

Commercial Leasing Bulletin:

Watch Your Step! Lease Termination Pitfalls

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By: [Ian Cantor](#) - [Commercial Leasing Group](#) – Minden Gross LLP

As many commercial landlords and tenants know, a tenant whose lease has been terminated for non-payment of rent may apply to the court for relief from forfeiture to effectively reinstate the lease. On the application, the court will balance various factors to determine if the tenant is deserving of relief and, if so, on what terms.

In many cases, there is limited risk for the landlord to oppose the application. Even if the lease is reinstated, the court will typically impose terms on the tenant that will inhibit further breaches and will often require the tenant to pay the landlord's legal costs, given that it was the tenant's misconduct that resulted in the matter being before the court.

However, what might be less appreciated is that, on many tenant court applications that follow a termination, the court never needs to consider relief from forfeiture to decide in the tenant's favour because the landlord has made a misstep in its termination process, rendering the termination invalid in the first place. In those cases, there is no valid forfeiture from which relief needs to be granted and it is the landlord, rather than the tenant, that is often on the defensive.

The Second Cup decision

[*The Second Cup Ltd. v. 2410077 Ontario Inc.*](#) case is a recent example where a landlord's purported termination of a lease was held invalid with significant adverse consequences to the landlord. In this Ontario Superior Court decision, the tenant was in arrears of rent; the landlord had issued a default letter; and, when full payment was not made, the landlord proceeded to lock out the tenant and post a termination notice.

The tenant brought an emergency application to the court to have the lease reinstated. The court found that "the question of relief from forfeiture does not need to be decided" because the termination itself was invalid. Among other things, the court held that, in sending a further letter requesting future rents **after** its default letter, the landlord had reaffirmed the landlord-tenant relationship and had waived its right to terminate the lease.

The court both reinstated the lease and ordered the landlord to pay the tenant's costs fixed at \$150,000 plus interest (!) which, despite a lease provision to the contrary, the tenant was permitted to set off against rent.

Landlord missteps

The *Second Cup* decision is but one recent example where a landlord termination misstep has found itself on the wrong side of a court decision. Here is a non-exhaustive list of circumstances where there is a significant risk of a landlord's termination for non-payment of rent being found by a court to be invalid:

1. The landlord makes a statement to the tenant that the tenant reasonably relies upon as extending the time for payment of rent;
2. The landlord demands or receives future rent after the default for which the landlord has terminated;
3. The landlord makes a rental arrears miscalculation, or other material error, in its notice of default;
4. The landlord fails to serve its default notice in accordance with the lease notice provisions;
5. The landlord purports to terminate prior to the time allowed in the lease for the tenant to cure the default by making payment;
6. The landlord gives a termination notice that demands possession at a future date;
7. The landlord purports to terminate whilst the tenant is protected by a Covid eviction moratorium, such as under the Canadian Emergency Rent Subsidy (CERS) program.

Conclusion

A commercial landlord's self-help right to terminate for non-payment of rent is a serious one. To avoid putting the validity of a termination at serious risk, a landlord must comply with its notice and related obligations under the lease and not take any steps that could be deemed as reaffirming the tenancy. If the termination is found to be valid, then, and only then, will it be appropriate for the court to consider the tenant's request for relief from forfeiture.

We will continue to provide updates on commercial leasing topics of interest. If you have any questions or would like to obtain legal advice on any leasing issues or litigation, please contact any lawyer in our Commercial Leasing Group.



Commercial Leasing Group

Stephen Posen

Chair, Commercial Leasing Group
e: sposed@mindengross.com
p: (416) 369-4103

Ian Cantor

Partner, Litigation Group
e: icantor@mindengross.com
p: (416) 369-4314

Christina Kobi

Partner, Commercial Leasing Group
e: ckobi@mindengross.com
p: (416) 369-4154

Benjamin Radcliffe

Partner, Commercial Leasing Group
e: bradcliffe@mindengross.com
p: (416) 369-4112

Steven Birken

Associate, Commercial Leasing Group
e: sbirken@mindengross.com
p: (416) 369-4129

Alyssa Girardi

Associate, Commercial Leasing Group
e: agirardi@mindengross.com
p: (416) 369-4104

Catherine Francis

Partner, Litigation Group
e: cfrancis@mindengross.com
p: (416) 369-4137

Michael Horowitz

Partner, Commercial Leasing Group
e: mhorowitz@mindengross.com
p: (416) 369-4121

Boris Zayachkowski

Partner, Commercial Leasing Group
e: bzayachkowski@mindengross.com
p: (416) 369-4117

Melodie Eng

Partner, Commercial Leasing Group
e: meng@mindengross.com
p: (416) 369-4161

Leonidas Mylonopoulos

Associate, Commercial Leasing Group
e: lmylonopoulos@mindengross.com
p: (416) 369-4324

Benji Wiseman

Associate, Commercial Leasing Group
e: bwiseman@mindengross.com
p: (416) 369-4114

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