SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF

No: 500-17-101946-187

DATE: September 6, 2018

BEFORE: THE HONOURABLE PETER KALICHMAN, J.S.C.

IMMEUBLES ESPOSITO INC.
Petitioner
v.
2863-4129 QUÉBEC INC.
Defendant
and
OFFICIER DE LA PUBLICITÉ DES DROITS DE LA CIRCONSCRIPTION FONCIÈRE DE MONTRÉAL
Mis en cause

JUDGMENT
(Interlocutory injunction and safeguard order)

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[1] Immeuble Esposito Inc. (the Landlord) seeks an interlocutory injunction to evict 2863-4129 Quebec Inc. (the Tenant) from the leased premises. At the same time, the Tenant seeks the issuance of a safeguard order to preserve its right to occupy the leased premises until final judgment.

[2] The Tenant has operated a daycare center in the leased premises since 1997. The initial five-year lease was renewed three times and was set to expire on June 30, 2017.[1]

[3] In the summer and fall of 2016, the parties met several times to discuss the terms of a possible renewal or of a new lease.[2]

[4] On October 27, 2016, the Landlord sent a letter to the Tenant indicating that it was preparing a "draft of the lease that both parties have agreed to in principal for the renewal terms of the Lease beginning July 1st, 2017 and ending June 30th, 2022".[3]

[5] That same day, the Tenant forwarded a copy of the Landlord's letter to the *Ministère de la famille et des aînés du Québec* as part of its request for a renewal of its daycare licence.[4]

[6] When the Landlord subsequently sent the Tenant a draft lease on November 15, 2016, a disagreement ensued which is at the heart of this litigation.[5]

[7] The Landlord wishes to include a clause that would allow it to terminate the lease before the expiry of the term should it receive an offer to purchase the land on which the leased premises are situated (the Land). The Landlord claims that this clause was discussed and agreed to by the Tenant in the meetings which took place in the summer and fall of 2016.

[8] The Tenant denies that such a clause was ever discussed much less agreed to.

[9] After the draft lease was received, the parties discussed their differing views at a meeting which took place on December 7, 2016. As far as the Landlord was concerned, it was clear after that meeting that no lease could be agreed to and that the Tenant would therefore be required to vacate the leased premises by June 30, 2017. The Tenant, however, understood that the Landlord would prepare a new lease that reflected what they had agreed to without the right to early termination.

[10] It was only in May of 2017 that the issue resurfaced and the parties exchanged letters outlining their differing views.[6]

[11] On May 29, 2017, the Landlord received an offer to purchase the land.[7]

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1 Exhibits P-3 and P-4.
2 The parties disagree over which was actually discussed.
3 Exhibit P-6.
4 Exhibit D-3.
5 Exhibit P-7.
6 Exhibits P-9, P-10 and P-11.
7 Exhibit P-22.

[12] The Court must decide whether the Landlord is entitled to an interlocutory injunction and whether the tenant is entitled to a safeguard order.

The interlocutory injunction

[13] The Supreme Court recently clarified the test for the issuance of a mandatory interlocutory injunction in *R. v. CBC*, a case that originated in Alberta.[8] Writing for the Court, Justice Brown set out the test as follows:

> [18] In sum, to obtain a mandatory interlocutory injunction, an applicant must meet a modified *RJR—MacDonald* test, which proceeds as follows:
>
> > (1) The applicant must demonstrate a strong *prima facie* case that it will succeed at trial. This entails showing a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice;
> >
> > (2) The applicant must demonstrate that irreparable harm will result if the relief is not granted; and
> >
> > (3) The applicant must show that the balance of convenience favours granting the injunction.

[14] The Supreme Court's decision in *CBC* has been applied several times in the Province of Quebec and will be applied here.[9]

[15] The conclusion sought by the Landlord is the same as what it seeks on the merits; the eviction of the Tenant. The Landlord argues that the test for the issuance of an interlocutory injunction applies no differently in such circumstances.

[16] The Court disagrees.

[17] The courts have recognized that when the conclusion sought by way of injunction is the same as what is sought on the merits, the assessment of the applicant's chances of success on the merits must be more demanding. The logic behind this position is evident; since the court's decision can likely not be undone by the final judgment, it must be all the more certain that the applicant's case on the merits is solid. Justice Gagnon in *Desjardins Sécurité financière, compagnie d'assurance-vie c. 9144-1220 Québec inc.*, described this approach in the following terms:

> [13] Le tribunal doit se montrer particulièrement prudent au stade de l'évaluation de l'apparence de droit, quand le sort de la requête en injonction interlocutoire

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8 [2018] SCC 5 (CanLII).

9 *Ville de Westmount c. KPH Turcot*, [2018] QCCS 2080; *Méthot c. Gamache-Gallant*, [2018] QCCS 995.

> scelle le sort ultime du litige. Il faut alors approfondir l'analyse des droits et obligations en cause. C'est le cas en l'espèce.[10]

[18] The Landlord has referred the Court to a number of decisions in which eviction was ordered by way of interim injunction.[11] It is clear from these decisions that the court was satisfied that the applicant's case on the merits was extremely solid. More particularly, it is clear that in each of these cases the court found no reasonable basis upon which to conclude that an agreement could be proven that would justify the tenant's continued occupation.

[19] That is not the case here.

[20] Neither party disputes that as a result of their meetings in the summer and fall of 2016, an agreement was reached for either a new lease or a renewal of the old lease. The Landlord's letter of October 27, 2016, attests to this fact.[12] The only issue on which they disagree is whether or not the Landlord was to have a right to terminate the lease prior to the expiry of the term in the event that the Land was sold.

[21] In their sworn declarations and in an examination on discovery, the Landlord's representatives contend that such a clause was clearly discussed and agreed to by the Tenant. They add that the Landlord had begun exploring the possibility of selling the Land and had determined that its value would be greatly enhanced by being able to offer it to a developer without the Tenant being in place. Consequently, they maintain that such a clause was essential to them.

[22] In her sworn declaration and examination on discovery, the Tenant's representative denies that the idea of the Landlord having a right to early termination was ever discussed. According to her, the first time the idea of adding such a clause was raised was when it was inserted in the November 15, 2016 draft lease.[13] She adds that she would never have agreed to such a clause because it would have made it impossible to obtain a daycare permit.

[23] The Landlord has not demonstrated that it has a strong *prima facie* case that it will succeed on the merits and certainly has not met an elevated threshold that would justify issuing an interlocutory injunction that mirrors the conclusions on the merits. Ultimately, the case will turn on the issue of credibility, which is best left to the trial judge. Consequently, the Landlord is not entitled to an interlocutory injunction.

[24] While it is not necessary to consider the other criteria for the issuance of an injunction, the Court will nonetheless briefly address each.

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10 [2015] QCCS 5126, par. 13. Voir aussi *Gravino* c. *Enerchem Transport inc.*, J.E. 98-1337 (C.A.).

11 *Compagnie W.W. Hôtels (Montréal) c. 2951-6572 Québec inc.*, 1995 CanLII 3822 (QC CS), *Gagné et al. c. Belley*, [2014] QCCS 4525, et *Turcotte c. Thirion*, [2015] QCCS 3112.

12 Exhibit P-6.

13 Exhibit P-7.

[25] The Court does not doubt that it is possible the Landlord will suffer a loss if it succeeds on the merits and is unable to obtain as high a price for the Land as it might today. However, such a loss does not constitute irreparable harm.

[26] As far as the balance of convenience is concerned, the Court finds that it favours the Tenant. If the injunction were issued, the Tenant would be forced to vacate the leased premises and to relocate the daycare with all the problems that such a move would entail, including a possible loss of clientele and difficulties in maintaining its permit. Conversely, if the injunction is not issued, the Landlord will possibly lose an opportunity to obtain a higher price for the Land but will continue to receive rent.

The safeguard order

[27] On its face, the order sought by the Tenant seems reasonable. It merely wants to ensure that the *status quo* is maintained until trial and to prevent the Landlord from interfering with its continued occupation of the leased premises.

[28] The principal problem with the Tenant's request is that it has failed to establish that an injunction is necessary. There is no allegation that the Landlord will take the law into its own hands while the case is pending before the Court. On the contrary, the Landlord's request for the issuance of an interlocutory injunction suggests that it respects the Court's authority.

[29] The Court's power to issue injunctions should only be exercised when there is a real threat that without such an order something will be done or not done, that will cause irreparable harm. In the present case, the concern is hypothetical. As a result, the Court will not grant the Tenant's request. Needless to say, should the situation change, the Court's view might change as well.

[30] While it is not necessary to examine the other applicable criteria, the Court adds that the Tenant's request is not urgent and, since there is no real threat to the *status quo*, it will suffer no irreparable harm if the injunction is not issued.

[31] Finally, given that both applications are dismissed, the Court will not grant costs to either side.

FOR THESE REASONS, THE COURT:

DISMISSES Plaintiff's request for an interlocutory injunction;

DISMISSES Defendant's modified application for a safeguard order;

WITHOUT legal costs.

PETER KALICHMAN, J.S.C.

Me Julien Poirier-Falardeau
Mercier Leduc s.e.n.c.r.l.
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Date of hearing: September 5, 2018