CITATION: 2316796 Ontario Inc, Chetti, 2016 ONSC 5216
COURT FILE NO.: CV-14-518681
DATE: 20160817

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
2316796 ONTARIO INC.	
	Applicant Tanya Walker, for the Applicant
— and —	
JOHN CHETTI	
	Respondent Alan Price, for the Respondent
	HEARD: February 9, 2016 and May 27, 2016

REASONS FOR JUDGMENT

M. D. FAIETA J.

INTRODUCTION

[l] The Applicant operated a restaurant on leased premises. Dusan Varga is the sole officer and director of the Applicant. The Respondent, John Chetti, is a part owner of another restaurant that operates in adjacent premises in the same building. Varga found that his restaurant business was not performing as well as he had hoped. Chetti sought to expand his restaurant or start a new venture by taking over the Applicant's premises by way of an assignment of lease and buying the assets of the Applicant's restaurant business for $125,000.

[2] Under the Agreement of Purchase and Sale ("APS"), the sale was to close on April 30, 2014; however, the parties only signed the APS on May 9, 2014. The sale was also conditional upon the delivery of the Landlord's consent to the assignment of the Applicant's lease, Awaiting receipt of the Landlord's consent, however, Varga closed his restaurant and gave Chetti keys to the premises in May 2014. Shortly thereafter, Chetti completed certain repairs to the premises.

[3] The Applicant alleges that Chetti agreed to pay rent for the premises pending the

Landlord's consent to the assignment. The Landlord's consent was obtained in September 2014 by way of a handwritten note. In that note, which Chetti signed, the Landlord provided a schedule for the rents to be paid, including rent owing for August and September 2014. Despite doing so, Chetti ultimately did not proceed with the purchase of the Applicant's assets and the assignment of the lease.

[4] Chetti submits that he is not liable for breach of the APS, as the Applicant failed to deliver an assignment of the lease by the APS's closing date and, in any case, the assignment of the lease was invalid. The Applicant seeks $125,000 for damages for breach of contract and $33,690.85 for renting the premises for the period from May 2014 until September 2014.

[5] To determine whether the Applicant delivered an assignment of the lease by the closing date and whether the assignment was valid, the following issues must be addressed:

(1) Should the APS be rectified to correct its closing date, given that the closing date provided in the Agreement elapsed before the date on which the APS was signed?

(2) Did Chetti waive strict compliance with the deadline for closing and the delivery of the assignment of lease?

(3) Did Chetti agree to pay interim rent for the premises to the Applicant?

(4) Did the Applicant deliver an assignment of lease as required by the APS?

(5) Did Chetti repudiate the APS?

[6] In answering these questions, I find as follows:

(1) The APS should be rectified to con•ect the closing date to June 9, 2014,

(2) Chetti cannot argue that the APS was invalid because the Landlord's consent was not provided by June 9, 2014. Chetti waived strict compliance with that deadline, which is demonstrated by his communication with both the Landlord and Varga. This waiver may also be inferred by Chetti's conduct.

(3) Chetti agreed to pay interim rent for the premises.

(4) The Applicant delivered the assignment to lease as required by the APS, Chetti cannot rely on the fact that the assignment was conditional upon August and September's rents being paid since Chetti was responsible for paying those rents.

(5) Because Chetti waived strict compliance with the closing date and because the assignment of the lease was valid, the APS between Chetti and Varga is binding. Chetti repudiated the APS by deciding not to complete ite

[7] I adjourned the hearing of this application in February 2016 in order to receive oral evidence directly from Varga and Chetti, given that the parties did not agree on all of the material

facts related to this dispute. Couniel for the parties agreed to an adjournment of the Application in order to have their clients testify. I remained seized of this Application. I did not require that the parties suffer the expense and delay of converting this Application to an action. These subsequent steps were a just, expeditious, and efficient procedural response, given the importance and complexity of the issues and the amounts involved in this proceeding.

[81 For the reasons described below, I award the Applicant damages in the amount of $ 129,338.17 plus interest and costs.

BACKGROUND

[9] The parties provided the following Agreed Statement of Facts:

1. From February 2012 May 2014, the Applicant/Plaintiff, 2316796 Ontario Inco, operated a restaurant business, known as Rakia Bar at 1402 Queen Street East Unit 8, Unit B, Toronto, Ontario (the "Premises"). The nature of the business is an Eastern European brandy bar.

2. The sole officer and director of the Applicant is Dusan Varga ("Varga"),

3. Rakia Bar leased the Premises from 1479830 Ontario Limited (the "Landlord") pursuant to an offer to lease executed on February 8, 2012 (the "Offer to Lease"), The Offer to Lease is the only lease agreement between Rakia Bar and the landlord. At all material times Lee Polydor ("Polydor") was the directing mind of the landlord.

4. The tenn of the Offer to Lease is from February 1 5, 2012 to February 28, 2017.

5. The Respondent/Defendant John Chetti ("Chetti") is a director and officer of 1695771 Ontario Ltd. which operates Queen Margarita Pizza ("QMP"). The natyre of the business of QMP is pizza and related Italiqn food. QMP operates pizza restaurants from three locations in the City of Toronto including 1402 Queen Street East. QMP is located in the same building above Rakia Bar.

6. QMP has operated from 1402 Queen Street East since 2009 and caused a five year lease to be executed at that time. The lease has since been reneyved.

7. Chetti met Varga in or around 2013/2014, when Varga first took possession of the Premises. They had a cordial relationship with each other.

8. In mid-April 2014, the parties staffed to communicate about Chetti purchasing the assets in the Premises and payment of that rent.

9. One reason why Chetti agreed to purchase the location is because QMP presently operates from the same plaza as the Premises.

10. All parties agree that the Purchase Agreement attached as Schedule A to this Agreement Statement of Facts, was executed by both parties in connection with

the purchase of the assets of Rakia Bar. The Plaintiff executed the Purchase Agreement as the seller and the Defendant executed the lease as buyer and indemnifier.

11. The Purchase Agreement was produced by Mr. Varga.

12. There is no written agreement concerning the payment of rent in the Premises from Chetti.

13. In the preamble, the month of April is crossed out and May is inserted. All parties agree that it was correct to make this change since it reflects the current month at the time of signing.

14. Paragraph 2 states that the Buyer agrees to purchase from the Seller and the Seller agrees to sell to the Buyer the Assets together with (1) an assignment of the lease of the Premises and (2) an assignment of the lease for the Leased Assets where permitted, all in as-is condition.

15. Paragraph 3 states that the purchase price of the assets is $125,000. Both parties agree that is the correct purchase price. No funds were advanced by Chetti towards the purchase price of the assets.

16. Paragraph 4 states that there would be a deposit of $5,000 at the time of signing. The deposit of $5,000 was not paid.

17 Paragraph 6 states that the closing date is April 30, 2014. Irrespective of the date, the assets were not purchased by Chettie

18. Paragraph 10 (b) provides that the Seller will comply with the Bulk Sales Act . (Ontario). All parties agree that there was non-compliance with the Bulk Sales Act.

19 Paragraph 10 (d) provides that the Seller must deliver to the Buyer at or before closing, the written consent of the landlord to the assignment of the lease of the Premises to the Buyer. All parties agree that the assignment from the landlord was provided in December 2014.

20. To date, Chetti has not submitted any correspondence to Varga outlining any issues regarding compliance with the terms contained in the Purchase Agreement.

21 e In or around June 2014, shortly after executing the Purchase Agreement, Chetti accepted the keys to possess Rakia Bar and started to renovate the Premises. The parties also agreed that Chetti would submit payment of rent in the amount of $6,338.17 while he possessed the Premises. The rent in June 2014 was discounted by $2,000.

22. Rent was not paid during the time that Chetti was in possession of the Premises, Specifically, rent was not paid for May, June, July, August or September 2014. The total rent requested is $33,690.85.

23. Chetti did advance $10,000 towards rent on or about August 10, 2014. That payment was marked as non-sufficient funds.

24. On or about July 15, 2014, Varga submitted to Chetti a Restaurant Management Agreement. It was understood that the purpose of this agreement would be to enable Chetti to operate a restaurant from the Premises as a manager instead of an owner in case the consent to the assignrnent was not forthcoming.

25. The Restaurant Management Agreement was not executed by any party,

26. The total amount requested is:

    a. Purchase price of the property - $125,000

    b. Rent - $33,690.85

    Total $158,690.85

[10] Chetti agrees with the above Statement of Facts, but disputes that: 1) the Landlord provided its consent to an assignment of the lease; 2) Chetti took "formal possession" of the Rakia premises; and 3) the Applicant suffered any damages.

[11] Varga testified that he rented the Premises for a five-year term commencing February 15, 2012 pursuant to the Offer to Lease that both he and the Landlord signed in February 20120 The lease provided Varga with two options to renew, each of which was for a five-year terme Varga and Chetti frequented each other's restaurants. They had a cordial relationship. However, Varga's restaurant business fared "average to bad," fie listed the business for sale with a real estate broker in 2014. Varga told Chetti that he was selling his business. Chetti expressed interest in leasing the Premises either for expanding his restaurant or for opening a new venture.

[12] Varga agreed to sell the Applicant's assets to Chetti. The APS provided that the sale was conditional upon the Landlord's consent to the assignment of the Applicant's lease. Varga provided Chetti with a draft copy of the APS in early April 2014. The sale included most of the Applicant's owned and leased assets in the restaurant. Varga modified the APS to incorporate changes sought by Chetti regarding purchase price, periodic payments of the price, and an indemnity. Varga and Chetti met and signed the APS on May 9, 2014. The sale price was $125,000. A deposit of $5,000

was to be paid when the parties signed the APS; however, Chetti did not pay the deposit. Given their cordial relationship, Varga expected that Chetti would pay the deposit on closing. Varga also provided Chetti with the keys to the Premises on the day that they signed the APS. Varga states that he left the keys with Chetti because Chetti wanted to "rebrand" the Premises. Varga said that there was talk of expanding QMP or using the Premises as a sandwich shop.

ANALYSIS

Issue #1: Should the APS be rectified to correct its closing date?

[13] Varga had provided Chetti with a draft copy of an APS that was dated _____ "thisday of April, 2014."

[14] The draft APS and the APS state:

> 60 CLOSING DATE: This Agreement shall be completed by no later than 5:00 pm on Wednesday, April 30, 2014, or such other time and date which the parties agree to in advance in writing, on which date possession of the Business and Assets is to be given to [the] Buyer, title to the assets shall be conveyed to [the] Buyer.

[15] Chetti sought certain changes to this draft agreement, such as the price, the periodic payment of the price, and the addition of an indemnification clause, which were eventually agreed upon. These further negotiations resulted in a revised APS being signed on May 9, 2014. However, the parties forgot to change the date for the completion of the sale from April 30, 2014 to a later date. Both Varga and Chetti agreed that they intended that the closing date be about one month after the day that they signed the APS.

[16] In Morgan Trust co. of Canada v. Falloncrest Financial corp. (2006), 218 OcA.Ce 71, the Ontario Court of Appeal stated, at parae 33, that:

> In order to obtain rectification of a term of a contract, [the moving party] must establish that all of the parties were in complete agreement as to the terms of their contract, but wrote them down incorrectly: H.F. Clarke Ltd v. Thermidclire Corp, Ltd (1973), 33 D.L.R. (3d) 13 at 20-21 (Ont. C.A.), reversed on other grounds (1974), 54 D.L,R. (3d) 385 (S.C.C.)C Clear and compelling evidence is required to show that the written contract does not correspond with a prior oral agreement.

[17] Given the common intention of the parties that the closing of the APS occur about one month after the date on which the APS was signed, I hereby correct the APS such that the closing date is June 9, 2014, rather than April 30, 2014.

Issue #2: Did Chetti waive compliance regarding the deadline for closing and the delivery of the Landlord's consent to the assi°nment?

[18] As noted, I have found that the closing date for the APS was June 9, 2014, Chetti submits that the Applicant repudiated the APS because it failed to provide the Landlord's consent to the

assignment of the Lease by June 9, 2014. The Applicant states that Chetti waived strict compliance with the deadline by his conduct.

[19] The Applicant relies on the doctrine of waiver. In Technicore Underground Inc. v. Toronto (City), 2012 ONCA 597, 296 0.A.Co 218, at parac 63, the Ontario coun of Appeal stated:

> Waiver occurs when one party to a contract (or proceeding) takes steps that amount to foregoing reliance on some known right or defect in the performance of the other party. It will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of the deficiency that might be relied on and (2) an unequivocal and conscious intention to abandon the right to rely on it. The intention to relinquish the right must be communicated. Communication can be formal or informal and it may be inferred from conduct. The overriding consideration in each case is whether one party communicated a clear intention to waive a right to the other party.

[20] In my view, Chetti waived compliance with the closing date and the deadline for the delivery of the assignment of the lease for the following three reasons.

[21] First, Chetti took the keys to the Premises when the deal was signed on May 9, 2014, and occupied the Premises beyond the closing date on June 9, 2014. Varga testified that the Rakia Bar signage was removed and that new chairs were brought into the Premises. He also testified that Chetti hired a contractor to do work in the Premises during June and July 2014. Chetti testified that he paid someone $1,500 to re-finish the table and renovate the bar in late May 2014, and that this work took three or four days. Chetti stated that he made no further use of the Premises; however, he did not return the keys to Varga.

[22] Second, Chetti did not have an amicable relationship with the Landlord as a result of another lawsuit in which they were parties. At the time that the APS was signed, Chetti had hoped that the Landlord would let "bygones be bygones" and approve the assignment of the lease. A Landlord's representative told Varga in June 2014 that the delay in receiving the Landlord's approval of the assignment was due to Chetti's request to renew his own lease. The Landlord wished to deal with both matters together and felt that the renewal of Chetti's existing lease took precedence over the assignment of the lease for the Applicant's Premises. Chetti was aware of the Landlord's position and continued to wait for the Landlord's approval of the assignment without protest beyond June 9, 2014.

[23] Third, and most significantly, Chetti signed a handwritten note with Polydor, the directing mind of the Landlord, and Varga in mid-September 2014. In this note, Chetti agreed to an assignment of the lease even though the closing date had long passed,

[24] I conclude that Chetti waived compliance with the closing date for the APS and the delivery of the Landlord's consent.

Issue #3: Did Chetti agree to pay interim rent for the Premises to the Applicant?.

[25] As noted above, the parties agreed that in June 2014, Chetti would "submit payment of rent in the amount of $6,338,17 while he possessed the Premises. The rent in June 2014 was discounted by $2,000." The parties also agreed that "[r]ent was not paid during the time that Chetti was in possession of the Premises. Specifically, rent was not paid for May, June, July, August or September, 2014. The total rent requested is $33,690.85." [Emphasis added,]

[26] The Applicant submits that Chetti agreed to pay rent for the Premises from the date that he took possession of the Premises until the date that the APS closed, being the rents for May through September 2014. Despite the Agreed Statement of Facts, Chetti denies any such arrangement.

[27] An email exchange between Varga and Chetti on July 8-9, 2014 states:

> Landlord to Varga: Hi Dusan. Please be informed that your July rent chq was NSF. Please confirm when you will drop off your replacement chq as long with your NSF charges $50.
>
> Varga to Chetti: We have till the 15th . I would like to tell him something
>
> Chetti to Varga: Sorry I'm confused thought it was 15 of the month.
>
> Varga to Chetti: Rent is due on the first of every month. By lease if the cheque bounces, we have till the 15 th to clear the balance for the month. [28] Varga sent another email to Chetti on July 30, 2014:
>
> John,
>
> You need to connect before noon tomon•ow. This needs to be taken care of with a certified cheque for 10K (July and June) made out to Tamara Oswald so she can in turn cut one for the LL.
>
> I need clarity on where you stand with the building and go forward plans. I hope you understand my position. I was quite trustworthy and had waited for several months to do a deal with you, losing two offers along the way. I have to sell this before midSeptember, and if not to you, it will have to be to someone else,

[29] Chetti did not respond to this email.

[30] However, Varga states that Chetti provided him a cheque for $10,000, which was returned non-sufficient funds ("NSF") on August 12, 2014. Varga did not provide a copy of the NSF cheque but he did present an excerpt from a bank statement, which shows that a cheque for $10,000 had been returned NSF to his accounta

[31] Varga sent a further email to Chetti on September 4, 2014:

> Subject: Payment to LL for 1402 Queen St E
>
> John,

> Please make a draft for the following
>
> 1479830 Ontario Limited
>
> August 2014 rent: $6,338.17 + $45 NSF
>
> TOTAL TO BE PAYED ON Thursday, 09.04.2014: $6,383.17
>
> FYI - IMPORTANT
>
> o We owe LL July, and now September rent. We will hold of on this until further notice
>
> e You owe me June 2014 which I covered after our verbal agreement in May 2014 that you will be covering costs until we finalize the deal. [Emphasis added]

[32] There is no other documentary evidence.

[33] Based on the exchange of emails and the other evidence, I am satisfied that Chetti agreed to pay for the rent of the Premises.

[34] However, I am not persuaded that the Applicant is entitled to $33,690.85 for unpaid rent when there is no evidence that the Applicant paid rent to the Landlord during this period other than in June 2014. Accordingly, I conclude that the Applicant is entitled to damages in the amount of $4,338.17, which takes into account the $2,000 discount the Applicant gave Chetti for rent in June 2014.

Issue #4: Did the Applicant deliver the Landlord's consent as required by the APS?

[35] Chetti submits that the Applicant breached the APS because it failed to deliver a signed assignment of the lease from the Landlord. No other conditions of the APS were relied upon by Chetti as evidencing a breach of the APS,

[36] The APS slates:

> 2. BUY AND SELL. The Buyer agrees to purchase from the Seller, and the Seller agrees to sell to the Buyer, the Assets together with (1) an assignment of the lease of the Premises; and (2) an assignment of the leases for the Leased Assets where permitted, all in as-is condition, and all in accordance with the terms of this Agreement…
>
> 6. CLOSING DATE. This Agreement shall be completed by no later than 5:00 p.m. on [June 9, 2014] or such other time and date which the parties agree to in advance in writing, on which date possession of the Business and Assets is to be given to [the] Buyer, title to the Assets shall be conveyed to [the] Buyer.
>
> 10. SELLER COVENANT:

(d) To deliver to [the] Buyer, at or before closing, the written consent of the Landlord to the assignment of the lease of the Premises to [the] Buyer. …

13. CONDITIONS:

(a) The obligation of the Buyer to complete this transaction shall be subject to satisfaction of the following conditions (which may be waived in whole or in part by the Buyer without prejudice to any claim for breach of covenant, representation or warranty):

(iii) The Landlord shall have approved the Buyer as a tenant, ancl shall have consented to the assignment of the lease of the Premises to the Buyer. [Emphasis added.]

[37] In Sativa Capital corp. v. Creston Moly corp., 2014 SCC 53, [2014] 2 S.C.R. 633, the Supreme Court of Canada explained that a contract should be interpreted in a practical, commonsense manner. At paras. 47-48, the Court stated:

…[T]he interpretation of contracts has evolved towards a practical, commonÆense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the panies and the scope of their understanding" To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

. No contracts are made in a vacuum: there is always a setting in which they have to be placed... In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating. (Reardon Smith Line, at p. 574, per Lord Wilberforce)

The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement …As stated by Lord Hoffmann in Investors Compensation Scheme Ltd. v. West Bromwich Building Society, [1998] 1 All E.R. 98 (H.L.):

The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [pc 115]

[38] When the provisions of the APS described above are read together, it is my view that the APS merely required the Applicant to deliver the consent of the Landlord to the assignment of the lease on or before closing.

[39] Both Varga and Chetti testified that they met with Polydor in September 2014. Each of them signed a one-page handwritten document, which was to provide the basis for a formal agreement. The handwritten note provided for the assignment of the lease, in addition to the renewal of Chetti's lease for his adjacent restaurant and Chetti's lease of another premises in the same building. In respect of the assignment of the lease, the note states:

1. Transfer to JC [John Chetti]/NewCo;
2. $6,000 net/mth approx. to reflect current lease to be confirmed
3. October 1 $12,000 (includes August)
4. November 1 $12,000 (includes September)

[40] The handwritten document, signed by the Landlord, Varga, and Chetti, requires that the August and September arrears be paid. Varga states that the Landlord told him that he would assign the lease so long as the above terms were satisfied. However, neither Varga nor Chetti paid the rents for August and September.

[41] Chetti argues that the Landlord did not deliver his consent, presumably because the condition to his consent — payment of August and September arrears — was not satisfied, In my view, however, this argument is without merit.

[42] As noted above, Chetti agreed to pay rent for the Premises between May and September 2014. Chetti now seeks to rely on his non-payment of rent to evade his obligations under the APS. I do not accept this position. Even if I were to accept that the Landlord's consent was invalid because of the non-payment of rent arrears, it would only be because of Chetti's breach of his own contractual obligations.

[43] Further, to adopt Chetti's view would amount to sanctioning his failure to comply with his duty to act in good faith in performance of his contractual obligations: see Bhasin v. Hrynew, 2014 SCC 71, [2014] 3 S.CR. 494 at para. 33.

[44] I find that the Applicant delivered the Landlord's consent as required by the APS6

Issue #5: Did Chetti repudiate the APS?

[45] Chetti decided not to pursue the assignment of the lease. At an examination held on March 9, 2015, Chetti stated:

> Q 227: So what really happened with that new space then? The Rakia Bar space. Did you just change your mind, you didn't want it anymore?

> Well, I missed the entire seasone I wasn't going to go through with it at that point. I wasn't going to open in January when just me and you can hold a candle in there and nobody would walk in.

[46] Although Chetti lost interest in the assignment of the lease, he did renew the lease of the premises for his adjacent restaurant at the rates described in the one-page handwritten document referenced above by way of a Lease Extension Agreement dated November 1 1, 2014.

[47] In my view, Chetti's decision not to complete the APS after the Applicant had obtained the consent of the Landlord to the assignment of the lease is a repudiation of the APS. I award damages in the amount of $125,000 to the Applicant.

CONCLUSIONS

[48] I award judgment to the Applicant in the total amount of $129,338.17, along with pre-judgment interest in accordance with the Courts ofJustice Act, R.S.O. 1990, c. C.43, and costs.

[49] I encourage the parties to resolve the issue of costs, failing which the Applicant shall provide its written costs submissions, not to exceed three pages in length exclusive of an outline of costs and any settlement offers, within two weeks of today's date. The Respondent shall deliver his reply submissions within three weeks from today's date on the same ten-nso

M.D. Faieta, J.

Released: August 17, 2016

CITATION: 2316796 Ontario Inc. v. Chetti, 2016 ONSC 5216
COURT FILE NO.: CV-14-518681
DATE: 20160817

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

2316796 ONTARIO INC.

Applicant

— and —

JOHN CHETTI

Respondent

REASONS FOR JUDGMENT

M.D. Faiefa J.

Released: August 17, 2016

CITATION: 2316796 Ontario Inc. v. Chetti, 2016 ONSC 5216
COURT FILE No.: CV-14-518681
DATE: 20160921

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN: 2316796 ONTARIO INC. (Applicant)

AND: JOHN CHETTI (Respondent) BEFORE: M. D.

FAIETA, J.

COUNSEL: Tanya C. Walker, for the Applicant
Alan Price, for the Respondent

COSTS ENDORSEMENT

BACKGROUND

[1] The Applicant brought an Application for Judgment in respect of the Respondent's failure to complete an Agreement of Purchase and Sale claiming damages in the amount of $340,497.78. For Reasons for Judgment dated August 17, 2016, I awarded damages in the amount of $ 129,338.17 plus pre-judgment interest and costs to the Applicant.

[2] The Applicant claims $27,090.17 in legal fees and $3,426.49 in disbursements on a partial indemnity basis. The Respondent submits that the proceedings were of average complexity. The Respondent submits that the time expended by counsel for the Applicant was excessive and should be reduced by 25%. The Respondent takes no issue with the claim for disbursements.

ANALYSIS

[3] I agree with the following statement made by Justice Myers in Fimax Investments v. Grossman, 2015 ONSC 2048, at para.7:

> The fixing of costs is a discretionary decision under s. 131 of the Courts ofJustice Act. That discretion is generally to be exercised in accordance with the factors listed in Rule 57.01 ofthe Rules ofCivil Procedure. These include the principle of indemnity for the successful party (57.01(l)(0.a)), the expectations of the unsuccessful party (57.01 the amount claimed and recovered (57.01 (l)(a)), and the complexity of the issues (57.01(1)(c)). Overall, the coun is required to consider what is "fair and reasonable" in fixing costs, and is to do so with a view to balancing compensation ofthe successful patty with the goal of fostering access to justice: Boucher v Public Accountants Council (Ontario), 2004 CanL11 14579, (2004), 71 0.R. (3d) 291 (Ont. C.A.), at paras 26, 37.

[4] Further, Rule 1.04(1.1) of the Rules of Civil Procedure provides that:

> In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

[5]In my view, the principle of proportionality informs the balancing of interests in deciding whether an award of costs is "fair and reasonable": see Strudwick v. Applied Consumer & Clinical Evaluations Inc., 2016 ONCA 520, at paras. 126-7.

I now turn to assess the various relevant considerations in assessing costs in this matter.

Result in the Proceedin

[7] As noted, the Application was granted. The claim for damages of $125,000.00 in breach of contract was granted. The claim for $215,497.78 for failure to submit lease payment between 2014 and 2017 was largely unsuccessful as only $4,338.17 was awarded in this respect.

Offers to Settle

[8] Curiously, there is no evidence of settlement offers having been exchanged between the parties.

Princi le of Indemni

[9] The Applicant claims partial indemnity costs in the amount of $30,516.66 comprised of:

- Fees, including HST: $27,090.17;
- Disbursements, including HST: $3,426.49.

[10] The Respondent takes no issue with the partial indemnity rates claimed by the Applicant.

[11] However, the Respondent submits that the Bill of Costs shows that the time expended by counsel and paralegals totaled 211.2 hours. The Respondent submits that the amount oftime spent is excessive and should be reduced by 25%. My calculations, in reviewing the Bill of Costs, shows that the Respondent has grossly overestimated the time spent by counsel in that that far less than 21102 hours is claimed by the Applicant:

Name	Hourly Rate	Total Hours
Tanya Walker	$210	77.6
Andrew Oostrom	$150	28.7
Ke-Jia Chong	$150	13.2
Paralegals	$72	2.8

[12] The time claimed by the Applicant covers all steps in this Application from its commencement through examinations and various appearances in court.

The Amount that an Unsuccessful Pa could Reasonabl Ex ect to Pa

[13] Typically a comparison ofthe costs sought by the parties assists in determining what amount was reasonably within the reasonable contemplation ofthe losing party. Counsel for the Respondent has not provided his Bill of Costs to the Respondent. Accordingly, the reasonable expectations of the Respondent cannot be assessed.

The Amount Claimed and the Amount Recovered

[14] As noted above, the Applicant has partially recovered the amount claimed.

The A ortionment of Liabili

[15] This consideration has no application on the facts of this case.

The Com lexi of the Proceedin

[16] I accept the Respondent's submission that this proceeding was of average complexity.

The Importance of the Issues

[17] The Applicant submits that the issues were important to the Applicant because it had not received payment pursuant to the Agreement of Purchase and Sale. In my view, this submission addresses the importance of the Application, rather than the issues raised by the Application, to the Applicant rather than the importance of the issues raised by the Application, whether on a jurisprudential or reputational basis, to the Applicant.

The Conduct of any Party that Tended to Shorten or Lengthen Unnecessarily the Duration of the Proceeding

[18] The Applicant submits that the Respondent failed to deliver a Responding Record to this Application by the date that the parties had agreed upon and that the Applicant had to bring a motion and obtain an order from Master Haberman that required such Record by April 16, 2015 and completion of cross-examination by April 30, 2015. The Respondent did not adhere to the crossexamination timetable. Justice Firestone ordered another timetable with completion of examinations by August 28, 2015. The cross-examinations were re-scheduled with the Applicant's consent to October 2, 2015 and then again to October 13, 2015. The Respondent failed to appear at his examination on October 13, 2015. The Respondent's examination was completed after I ordered same on February 9, 2016.

[19] The Applicant submits that various defences, including compliance with the Bulk Sales Act, were withdrawn only at the hearing of this Application and resulted in unnecessary costs.

Whether any Step in the Proceeding was Improper, Vexatious or Unnecessary or Taken Through Negligence, Mistake or Excessive Caution

[20] No submissions were made in this respect.

A Party's Denial of or Refusal to Admit Anything that Should Have Been Admitted

[21] The Applicant submits that the Respondent should have consented to Judgment as the Applicant ". .. demonstrated that it was owed funds for the purchase of the asset and lease."

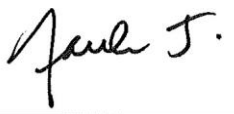
[22] In my view, the Respondent's position raised triable issues.

Whether it is Appropriate to Award any Costs or More Than One Set of Costs Where a Party Commenced Separate Proceedings

[23] No submissions were made in this respect.

CONCLUSIONS

[24] Having considered the submissions ofthe parties and the factors described above, including the principle ofproportionality, I find that it is fair and reasonable to award the sum of $30,516.66 in costs, inclusive of taxes and disbursements, to the Applicant payable forthwith by the Respondent.



M. D. FAIETA, J.

Released: September 21, 2016