

CITATION: Ontario College of Optometrists v. SHS Optical Ltd.,
2010 ONSC 6079
COURT FILE NO.: 05-18863
DATE: November 2, 2010

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: THE ONTARIO COLLEGE OF OPTOMETRISTS Applicant
v.
SHS OPTICAL LTD., DUNDURN OPTICAL LTD., and JOHN DOE, all
carrying on business under the name GREAT GLASSES, JOANNE MARIE
BERGEZ and BRUCE BERGEZ Respondents
And
COLLEGE OF OPTICIANS OF ONTARIO Intervenor
And
ATTORNEY GENERAL OF ONTARIO Intervenor

BEFORE: The Honourable Mr. Justice J. Turnbull

COUNSEL: John Longo, for Tenant
Gustavo F. Camelino for Landlord
Michael J. MacNaughton for Receiver

HEARD: November 1, 2010

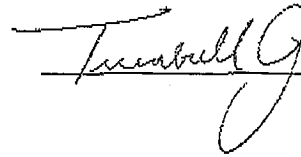
ENDORSEMENT

- [1] I was asked to deal with an emergency motion in this matter by telephone today. No papers were filed but counsel made representations orally to assist me in giving direction in this matter.
- [2] Counsel for the tenant, Mr. Longo, indicated that he sought this conference call on an urgent basis because his client, who purchased the Great Glasses Franchise at 125 Queensway is going to be evicted by her landlord for non payment of rent. The court was advised that at the time the tenant took over the franchise in late 2009, the rent was in arrears and she paid the arrears owing and also other suppliers who were owed money.

At that time, the tenant assumed a lease that still had approximately 3-4 years left on its term. Clearly, the goodwill of location was a factor a prudent purchaser would have taken into account in determining the amount to pay for such a business.

- [3] He advised, that after the court issued its order appointing a Receiver, thereby prohibiting the tenant from carrying on business as she had done to that time, the business was considerably disrupted. While the details were not given to me, I can only assume that the Eye Logic machine that she had been using since she bought the franchise in December 2009, was removed by the Receiver as ordered by the Court. The transition presumably was very difficult until such time as the services of an optician were obtained to permit her to operate in compliance with the law.
- [4] As a result, her rent fell into arrears. The landlord was not able to move to force payment of rent due to the court ordered stay. The tenant is now in arrears for the months of September and October, 2010 in the amount of \$11,205.36.
- [5] On October 18th, 2010, counsel for the landlord wrote to the Receiver and advised the Receiver of the arrears. By letter dated October 25th, 2010, the Receiver advised that if the tenant paid all the arrears by November 1, 2010, he would not exercise his discretion to lift the stay of proceedings (the Stay) contained in the court's order.
- [6] The tenant was not able to pay the arrears within such a short period of time. The landlord wished to take the lease out of governance by the Receivership, thereby being able to avail itself of the remedies available under the lease and under the *Commercial Tenancies Act*, R.S.O. 1990, Chapter L 7 as amended. Mr. Camelino argued that the proper remedy is for the tenant to bring an application for relief from forfeiture.
- [7] I have considered the equities of this situation, and particularly the fact that the order appointing a Receiver has impacted this franchisee. The tenant is prepared to pay the arrears owing on a strict timetable so that the immediate financial prejudice to the landlord is removed. I am also influenced by the fact that the franchisees are apparently involved in negotiation with the Attorney General to resolve issues collectively and that the tenant may be denied her opportunity to participate in those discussions if the Stay was lifted.
- [8] It is therefore ordered:
1. The Stay previously ordered by the Court is not to be lifted with respect to 125 Queensway.
 2. The tenant is to pay the arrears owing and the rent payable to the end of 2010 by certified cheque as follows:
 - a. \$7,357.47 on or before Friday November 5, 2010.

- b. \$2,357.47 on or before each Friday commencing November 12, 2010 for seven consecutive weeks.
3. If any of the payments specified in paragraph 8 (2)(a) or (b) is missed, the landlord does not need to seek leave of the Receiver or this Court to lift the Stay and may seek its remedies under the lease and under the relevant legislation.
4. This order is made without prejudice to the rights of the landlord to seek a lifting of the Stay by motion properly served on the Receiver and counsel for the tenant returnable before the Court on November 26, 2010 at Hamilton.
5. It is ordered that a copy of this endorsement be served by fax upon Counsel for the Attorney General of Ontario.



Turnbull, J.

Date: November 2, 2010.