

Distraining Landlords: A Cautionary Tale*

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A landlord's ability to distraint (i.e. to take, hold and eventually sell) a defaulting tenant's property can be an effective tool to protect a landlord's financial interests in a lease. But what obligations does a landlord have to a third party claiming to own the distressed property? A recent Ontario Superior Court of Justice decision examined the competing rights of a distraining landlord and a third party's ownership interest in distressed goods.

The facts of the case are relatively straightforward. Upon default of a lease, the landlord effected a distraint of all the property in the tenant's premises. Shortly after the distraint, a third party supplier of the tenant contacted the landlord's solicitor to advise that the supplier was the rightful owner of certain equipment and supplies leased to the tenant, which were included in the landlord's distraint.

Although the supplier's original request was unsuccessful, the landlord eventually acknowledged the supplier's ownership rights to the goods and agreed to allow the supplier to retrieve its property upon payment of the landlord's legal fees.

The supplier initially disputed the requested payment and threatened legal action if the landlord did not allow it to retrieve its property, but ultimately the supplier agreed to pay the fees.

Despite meeting all of the landlord's demands, the supplier did not receive permission to recover its property until over two years after the initial distraint, at which point the equipment was badly corroded and essentially worthless.

In its analysis of this case, the court relied on the following two provisions of the Ontario *Commercial Tenancies Act*:

31(2) A landlord shall not distraint for rent on the goods and chattels of any person except the tenant or person who is liable for rent, although same are found on the premises; ...

55(1) A distrainer who takes an excessive distress, or takes a distress wrongly, is liable in damages to the owner of the goods or chattels distrained.

Based on the facts of this case, the landlord was clearly in violation of the Act.

The court further held that the landlord's distraint of the supplier's property and subsequent refusal to allow the supplier to recover such property amounted to a "conversion", the wrongful interference with the goods of another, such as taking using or destroying these goods in a manner inconsistent with the owner's rights of possession.

The interesting aspect of this decision is not the fact that the landlord was found liable to the supplier for the value of the property (\$12,850.00), resulting from the landlord's wrongful

distrain, as the Act is clear that a landlord cannot distrain a third party's goods. Rather, what's interesting is that the landlord was also found liable for punitive damages in the amount of \$5,000.00 for its actions and dealings with the supplier after the distraint.

The fact that the landlord refused the supplier's request to retrieve its property, then imposed unreasonable demands on the supplier to pay its legal fees (and when such demands were met, did not allow the supplier to recover its property until over two years after the initial distress), was sufficient for the court to reprimand the landlord and penalize it with punitive damages.

The lesson to be learned from this decision is that a landlord must distrain in a reasonable manner. If a landlord is aware that the tenant is not the rightful owner of any of the distrained property, the landlord must grant such owner reasonable access to the premises for the recovery of its property.

Any refusal or unreasonable conditions in this regard will certainly attract damages for wrongful distraint and, if the landlord's actions are particularly unreasonable, the court will also award punitive damages against the offending landlord.