



Volume XVII Number 6

October 2022

Commercial Leasing

Thinking About Assigning a Commercial Lease? Make Sure the Assignee is Fit for Purpose

By
Andrew Kirk, Lawyer
andrew@defranlaw.com

Assigning interest on a commercial property is a process that should be handled with care. As the Assignor Landlord, you are essentially designating the Assignee with the responsibility of managing the property appropriately and handling any existing commercial leases that are in place. A recent case highlights the issues that can arise when an Assignee acquires interest, including a commercial lease, and then proceeds to mismanage their responsibilities to the commercial tenant.

In *Up In Frames v. NYX Yonge Inc.*, 2022 ONSC 4795, a commercial lease had been entered into by Maria Messina as Landlord and the applicant tenant at 3200 Yonge Street in Toronto. Specifically, a retail lease had been agreed between the parties that was due to expire in 2023 with the option for a five-year extension. The building that housed the leased premises was acquired in May 2020 by NYX Capital Corp., with the landlord's interest in the lease being assigned to an affiliate of NYX Capital Corp., who was also the respondent in the subject case.

In February 2022, the respondent sent a default notice to the applicant tenant for payment of \$45,057.19 in arrears within 30 days, followed by a lease termination notice one month later. The applicant contested the notice by seeking an injunction with the Ontario Superior Court, arguing not only that it was not in default of the lease, but it was the respondent, in fact, who had fabricated the alleged default arrears in order to evict the applicant from the premises.

According to the evidence presented, the value of unpaid property tax, which comprised the majority of arrears, was grossly misrepresented. It was also proven that the Assignee had failed to deliver an invoice insofar as the matter of the unpaid water bill was concerned. The Superior Court determined that the applicant tenant had already been paying the property tax as part of the "semi-gross" rental payments and, therefore, was only responsible for the escalation in realty taxes over and above the first year of the tenancy as was specified in the terms of the lease. Lastly, the final portion of arrears, being basic rent, had been furnished as a post-dated cheque by the applicant tenant prior to the respondent acquiring the property, which had not been deposited due to a clerical error. The



Superior Court declared the Default Notice null and void, resulting in the respondent being unable either to terminate the lease or enter the premises without a court order.

This case provides a clear example of negligence on behalf of the Assignee, who made three critical errors. **First**, they failed to review the source document properly, namely the current Commercial lease pertaining to the assignment. As a result, they made a crucial error in calculating outstanding property tax arrears. **Second**, they failed to deliver the unpaid water bill to the applicant and did not provide any means for said applicant to know that payment of the bill was due, although they had already ensured to arrange payment for the correct amount to cover the outstanding balance. **Third**, they overlooked the fact that the unpaid rent portion of the arrears had previously been delivered by the applicant via post-dated cheque, even though it had failed to be deposited by the Assignee. Taken together, these errors had the combined effect of severely discrediting the competence of the Assignee and undermining the judgment of the Assignor.

With retail leases especially, the landlords usually prefer to take matters into their own hands and exercise substantial control to ensure viability of the leased premises. Generally speaking, the Assignor should take measures to ensure a similar degree of competence and control that was previously exercised is reflected under the new management of the Assignee. As a precautionary measure, the Assignor can minimize the risk of negligence by performing historical checks on previous lease assignments managed by the Assignee. This would provide a clear picture on how processes such as bill payments and rent collection are facilitated. Also, it should be recognized that the shortcomings of an Assignee can have an effect on how the Assignor is perceived, similar to how an employee's delinquency can reflect negatively on the employer.

That being said, commercial landlords should take care to assess the competency of potential assignees and conduct due diligence on the tasks expected to be fulfilled by them. Undertaking all of these precautions will certainly help you to minimize the likelihood of lawsuits and go a long way to promoting good relations between the associated parties – Assignor, Assignee and Tenant.

