

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

AUTOTEC LTD.

Applicant

-and-

507407 NWT LTD.

Respondent

**Transcript of the Reasons for Decision of the Honourable Justice
S.H. Smallwood sitting in Yellowknife, in the Northwest
Territories, on the 13th day of March, 2020.**

APPEARANCES:

A. Regel:

Counsel for the Applicant

G. Wallbridge:

Counsel for the Applicant

D. McNiven:

Counsel for the Respondent

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RULINGS, REASONS

Reasons for Decision

1

1 THE COURT: This is an application with respect to a
2 lease and a caveat. Autotec is the tenant on a lease for
3 a commercial property. Autotec filed a caveat against
4 title regarding the lease. The issue is whether Autotec
5 validly exercised their option to renew the lease or
6 whether they failed to do so, causing the lease to expire
7 and resulting in the lapse of the caveat.

8 Autotec, as the tenant, and Home
9 Hardware Stores Limited, as the landlord, entered into
10 a lease on December 14th, 2009, for property at 354
11 Old Airport Road. The lease was for a term of three
12 years and had an option to renew for two further three-
13 year terms.

14 Autotec filed a caveat against title,
15 claiming an interest pursuant to the lease on April 30th,
16 2010. Autotec exercised the options to renew the lease
17 in 2012 and 2015.

18 The landlord of the property changed
19 during the term of the lease. On September 24th,
20 2015, Autotec and 6033 NWT Limited, as the new
21 landlord, signed an agreement to amend the lease to
22 add a third option to renew from December 2018 to
23 December 2021. The option to renew was to be
24 exercised by giving written notice to the landlord not
25 later than three months prior to the expiry of the term.

26 The Business Development Bank of
27 Canada (BDC) was the mortgagee to the property. In

1 July 2017, BDC commenced foreclosure proceedings
2 against the registered owners of the property.

3 An *ex parte* preservation order was filed
4 on October 5th, 2017, allowing BDC to preserve the
5 property. The order stated that BDC "shall not be
6 considered a mortgagee in possession as a result of
7 this order." Ultimately, 507407 NWT Limited purchased
8 the property via an order for sale granted September
9 13th, 2019.

10 Autotec sent a letter of renewal seeking
11 to exercise the option to renew the lease for a further
12 term of three years. The letter was sent via email to
13 Edward Gullberg, the solicitor for BDC, and the date on
14 the email is 8/10/2018. The letter itself which is
15 attached to the email is signed but not dated. It is not
16 clear from the email whether that refers to August 10th,
17 2018, or October 8th, 2018.

18 The affidavit of Vanessa Wareham to
19 which the email and letter are attached as exhibits are
20 vague about the date. She deposes that in or around
21 August 2018 she was informed about the foreclosure
22 proceedings. She then states that Autotec was
23 concerned about the impact of the foreclosure and sent
24 the attached email to BDC via Mr. Gullberg. Her
25 affidavit, however, does not state the date the email
26 was sent.

27 The date is important because Autotec

1 had to renew its option to the lease three months prior
2 to its expiry at the end of December 2018. If the option
3 to renew was sent in October, it was obviously sent too
4 late. If it was sent in August then it was sent in time.

5 Assuming without deciding that the letter
6 purporting to renew the lease was sent in August, the
7 issue then is whether the email and letter actually
8 exercised the option to renew the lease. 507407
9 argues that it did not because the renewal was sent to
10 the solicitor for BDC, Mr. Gullberg, and BDC was the
11 mortgagee and not the landlord.

12 While there was a preservation order that
13 allowed BDC to collect rent and change the locks, it
14 also specifically stated that BDC was not a mortgagee
15 in possession of the property.

16 507407 argues that the lease expired
17 without being renewed and the caveat lapsed and, as
18 such, Autotec is an overholding tenant.

19 Autotec argues that the previous owner,
20 the landlord, had abandoned the property, and BDC,
21 through the foreclosure process, had acted like a
22 landlord. The previous owner had no more authority
23 over the property once BDC took over the property, and
24 service of the option to renew the lease on 6033 would
25 have been pointless in the circumstances.

26 Autotec argues that BDC's actions reflect
27 an acceptance of the renewal of the option, that BDC

1 never disputed the renewal of the option, listed the
2 property for sale subject to the lease, and made no
3 effort to remove Autotec from the property.

4 There were other arguments made about
5 representations made during the sale of the property
6 and the terms of the sale to 507407, but in my view the
7 issue is whether the lease was renewed. The order for
8 sale and other sale documents may have stated that
9 the sale was subject to a lease, but those documents
10 cannot establish the validity of a lease on their own. A
11 lease still has to be valid on its own terms.

12 Representations regarding whether the
13 lease would be continued, made either orally or in
14 emails, also do not establish the validity of the lease
15 and do not necessarily bind either party.

16 BDC was the mortgagee of the property.
17 Whether or not BDC became a mortgagee in
18 possession when BDC obtained the preservation order
19 and took over management of the property does not
20 necessarily make BDC responsible for the lease or its
21 renewal.

22 At common law, a mortgagee, whether or
23 not in possession, is not automatically responsible for
24 collateral contracts. *2774880 Manitoba Ltd. v Superior
25 Management Ltd. et al.*, 2000 MBCA 47, para. 8.

26 BDC as mortgagee was not a party to the
27 lease and did not have the ability to deal with the lease.

1 The previous owner, 6033, did not assign the rights
2 under the lease to BDC. The abandonment of the
3 property by 6033 forced BDC as the mortgagee to step
4 in and assume a management role with respect to the
5 property, but this cannot be construed as an
6 assignment of 6033's obligations under the lease to
7 BDC or an acceptance by BDC of the obligations under
8 the lease.

9 BDC obtained a preservation order and
10 collected rent not because they assumed the role of
11 landlord in the lease with Autotec, but to allow BDC to
12 collect payments and secure the mortgage debt which
13 was owed to them by the mortgagor. BDC was not the
14 landlord, and there was no contractual relationship
15 between BDC and Autotec.

16 Autotec argues that sending the notice to
17 exercise the option to 6033 would have been pointless
18 as BDC was in control of the property. Because of this,
19 Autotec sent the notice to BDC. I can understand why
20 Autotec acted as they did in sending the notice to
21 BDC's solicitor. BDC had taken over management of
22 the property and was collecting rent from Autotec.

23 However, while BDC may have been the
24 landlord in fact, they were not the landlord in law. 6033
25 remained the landlord until the title to the property
26 changed. Service of the notice could have been made
27 on 6033's registered office or on Jason Clarke, who

1 signed the lease agreement to provide the third option
2 to renew on behalf of 6033.

3 Mr. Clarke swore an affidavit in this
4 proceeding which indicates that he lives in Yellowknife.
5 The affidavit was filed by the plaintiff, which leads me to
6 believe that Autotec could have located Mr. Clarke to
7 serve the notice on him. If Autotec had done so,
8 neither BDC nor 507407 could now complain that the
9 service was invalid or pointless. Unfortunately, Autotec
10 did not take these steps.

11 Therefore, I find that Autotec did not
12 validly renew the lease. As such, the lease expired at
13 the end of December 2018 and the caveat lapsed.
14 Autotec is an overholding tenant to which 507407
15 provided a valid notice of termination. There will be an
16 order then allowing Autotec a reasonable time to vacate
17 the premises or alternatively, to sign a new lease. In
18 the circumstances, I am going to grant 90 days. And in
19 the meantime, Autotec will pay rent as an overholding
20 tenant in the amount of 6,500 per month and 507407
21 will have their costs pursuant to the *Rules*.

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23 **(PROCEEDINGS ADJOURNED)**

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CERTIFICATE OF TRANSCRIPT

Neesons, the undersigned, hereby certify that the foregoing pages are a complete and accurate transcript of the proceedings transcribed from the audio recording to the best of our skill and ability.

Dated at the City of Toronto, in the Province of Ontario, this 25th day of March, 2020.



Kim Neeson
Principal