 773, at para. 71; *Glasjam Investments Ltd. v. Freedman*, 2014 ONSC 3878, at para. 33.

[16] The plaintiffs' evidence on the question of mitigation is not only based on double hearsay, but also on statements by Ms. Iaquina-Pukas which contain few very details to assist the court in determining whether the plaintiffs have mitigated their damages. A bald statement that any of the plaintiffs has mitigated its damages is a conclusion of law. Whether or not the plaintiffs have mitigated their damages is a mixed question of fact and law which requires an evidentiary record. Though a plaintiff is entitled to damages for the entire unexpired period of the lease, the quantum of damages is not simply the balance of unpaid rent for the remainder of the lease term, as explained above.

[17] Ms. Iaquina-Pukas' affidavit also has a number of exhibits annexed to it, which contain hearsay evidence. The truth of the contents of documents cannot simply be proven by affixing them as exhibits to an affidavit: see *Katz v. Katz*, 2014 ONCA 606, 377 D.L.R. (4th) 264; *Sears v. Coristine*, 2020 ONSC 7968; and *Buffa v. Gauvin* (1994), 18 O.R. (3d) 725, at pp. 727-28.

Disposition

[18] For the reasons above, the motion for default judgment is dismissed, without prejudice to the plaintiffs renewing their motion.

Date: September 28, 2026

Justice A. P. Ramsay