

CITATION: Cherry Cola’s Rock ‘N’ Rolla Inc. v. Choi, 2021 ONSC
COURT FILE NO.: TBA
DATE: 20210507

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **CHERRY COLA’S ROCK ‘N’ ROLLA INC.** Applicant

 AND:

 WAI CHOI Respondent

BEFORE: Chalmers, J.

COUNSEL: *R. Macklin*, for the Applicant
 W. Choi, self-represented

HEARD: May 7, 2021 by teleconference

ENDORSEMENT

OVERVIEW

[1] The Applicant, Cherry Cola’s Rock ‘N’ Rolla Inc. (CCR) operates a restaurant/bar at 200 Bathurst Street, Toronto. The premises are owned by the Respondent, Wai Choi. On March 1, 2017, CCR entered into an Agreement to Lease the premises. CCR paid its rent and otherwise complied with the terms of the lease from 2017 until March 2020.

[2] In March 2020, the government’s response to the COVID-19 pandemic resulted in the closure of restaurants and bars. CCR has not operated since March 2020.

[3] Mr. Choi applied for and received the Canada Emergency Commercial Rent Assistance (CECRA) in 2020. In addition, CCR applied for and was approved for the Canada Emergency Rent Subsidy (CERS) as of April 6, 2021. The CERS was retroactive to September 27, 2020. CCR provided proof of the approval for CERS to the Respondent by May 5, 2021.

[4] Pursuant to the applicable Regulation, there is a ban on evicting a tenant in receipt of the CERS for a period of 12 weeks from the date of CERS approval. In this case, the approval is April 6, 2021 and therefore the 12-week eviction bar applies to June 29, 2021. The Respondent notified CCR in writing that he intends to evict CCR notwithstanding the eviction ban.

[5] CCR brings this urgent Application for a declaration that the Respondent is barred from evicting CCR from the premises.

ANALYSIS

Notice of the Application

[6] CCR was approved for the CERS benefit as of April 6, 2021. According to the affidavit of Cherish Stevenson, the principal of CCR (sworn May 7, 2021), she provided proof of the CERS approval to Mr. Choi. Mr. Choi denies receiving proof of the approval. On May 3, 2021, Mr. Choi took the position that CCR was in breach, due to the failure to provide proof of the CERS approval. He advised that he will “call the bailiff” presumably to evict CCR.

[7] On May 4, 2021, counsel for CCR wrote to Mr. Choi in an attempt to negotiate the payment of the rent. Mr. Choi was not prepared to negotiate. By e-mail sent May 6, 2021, Mr. Choi stated that he has a meeting with the bailiff tomorrow (May 7, 2021). In the e-mail he states that he will “lock her out”. By e-mail sent May 7, 2021 at 10:25 a.m., Mr. Choi advised counsel for CCR that he is proceeding with the eviction.

[8] On May 7, 2021, at 10:53 a.m., counsel for CCR sent an e-mail to Mr. Choi enclosing the Notice of Application. He asked that Mr. Choi not rush ahead with an eviction before the parties had a chance to address this matter in Court. Counsel also asked for the name of the Bailiff and the contact information so the Notice of Application could be served on the Bailiff. In response, Mr. Choi stated, “Sorry, I take my chance. Maybe I see you in court. Whenever that is.”

[9] The court office advised counsel for CCR that the urgent Application would be heard on May 7, 2021 at 3 p.m. by teleconference. The Court provided the call-in information to counsel for CCR at 2:16 p.m. Counsel for CCR advised Mr. Choi that the Application would be heard at 3 p.m. and forwarded the call-in information. At 2:19 p.m., Mr. Choi advised that he was unavailable and was in another meeting. The Court office sent an e-mail to Mr. Choi at 2:22 p.m. stating that it is expected that Mr. Choi would rearrange his affairs and attend the Application by telephone today at 3 p.m. There was no response from Mr. Choi to this e-mail.

[10] The Application proceeded today at 3 p.m. Mr Choi was not in attendance at 3 p.m. I waited 5 minutes to give him time to join the teleconference. He did not join the call, and the motion proceeded in his absence.

[11] CCR argues that the Application is urgent. Mr. Choi has stated an intention to proceed with an eviction. CCR has operated for over 10 years. CCR is concerned that if evicted it will not be in a position to restart its business as soon as the pandemic restrictions are lifted. CCR argues that if it is required to move from this location it will recede from the patron’s consciousness and will suffer a permanent irreparable loss of business.

[12] I am satisfied that there is urgency to this Application. Mr. Choi was provided with notice of the hearing and chose not to attend. I am prepared to proceed with the Application. I grant an order pursuant to R. 3.02 abridging the time for service of the Application. I also grant an order for substituted service *nunc pro tunc* authorizing service on Mr. Choi by e-mail, at waichoigeneralcontracting@hotmail.com, and setting the effective date of service as the date of the transmission of the e-mail.

Eviction during the Pandemic

[13] Ms. Stevenson lives in the residential apartment above the CCR. It is not clear from the exchange of e-mails between Mr. Choi and counsel for CCR whether Mr. Choi intends to evict Ms. Stevenson from the residential apartment. The Ontario government has issued an emergency order to temporarily pause the enforcement of residential evictions while stay-at-home orders are in force. There is currently a stay-at-home order in place. I am satisfied that Mr. Choi is temporarily prevented from enforcing a residential eviction.

[14] With respect to the commercial tenancy, Mr. Choi received the CECRA in 2020. As a result, he was barred from evicting CCR before January 31, 2021. The CECRA program was replaced with the CERS program. Ontario Regulation 763/20 made under the *Commercial Tenancies Act*, provides that there is a non-enforcement period for commercial tenancies from December 2020 to April 22, 2022. The non-enforcement period applies if the following criteria are met:

1. the tenant has been approved to receive the CERS;
2. the tenant provided proof of the approval to the landlord; and
3. not more than 12 weeks have passed since the day the tenant was approved.

[15] CCR submits that it complied with the requirements set out in the Regulation. It was approved for the CERS and provided proof of the approval to Mr. Choi. As a result, the non-enforcement period runs 12 weeks from the date of approval on April 6, 2021 to June 29, 2021.

[16] Mr. Choi takes the position that CCR failed to comply with the requirement that proof of the approval be provided to the landlord. There is no time set out in the Regulation as to when proof is to be provided. CCR states that proof of the approval was provided to Mr. Choi by counsel for CCR on May 5, 2021. I find that this satisfies the second requirement that proof is to be provided to the landlord.

[17] Based on the fact that CCR was approved for the CERS program on April 6, 2021 and notice was provided to Mr. Choi by May 5, 2021, I am satisfied that the two requirements set out in the Regulation were satisfied. The non-enforcement period runs from April 6, to June 29, 2021.

[18] Although Mr. Choi received proof of the CERS approval by May 5, 2021, he advised CCR that he was going to proceed with the eviction. I find that he has no authority to do so.

[19] Mr. Choi takes the position that all funds CCR receives from the CERS program are to be paid to him. The Regulation does not state that the non-enforcement period applies only if the CERS funds are paid in full to the landlord. Although there is no requirement in the Regulation, there is an expectation that the tenant and landlord will work out an arrangement to pay the rent, or a portion thereof. CCR offered to provide all future CERS payments to Mr. Choi. Mr. Choi did not respond to that proposal except to state that he is meeting with the Bailiff to proceed with an eviction.

[20] I am satisfied that CCR complied with the Regulation and as a result, the non-enforcement period runs to June 29, 2021. I grant the Applicant's request for a declaration that Mr. Choi is barred from evicting CCR from the premises, subject to any further order of the Court.

DISPOSITION

[21] I make the following order:

- a. the time for service of the Application is abridged pursuant to R. 3.02;
- b. substituted service *nunc pro tunc* authorizing service on the Respondent by e-mail at waichoigeneralcontracting@hotmail.com and setting the effect date of service being the date of the transmission of the e-mail to the Respondent;
- c. I grant a Declaration that Mr. Choi is barred from evicting CCR from the premises, subject to any further order of the Court; and
- d. I order costs of the Application payable by Mr. Choi to CCR fixed in the amount of \$3,000 inclusive of counsel fee, disbursements and H.S.T. The costs are payable within 30 days of the date of this order.

[22] Order to go in accordance with the draft order filed and signed by me.

[23] I remain seized.

DATE: MAY 7, 2021



C. H. ALMERS, J.