

CANADA / JUDGMENT

Emerald Enterprises Ltd. v. 1026900 B.C. Ltd.

2025 BCSC 444

COURT

Supreme Court of British Columbia

DECIDED

25 February 2025

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2025 BCSC 444 Emerald Enterprises Ltd. v. 1026900 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Emerald Enterprises Ltd. v. 1026900 B.C. Ltd.,

2025 BCSC 444

Date: 20250225

Docket: S50680

Registry: Penticton

Between:

Emerald Enterprises Ltd.,

Joseph Vunak and Nada Vunak

Petitioners

And

1026900 B.C. Ltd and Jason Stutzke

Respondents

Before: The Honourable Justice Layton

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioners:

R. Okayama

Appearing on his own behalf and on behalf of the Respondent 1026900 B.C. Ltd.:

J. Stutzke

Place and Date of Hearing:

Penticton, B.C.

February 24, 2025

Place and Date of Judgment:

Penticton, B.C.

February 25, 2025

- [1] THE COURT: This is a petition by the petitioners, brought under s. 21 of the Commercial Tenancy Act, R.S.B.C. 1996, c. 57, for an order that the respondents wrongfully hold particular lands against the right of the petitioners, and for the issuance of a writ of possession placing the petitioners in possession of those lands.
- [2] The respondent Mr. Stutzke opposes the application on his own behalf and also on behalf of the other respondent, 1206900 B.C. Ltd.

Relevant Background

- [3] The petitioners Nada Vunak and Joseph Vunak are building owners of the commercial property located at 2490 Government Street, Penticton ("the Lands").
- [4] Attached to the building on the Lands, and on the Lands as well, are two residential units. The Vunaks live fulltime as the residents in one of the units, while the other unit is currently under renovation and not occupied.
- [5] The Vunaks own the petitioner Emerald Enterprises Ltd. ("Emerald"), a company incorporated in British Columbia.
- [6] For about 30 years, the Vunaks owned and operated a cabinet company called Medallion Kitchen Cabinets Manufacturing Number 1 Ltd. ("MKCM").
- [7] Mr. Stutzke owns various companies involved in home construction and is the sole shareholder of the respondent 1206900 B.C. Ltd.
- [8] On July 8, 2020, the Vunaks entered into a written share purchase agreement with Mr. Stutzke, pursuant to which Mr. Stutzke purchased their shares in MKCM. This agreement provided that Mr. Stutzke would be able to lease the Lands for a five-year term for \$10,000 per month plus GST, commencing November 1, 2020.

- [9] Also on July 8, 2020, the petitioners and respondents entered into a written amended share purchase agreement for Emerald to lease the Lands to 1206900 B.C. Ltd. The lease commenced on November 1, 2020, for a five-year term, and the rent was \$10,000 per month plus tax. Mr. Stutzke was jointly and severally liable to perform the covenants and agreements contained in this amended share purchase agreement.
- [10] The respondents failed to pay rent on time in November and December 2024. However, they were able to pay the overdue rent late after a demand letter from counsel for the petitioners.
- [11] The respondents again failed to pay rent on time for January 2025, when a cheque they provided over a week late bounced and could therefore not be cashed by the petitioners.
- [12] On January 20, 2025, counsel for the petitioners therefore sent a letter to counsel for the respondents providing notice to quit the lease for the Lands and to terminate the lease.
- [13] On January 22, 2025, counsel for the petitioners sent a letter to counsel for the respondents demanding vacant possession of the Lands by February 5, 2025.
- [14] Despite receiving the notice to quit and demand for vacant possession, the respondents remain in possession of the Lands.
- [15] In her affidavit made February 10, 2025, Nada Vunak states that, from her residence next to the Lands, she has observed that since mid-February the bay doors in the back of the commercial building have generally been shuttered with cardboard. The small entrance door has been covered with material that prevents people from seeing inside, and there are generally no vehicles and very few people coming in and out of the building.
- [16] Ms. Vunak also states that she has observed that the dust collector and air compressor used in MKCM's cabinet making business do not appear to have been running since mid or late January, which suggests the business is engaged in little if any cabinet-making activity.
- [17] Ms. Vunak further states that the respondents have been responsible for paying all utility payments for the Lands for the entire term of the lease, but owe a substantial balance to the City of Penticton for outstanding utility bills, in excess of \$8,300 as of January 21, 2025. The City sent her a letter stating that this amount will eventually be charged to the Lands.
- [18] The City also informed Ms. Vunak that, as a result of these outstanding amounts, the power to the Lands would be disconnected on February 5, 2025. Ms. Vunak believes this has occurred, which she says raises a concern that pipes in the building could freeze if temperatures decrease significantly.
- [19] On February 12, 2025, the petitioners filed a requisition that this matter be heard on short notice, and on February 13, Associate Judge Schwartz directed that it be heard in chambers on February 24.

[20] On February 14, 2025, the petition and supporting materials, as well as the February 12 requisition and the February 13 registry notice of hearing, were served on the respondents in accordance with s. 20 of the Commercial Tenancy Act.

[21] On February 21, 2025, the respondents filed a petition response and an affidavit made by Mr. Stutzke, the contents of which I will address later in my reasons.

Relevant Provisions of Commercial Tenancy Act

[22] Sections 18 to 24 of the Commercial Tenancy Act state as follows:

Landlord may apply to Supreme Court

18 (1) In case a tenant, after the lease or right of occupation, whether created in writing or verbally, has expired, or been determined, either by the landlord or by the tenant, by a notice to quit or notice under the lease or agreement, or has been determined by any other act whereby a tenancy or right of occupancy may be determined or put an end to, wrongfully refuses, on written demand, to go out of possession of the leased land, or the land that the tenant has been permitted to occupy, the landlord may apply to the Supreme Court

- (a) setting out in an affidavit the terms of the lease or right of occupation, if verbal;
 - (b) annexing a copy of the instrument creating or containing the lease or right of occupation, if in writing;
 - (c) if a copy cannot be annexed by reason of it being mislaid, lost or destroyed, or of being in possession of the tenant, or from any other cause, then annexing a statement setting forth the terms of the lease or occupation, and the reason why a copy cannot be annexed;
 - (d) annexing a copy of the demand made for delivering possession, stating the refusal of the tenant to go out of possession, and the reasons given for the refusal, if any; and
 - (e) any explanation in regard to the refusal.
- (2) This section extends and shall be construed to apply to tenancies from week to week, from month to month, from year to year, and tenancies at will, as well as to all other terms, tenancies, holdings or occupations.
- (3) An application under subsection (1) shall be commenced at a registry of the Supreme Court located in the judicial district where the land is situated.

Court to appoint time and place of inquiry, etc.

19 If after reading the affidavit it appears to the court that the tenant wrongfully holds and that the landlord is entitled to possession, the court shall appoint a time and place to inquire and determine whether the person complained of was a tenant of the complainant for a term or period which has expired, or has been determined by a notice to quit or otherwise, whether the tenant holds possession against the right of the landlord and whether the tenant has wrongfully refused to go out of possession, having no right to continue in possession.

Notice in writing of inquiry

20 (1) Notice in writing of the time and place appointed under section 19 shall be served by the landlord on the tenant or left at the tenant's residence or place of business at least 5 days before the day appointed, if not more than 32 km from the tenant's residence or place of business and one day in addition for every 32 km above the first 32, reckoning any broken number above the first 32 as 32 km.

- (2) A copy of the affidavit on which the appointment was obtained, and of the papers attached to it shall be annexed to the notice.

Court to issue writ of possession

21 (1) If at the time and place appointed under section 19 the tenant, having been notified as provided, fails to appear, the court, if it appears to it that the tenant wrongfully holds, may order a writ to issue to the sheriff, commanding the sheriff to place the landlord in possession of the premises in question.

- (2) If the tenant appears at the time and place, the court shall, in a summary manner, hear the parties, examine the matter, administer an oath or affirmation to the witnesses adduced by either party, and examine them.
- (3) If after the hearing and examination it appears to the court that the case is clearly one coming under the true intent and meaning of section 18, and that the tenant wrongfully holds against the right of the landlord, then it shall order the issue of the writ under subsection (1) which may be in the words or to the effect of the form in the Schedule; otherwise it shall dismiss the case, and the proceedings shall form part of the records of the Supreme Court.

Other rights and remedies of landlords not prejudiced

22 Sections 18 to 21 do not prejudice or affect any other right or right of action or remedy that landlords may possess in any of the cases provided for.

Style of cause

23 Proceedings under sections 18 to 21 shall be commenced at a registry of the Supreme Court located in the judicial district where the land is situated.

Service

24 Service of all papers and proceedings under sections 18 to 21 shall be properly effected if made as required by law in respect of writs and other proceedings in actions for the recovery of land.

[23] Reliance on these provisions of the Commercial Tenancy Act requires strict compliance by landlords seeking to obtain possession. See *Allen v. Khinda*, 2022 BCSC 815 at paras. 32-33.

[24] For example, the written request for vacant possession must be made separately and after the notice to quit. See *Allen* at paras. 31, 40.

Analysis

[25] The hearing before me is for the purpose of determining whether to issue a writ of possession pursuant to s. 21 of the Commercial Tenancy Act.

[26] The respondents have been notified of this hearing as required, and have appeared to contest the relief sought.

[27] Pursuant to s. 21(2) of the Commercial Tenancy Act, I have therefore conducted a hearing in a summary manner, during which I heard the parties, examined the matter, and considered any evidence provided by the parties, for the purpose of determining whether the respondents wrongfully hold the Lands and, if so, whether a writ should issue to cause the petitioners to have possession of the Lands.

[28] Having conducted this inquiry, I have come to the following conclusions.

[29] First, the tenancy has been determined by the landlord by the notice to quit served on the respondents on January 20, 2025.

[30] Second, on January 22, 2025 the respondents were served with a demand for vacant possession of the Lands by February 5, 2025.

[31] Third, the respondents have not complied with the landlord's demand for vacant possession.

[32] Fourth, and consequently, the respondents wrongfully hold possession of the Lands against the right of the petitioners, and have wrongfully refused to go out of possession, having no right to continuing possession.

[33] The respondents do not appear to take any issue with the first three of these findings based on the evidence.

[34] Rather, the respondents say the petitioners have interfered with their business, so as to prevent them from receiving funds that would have been used to pay the rent and that, in any event, they should have until May 31, 2025, to vacate the premises, because moving their equipment any earlier will be a significant burden.

[35] The respondents' argument in essence amounts to reliance on s. 24 of the Law and Equity Act, R.S.B.C. 1996, c. 253, which provides that:

24 The court may relieve against all penalties and forfeitures, and in granting the relief may impose any terms as to costs, expenses, damages, compensations and all other matters that the court thinks fit.

[36] The application of s. 24 in the context of a proceeding under s. 21 of the Commercial Tenancy Act is discussed in *Wong v. Magnuson*, 2020 BCSC 1752. The facts there are somewhat similar to those in this case, in that the tenant did not dispute that the landlord had met the conditions in s. 21 of the Commercial Tenancy Act, but sought relief from forfeiture, at least for a period of six months, pursuant to s. 24 of the Law and Equity Act.

[37] It is in this context that at, paras. 23 and 24 of his reasons in *Wong*, Justice Majawa discussed the principles underlying s. 24, and the factors governing its application:

[23] Relief against forfeiture under s. 24 is an equitable remedy. The respondents urge me to exercise my discretion to grant them relief from forfeiture, to reinstate the lease, and adjourn these proceedings for six months while they pursue the necessary licences.

[24] The factors to consider under s. 24 include the conduct of the respondents, the gravity of the breaches, the disparity between the value of the property forfeited, and the damage caused by the breach: *Saskatchewan River Bungalows v. Maritime Life Assurance Co*, 1994 CanLII 100 (SCC), [1994] 2 S.C.R. 490. The party seeking relief from forfeiture should come to the court with "clean hands" and must also disclose all relevant matters to the court: *600443 B.C. Ltd. v. XJ Motors Ltd.*, 2011 BCSC 1144 at 34 and 36.

[38] In my view, an application of these factors does not justify granting the respondents the relief from forfeiture that they request.

[39] I say this for several reasons.

[40] To begin with, the breaches of the lease are serious, the respondents having missed rent payments totalling \$21,000 for January and February 2025.

[41] Furthermore, based on the evidence, I find there is no real likelihood the respondents will be able to catch up on these missed rental payments, let alone make rental payments in the future. Allowing the respondents to retain possession of the Lands until May 31, 2025 is thus highly likely to result in the petitioners losing a total of five months' rent, and thus over \$50,000.

[42] The respondents say the petitioners have interfered with their business so as to adversely impact their ability to pay the rent, but I do not accept this contention.

[43] For one thing, it is based on hearsay evidence from a manager or senior employee at MKCM. But altogether apart from this hearsay problem, and more importantly, this evidence lacks detail sufficient to even tenuously connect the petitioners to any improper interference.

- [44] Regardless, Mr. Stutzke's affidavit states that a number of key employees left MKCM in mid-September 2024, apparently after committing theft or fraud that cost the company over \$250,000, thereby creating a "dire" situation. There is no suggestion in the evidence that this dire situation is the responsibility of the petitioners.
- [45] Plus, reply evidence filed by the petitioners shows that Mr. Stutzke and his companies are involved in 10 court actions filed since the start of 2024, one of which led to a court-ordered sale of a mortgaged property in a proceeding where Mr. Stutzke and one or more of his companies were petition respondents. Mr. Stutzke's affidavit does not disclose these court actions, which he conceded in his oral submissions had contributed to his inability to pay rent. This failure to disclose suggests a lack of the "clean hands" that, as Justice Majawa stated in Wong, are necessary to justify relief under s. 24 of the Law and Equity Act.
- [46] The dire financial straits faced by the respondents are further exemplified by their failure to keep up on utility payments for the Lands.
- [47] In his affidavit, Mr. Stutzke implies that this problem arose because the postal strike resulted in the outstanding utility bills not coming to the respondents' notice, and also because the bills were being emailed to a former MKCM employee. These explanations seem rather unlikely but, if true, one would expect the respondents to have promptly remedied the problem. Mr. Stutzke's account of what happened after MKCM contacted the City of Penticton in an attempt to do so is difficult to understand, but in any event did not meet with any sustained success. Ultimately, MKCM's failure to solve the utilities issue is yet another indication of the respondents' overwhelming financial problems.
- [48] Other arguments raised in Mr. Stutzke's affidavit relate to a dispute between the petitioners regarding the share purchase agreement, which I understand is the subject of a separate court proceeding. But this share agreement dispute has not been linked in the evidence to the respondents' failure to pay the rent in any way that would support equitable relief.
- [49] Mr. Stutzke's affidavit further alleges that the petitioners' daughter has been harassing him and MKCM in a way that is damaging to their business. But the evidence on this point is not sufficient to establish any culpability on the part of the petitioners, even assuming the alleged harassment has had this impact.
- [50] To his credit, Mr. Stutzke candidly admitted in oral submissions that, based on the problems he and 1206900 B.C. Ltd. encountered in paying the rent in November and December 2024, and their failure to pay the rent in January and February 2025, it is understandable that the petitioners would worry that the rent will not be paid in the future if the respondents are permitted to remain in possession.

- [51] However, Mr. Stutzke was unable to commit to paying the arrears in rent in the near term or to providing security to counter the concern of additional missed payments between now and May 2025, which is when he says the respondents will leave the Lands on their own accord. I am therefore unable to see what terms I could impose in conjunction with relief from forfeiture that would be fair and equitable in the circumstances. See Wong at para. 39.
- [52] Finally, Mr. Stutzke argued that at least two months of continued possession are needed to permit him to remove his equipment from the Lands, because doing so will be a complicated and time-consuming process. For example, in oral submissions he explained that the roof must be taken off a tower to extract the dust-collection system.
- [53] I accept that moving items out of the Lands may well be a major task. But the petitioners should not be required to forego significant rental amounts during that period of time. In this regard, the equities favour them, not the respondents.
- [54] In my view, the respondents should therefore have no more than 14 days from today to deliver vacant possession of the Lands to the petitioners, and the petitioners are entitled to a writ of possession on those terms.

Conclusion

- [55] For the reasons given, I am making an order pursuant to ss. 18, 19, and 21 of the Commercial Tenancy Act that the respondents wrongfully hold the Lands against the right of the petitioners, and that the petitioners are entitled to possession of the Lands.
- [56] Furthermore, under s. 21 of the Commercial Tenancy Act, I am issuing a writ of possession, pursuant to which the respondents must deliver up vacant possession of the Lands no later than 4:00 p.m. on Tuesday, March 11, 2025.
- [57] The petitioners will have their costs of this application.

"D. Layton J."

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