CITATION: Cherry Cola's Rock 'N' Rolla Inc. v. Choi, 2021 ONSC
COURT FILE NO.: CV-21-00662357-0000
DATE: 20211213

SUPERIOR COURT OF JUSTICE – ONTARIO

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

AND:

WAI CHOI Respondent

BEFORE: Chalmers, J.

COUNSEL: *R. Macklin and S. Gill*, for the Applicant

J. Barr, for the Respondent

HEARD: December 3, 2021 by videoconference

ENDORSEMENT

OVERVIEW

[1] The Applicant, Cherry Cola's Rock 'N' Rolla Inc. (CCR) operates a restaurant/bar at 200 Bathurst Street, Toronto (the "Premises"). The Premises are owned by the Respondent, Wai Choi. CCR paid its rent and otherwise complied with the terms of the lease from 2017 until March 2020.

[2] In March 2020, the government ordered the closure of restaurants and bars in response to the COVID-19 pandemic. 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 CERS approval to the Respondent on May 5, 2021.

[3] The Respondent notified CCR in writing that he intended to evict CCR from the leased Premises. In response, CCR brought an urgent Application for a declaration that the Respondent is barred from evicting CCR. The matter came before me on May 7, 2021. I made an order granting a declaration that the Respondent is barred from evicting the Applicant from the Premises subject to any further order of the court. My assistant sent an e-mail to the parties on May 8, 2021 enclosing the Order and endorsement.

[4] On October 9, 2021, the Respondent evicted the Applicant from the Premises. The Applicant requested an urgent case conference to seek an injunction to allow it to remain in the Premises. The Applicant also sought to schedule a date for a motion for contempt.

[5] A case conference was convened for October 21, 2021. On the case conference, the Respondent took the position that he had not received the Order and endorsement dated May 7, 2021. Although there is evidence that the Order was sent by e-mail on May 8, 2021, I asked

counsel for the Applicant to send another copy to the Respondent by e-mail. The Respondent confirmed receipt of the Order and endorsement during the case conference. At the case conference, the Respondent agreed to allow the Applicant back into the Premises.

[6] The Applicant brings this motion for an order of contempt as against the Respondent. The Respondent brings a motion to vary my order dated May 7, 2021 to allow for an eviction of the Applicant. For the reasons set out below, I vary my order to specifically state that the Respondent is enjoined from evicting the Applicant on or before February 28, 2022 except by further order of the court. I also find Mr. Choi to be in contempt of the Order dated May 7, 2021. The sentencing phase of the contempt hearing is adjourned to a date after February 28, 2022.

BACKGROUND FACTS

[7] CCR operates a restaurant/bar and event venue business at the Premises. CCR has operated at this location for the past 10 years. CCR leased the Premises pursuant to a commercial lease. The term of the lease expires on February 28, 2022.

[8] After the provincial Government ordered a shut down of restaurants and bars in March 2020, the Applicant applied for the CERS benefit. The Applicant was approved for CERS as of April 6, 2021. On May 3, 2021, Mr. Choi took the position that CCR was in breach of the lease due to the failure to provide proof of the CERS approval. Mr. Choi advised CCR that he is meeting with the Bailiff to proceed with an eviction.

[9] 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. The CERS approval was provided to Mr. Choi on May 5, 2021. 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.

[10] CCR brought this Application to enjoin the landlord from taking steps to evict CCR. On May 7, 2021 at 10:53 a.m., counsel for CCR sent an e-mail to Mr. Choi enclosing the (unissued) Notice of Application. He asked that Mr. Choi not rush ahead with an eviction before the parties had a chance to address the matter in Court. Counsel also asked for the name and contact information of the bailiff 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."

[11] 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 pm, 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 will rearrange his affairs and attend the Application by telephone. There was no response from Mr. Choi to this e-mail.

[12] The Application proceeded on May 7, 2021. Mr Choi did not attend, and the matter proceeded in his absence. I granted the order sought. In my endorsement I stated as follows:

> 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.

[13] After the oral hearing, the Applicant's lawyer wrote to Mr. Choi and reported on the disposition of the motion. The e-mail was sent on May 7, 2021, at 4:13 p.m. Mr. Choi has acknowledged receiving the e-mail. The e-mail states as follows:

> Mr. Choi,
>
> The hearing has concluded. Orally, the presiding Judge, Chalmers J. indicated he would grant the order we were seeking which, amongst other things, would bar, by Court Order, you from evicting Cherry Cola's Rock 'N' Rolla Inc. from 200 Bathurst Street, Toronto, Ontario.
>
> The written endorsement and formal Court order are to follow.
>
> Obviously, you must immediately cease and desist all eviction steps. This includes any bailiff or other agent. You must provide copies of all documents to the bailiff (including this email).
>
> We repeat what we have stated previously, you should retain counsel.
>
> If you breach and attempt to evict, we anticipate obtaining instructions for a contempt of court motion against you and, if appropriate the bailiff.
>
> Please contact me if you have any questions.

[14] It is Mr. Choi's position that he expected the signed Order and endorsement would be later sent to him by mail. On the morning of May 8, 2021, my assistant sent the Order and endorsement by e-mail to the parties. She used the e-mail address for Mr. Choi approved for substitute service. Mr. Choi did not acknowledge receipt. Two hours later, counsel for the Applicant also sent a copy of the endorsement and Order to Mr. Choi by e-mail.

[15] On June 26, 2021, Ms. Stevenson, the principal of CCR sent an e-mail to Mr. Choi and enclosed the most recent CERS approval dated June 25, 2021. In the e-mail, Ms. Stevenson referenced the Order and endorsement dated May 7, 2021. She specifically stated as follows:

> Any attempt to lock-out or otherwise interfere with my tenancy or operation of my business during this (or any subsequently approved) period, will constitute a breach of CERS and the above-noted Order.

[16] In response, Mr. Choi stated that he already sent a termination of the commercial lease and that legal proceedings will be coming. On August 30, 2021, Mr. Choi sent an e-mail to Ms. Stevenson and stated that he is proceeding to have the injunction removed.

[17] In October 2021, the Applicant took steps to reopen the restaurant/bar. She booked several performing acts. On October 9, 2021, the Respondent evicted the Applicant from the premises. The Respondent attended at the premises with AAA Mr. Bailiff (2000). The Applicant showed

Mr. Choi and the bailiff the Order dated May 7, 2021. The Respondent did not comply with the Order and proceeded to change the locks. The Applicant requested an urgent case conference to seek an injunction to maintain the *status quo* and to schedule a date for a motion for contempt.

[18] A case conference was convened for October 21, 2021. On the case conference, the Respondent took the position that he had not received the Order and endorsement dated May 7, 2021. Although there is evidence that the Order was sent by e-mail on May 8, 2021, I asked counsel for the Applicant to send another copy to the Respondent by e-mail. The Respondent confirmed receipt of the Order and endorsement during the case conference.

[19] On the case conference, I advised the Respondent that my Order dated May 7, 2021, provides that there can be no eviction until there is a court order varying the Order. The Respondent confirmed that no further steps would be taken to evict the Applicant before the motion to vary can be heard. He also confirmed that the Applicant may retain a locksmith to change the locks on the building, so the Applicant could reopen for business.

[20] On November 17, 2021, CCR received another CERS approval. CCR advised Mr. Choi of the CERS approval on November 18, 2021. The current non-enforcement period runs for 12 weeks from November 17, 2021 and expires on February 9, 2022.

THE ISSUES

[21] There are two issues for determination on this motion:

a. Has the Respondent established grounds to vary/set aside the May 7, 2021 Order?

b. Is the Respondent in contempt of court?

ANALYSIS

Respondent's Motion to Vary the Order

[22] After the Covid-19 shutdowns, the federal government introduced the Canada Emergency Commercial Rest Assistance (CECRA) program. 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.

[23] Ontario Regulation 763/20 made under the *Commercial Tenancies Act*, R.S.O. 1990, c.L.7, 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.

[24] CCR submits that it complied with the requirements set out in the Regulation. Once approved for the CERS benefit, it provided proof of the approval to Mr. Choi. The initial non-

enforcement period ran for a 12-week period from the date of approval on April 6, 2021 to June 29, 2021. There were further approvals on June 25, 2021 and November 17, 2021 which extended the non-enforcement period. The non-enforcement period currently runs to February 9, 2022.

[25] The Respondent takes the position that there are rent arrears and as a result, the Order ought to be varied to allow for an eviction of the Applicant from the premises.

[26] It is my view that there can be no eviction of the Applicant for non-payment of rent during the non-enforcement period. Section 81 of the *Commercial Tenancies Act* provides that a Judge shall not order a writ of possession during the non-enforcement period if the basis for ordering the writ is for arrears of rent.

[27] I am satisfied that based on the most recent approval of the CERS benefit, the Order cannot be varied to allow for an eviction before February 9, 2022. In his oral submissions, counsel for Mr. Choi did not dispute this. However, it is his position that the Order ought to be varied to provide that the bar on eviction applies only for the non-enforcement period. Mr. Choi argues that once the current non-enforcement period ends and assuming there are no further CERS approvals, he could evict the Applicant.

[28] The Applicant takes the position that there is no basis for varying the Order. The non-enforceability period expires on February 9, 2022. This is only 19 days before the expiry of the lease. It is the Applicant's position that the balance of convenience warrants maintaining the bar of eviction until the expiry of the lease on February 28, 2022. The Applicant will be prejudiced if it is required to vacate the premises 19 days before the expiry of the term. The only prejudice to the Respondent is that it may lose rent for the final 19 days of the lease. The monthly rent is $7,800. The loss of 19 days of rent is approximately $5,300.

[29] The current non-enforcement period will expire on February 9, 2022. If there is a further CERS approval, the non-enforcement period will be extended past that date. If the non-enforcement period is extended past February 9, 2022, the Applicant will be required to vacate the premises at the end of the term of the lease on February 28, 2022.

[30] It is my view that there is no reason to vary the Order to allow the Respondent to evict the Applicant on February 9, 2022 (assuming no further extension of the non-enforcement period). It is my view that there is a benefit to both parties in having a fixed and certain date for the Applicant to vacate the premises. There is little or no prejudice to the Respondent if the Applicant is permitted to remain in the premises until the end of the term. Any claim the Respondent may have for unpaid rent may be advanced in an action against the Applicant.

[31] I am satisfied that the balance of convenience favours maintaining the *status quo* until the end of the term of the lease on February 28, 2022. The Order is to be varied to specifically provide that the Respondent is barred from evicting the Applicant before the end of the term of the lease on February 28, 2022, subject to further order of the court.

Applicant's Motion for Contempt

[32] On May 7, 2021, I ordered that Mr. Choi was enjoined from evicting the Applicant without a further order of the court. I awarded costs to the Applicant fixed in the amount of $3,000. The

Applicant argues that Mr. Choi breached of the Order when he evicted the Applicant from the premises on October 8, 2021. In addition, he has not paid the cost award.

[33] Rule 60.11 provides for a civil remedy of contempt of court. On a contempt motion, the alleged contemnor has the right to make full answer and defence. Mr. Choi was served with the motion for contempt on October 19, 2021. At the commencement of the hearing today, I asked Mr. Choi's counsel if he wished to cross-examine witnesses or call any evidence with respect to the contempt motion. He declined to do so.

[34] The procedure on a contempt proceeding is to bifurcate the proceedings into two phases; the liability phase, and if liability is established, the penalty phase.

a. Liability Phase

[35] A three-part test must be met:

(i) the order that was breached must state clearly what should and should not be done;

(ii) the party who disobeys the order must have actual knowledge of the order; and

(iii) the party in breach must have intentionally done the act that the order prohibits: *Carey v. Laiken*, 2015 SCC 17, at paras. 33-35, see also *Greenburg v. Nowack,* 2016 ONCA 949 at para. 25.

[36] There is no dispute between the parties as to the test to be applied or the standard of proof. The proof must be beyond a reasonable doubt, rather than the usual civil standard of balance of probabilities. Assessing the "beyond a reasonable doubt" standard of proof in civil contempt cases has been explained as follows:

> I am required to work through three steps, adapting the criminal jury instruction. First, if I believe Mr. Bourdeau's exculpatory evidence, then I must dismiss the motion. Second, if I do not believe his exculpatory evidence but I am nonetheless left in reasonable doubt by it or otherwise have a reasonable doubt about where the truth of the matter lies, then I must dismiss the motion. Third, even if I am not left in doubt by Mr. Bourdeau's evidence, I must ask myself whether, on the basis of the evidence that I do accept, I am convinced beyond a reasonable doubt by that evidence that Mr. Bourdeau is in contempt of court. This approach applies to credibility findings in respect of disputed evidence on the elements of contempt of court and on the elements of defences raised to it: *Swede Farms Ltd. v. Ontario Egg Producers*, 2011 ONSC 3650, at para. 25.

i) Is the Order Clear and Unambiguous?

[37] Mr. Choi argues that the order did not clearly state what should and should not be done. He takes the position that the Order is ambiguous and overly broad.

[38] The Order provides that the Respondent is barred from taking any steps to evict CCR without first obtaining a further order of the court. Mr. Choi argues that the word "barred" is

unclear. The Applicant states that the word "barred" in a legal document means that a party is prohibited or prevented from doing a certain act. Mr. Choi in his affidavit filed in support of this motion states at paragraph 15 that he understood that he was "not allowed" to evict the Applicant while they were under CERS non-enforcement protection. I am satisfied that Mr. Choi understood that the word "barred" meant he was not allowed to evict.

[39] Counsel for Mr. Choi argued that even if the meaning of the word "barred" was understood by Mr. Choi, the Order is ambiguous and uncertain. The Respondent argues the Order does not specifically state that the Respondent is barred from evicting the Applicant only if there is non-payment of rent. The Respondent also argues that there is uncertainty as to when the bar expires.

[40] The Order does not set out any condition or time limit on the bar of eviction. There may be uncertainty about whether the Applicant received additional CERS approvals or when the non-enforceability period may end. There may be an issue as to whether the non-enforceability period applies if there is a breach of the lease for reasons other than non-payment of rent. It is because of the uncertainty that the Order provides that it is necessary for the Respondent to return to court to vary the Order before taking any steps to evict.

[41] It is my view that the words "subject to any further order of the court", are clear and unambiguous. The Respondent knew that if he wanted to evict the Applicant, a further order of the court was required. I am satisfied that the Applicant has established beyond a reasonable doubt that the Order clearly sets out what the Respondent should and should not do.

ii) Did Mr. Choi have Actual Knowledge of the Order?

[42] Mr. Choi takes the position that he did not have actual knowledge of the Order. After the oral hearing, the Applicant's lawyer wrote to Mr. Choi and reported on the results of the motion. The e-mail was sent on May 7, 2021, at 4:13 pm. Mr. Choi acknowledged receiving the e-mail. The e-mail specifically provides that I would grant the order to bar Mr. Choi from evicting Cherry Cola's Rock 'N' Rolla.

[43] On May 8, 2021, my assistant sent the endorsement and Order by e-mail to the parties. In sending the endorsement and Order to Mr. Choi, she used the e-mail address approved by court order for substituted service. Mr. Choi did not acknowledge receipt. Two hours later, counsel for the Applicant also sent a copy of the endorsement and Order to Mr. Choi by e-mail. Mr. Choi does not take the position that he did not receive the May 8, 2021 e-mails but states that he does not recall seeing the Order until the case conference on October 21, 2021.

[44] On May 7, 2021, Mr. Choi was advised that an order had been made and was advised of the contents of the order. Mr. Choi does not dispute that he received this e-mail. He states that he expected to receive the formal order by mail. It is not clear why he thought the order would be provided by mail when all previous communications were by e-mail. He received an e-mail from the Superior Court on May 8, 2021. Again, it does not appear that Mr. Choi disputes receiving the e-mail. However, he suggests he did not open the attachments. On June 26, 2021, Ms. Stevenson sent an e-mail to Mr. Choi, in which she specifically states that there is an Order that prevents Mr. Choi from evicting CCR. Although it is his position that he had not received a copy of the Order, Mr. Choi did not ask Ms. Stevenson for a copy of the Order.

[45] I am satisfied that Mr. Choi had actual knowledge of the Order when he received the e - mail from counsel for the Applicant on May 7, 2021. At that time, he was advised of the essential terms of the Order. I also find that he received the actual Order on May 8, 2021. It strains credibility that Mr. Choi would not have opened an e-mail from the court the day after he knew an order had been granted. The fact he did not request a copy of the Order after he received the June 26, 2021 e-mail from Ms. Stevenson is consistent with Mr. Choi having already received the Order.

[46] Even if he had not seen the actual Order when it was sent to him on May 8, 2021, he knew or ought to have known that no steps to evict were to be taken in the absence of a further order of the court. Carelessness in failing to make himself acquainted with the Order is not a valid reason for failing to comply: *Sheppard v. Sheppard* (1976), 12 O.R. (2d) 4 (C.A.) at pp. 4-5.

[47] I am satisfied that the Applicant has established that Mr. Choi had actual knowledge of the Order beyond a reasonable doubt.

iii) Did Mr. Choi intentionally do the Act that the Order Prohibits?

[48] There is no dispute between the parties, that Mr. Choi evicted the Applicant from the Premises on October 8, 2021. He attended at the Premises with a bailiff. He had the locks changed. The Applicant was prevented from accessing the Premises until the case conference on October 21, 2021. Mr. Choi did not obtain a further order of the Court before evicting the Applicant.

[49] With respect to the third part of the test, I am satisfied that the Applicant has proven beyond a reasonable doubt that Mr. Choi intentionally evicted the Applicant from the Premises for 21 days in October 2021 without first obtaining a further order of the court.

Conclusion

[50] I am satisfied that the three parts of the test for civil contempt have been proven beyond a reasonable doubt. I find Mr. Choi in contempt of my order dated May 7, 2021.

b. Penalty Phase

[51] The contempt hearing contemplates two separate phases – the liability phase and the penalty phase. The two-stage hearing allows the party found to be in contempt, some time to purge the contempt. The extent to which the contempt is purged will be a factor in determining the appropriate penalty. If the contempt is fully purged before the date for the penalty phase, there could be no penalty or a suspended sentence. If the contempt is not purged, the penalty could be a fine or a period of incarceration.

[52] A factor in the sentencing of Mr. Choi will be whether he complies with the previous orders of the court. The Order requires Mr. Choi to pay costs fixed in the amount of $3,000. The cost award remains outstanding. Compliance with the previous cost award will be a factor on sentence.

[53] The Order provides that Mr. Choi is to not take any steps to evict the tenant unless there is a further order of the court. Notwithstanding that Order, Mr. Choi evicted the Applicant from the Premises on October 8, 2021. The Order has been varied to provide that Mr. Choi is not to take any steps to evict the Applicant before the expiry of the lease on February 28, 2022, subject to

further order of this court. Compliance with this term of the Order will also be a factor in determining the appropriate penalty for contempt.

[54] The penalty phase shall be scheduled to take place after the expiry of the lease on February 28, 2022. Counsel for the Plaintiff is responsible for securing the date for the penalty phase, from the Motion Co-Ordinator. I remain seized of the matter.

DISPOSITION

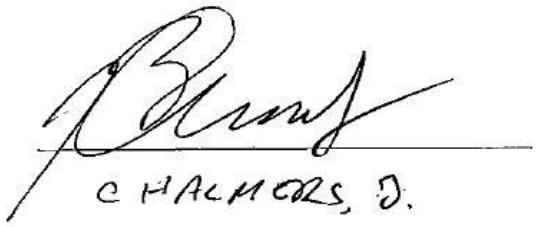
[55] I make the following order:

(i) the Order dated May 7, 2021 is varied to provide that the Respondent is barred from evicting the Applicant before the end of the term of the lease on February 28, 2022, except by further order of this court;

(ii) I find Mr. Choi in contempt of court for failing to comply with the Order dated May 7, 2021. The penalty phase of the contempt hearing is adjourned to a date to be scheduled after February 28, 2022.

[56] The Applicant is successful with respect to both Mr. Choi's motion to vary and its motion for contempt. The Applicant is presumptively entitled to its costs. Following the hearing of the motions, and before the release of this endorsement, the parties delivered their costs outline. The Applicant seeks costs of the contempt motion in the amount of $23,784.28 on a substantial indemnity basis and $17,739.52 on a partial indemnity basis. The Applicant also seeks costs for the motion to vary in the amount of $12,811.76 on a partial indemnity basis. The Respondent's costs outline for the motion to vary is in the amount of $7,072.54 and the costs for the motion for contempt is in the amount of $6,320.99, both on a partial indemnity basis.

[57] If there is no agreement with respect to costs, the Applicant may deliver written cost submissions of no more than 3 pages in length, excluding caselaw and bills of costs, within 14 days of the date of this endorsement. The Respondent may deliver his reply cost submissions on the same basis within 14 days of receiving the Applicant's submissions.



DATE: December 13, 2021