ONTARIO SUPERIOR COURT OF JUSTICE (TORONTO REGION)

CIVIL ENDORSEMENT FORM

BEFORE	Robert Centa J.	Court File Number: CV-23-00694740-0000

Title of Proceeding:

2771656 Ontario Inc. — Plaintiff

-v-

T-Dot Auto Collision Inc. operating as Cannaverse and Yalini Manoharan, a.k.a. Yalini Ruthiran — Defendants

Case Management: ☐ Yes If so, by whom:	X No

Participants and Non-Participants:

Party	Counsel	E-mail Address or telephone	Participated
1) Plaintiff	Natalia Sidlar	nsidlar@foglers.com	Y
2) Defendant	Oleg Roslak	oroslak@himprolaw.com	Y

Date Heard: October 11, 2024

Nature of Hearing (mark with an "X"):

☒ Motion ☐ Appeal ☐ Case Conference ☐ Pre-Trial Conference ☐ Application

Format of Hearing (mark with an "X"):

☐ In Writing ☐ Telephone ☒ Videoconference ☐ In Person

Relief Requested:

Landlord's motion for summary judgment on its claim for breach of a lease and to dismiss the defendant tenant's counterclaim.

Disposition made at hearing or conference (operative terms ordered):

Judgment granted in favour of the landlord. Tenant's counterclaim dismissed.

Brief Reasons, if any:

The plaintiff, 2771656 Ontario Inc., owns property on Queen Street West, Toronto, which it rents to commercial tenants. In October 2020, the landlord signed a lease with the defendant T-Dot Auto Collision Inc. which, despite its name, now carries on business as a cannabis retailer, operating as Cannaverse. The defendant Yalini Ruthiran is an officer and director of the tenant and signed a personal guarantee of the tenant's obligations under the lease.

In July 2021, the tenant defaulted on its obligations under the lease. By September 30, 2021, the tenant owed $46,827.21 to the landlord in unpaid rent and the landlord and tenant entered into a rent abatement agreement. The tenant failed to pay the rent owing in December 2022, which breached the lease and the rent abatement agreement. On December 29, 2022, the landlord issued a notice of default to the tenant. The tenant did not cure its default by the deadline of December 29, 2022. On January 6, 2023, the tenant abandoned the premises. On January 9, 2023, the landlord issued a notice of termination of lease to the tenant. This correspondence will be discussed further below.

On February 15, 2023, the landlord commenced this proceeding against the tenant for payment of the rental arrears and damages for unpaid rent for the unexpired term of the lease. It also sued Ms. Ruthiran for breach of the guarantee. On July 10, 2023, the defendants delivered a statement of defence, and the tenant advanced a counterclaim for damages for breach of the lease, conversion, and unjust enrichment.

The landlord brought this motion for summary judgment. It seeks summary judgment against the defendants in the amount of $163,045.75. and dismissal of the counterclaim. The defendant requested that the landlord's motion for summary judgment be dismissed.

Concessions made by the parties and issues remaining in dispute

To the credit of the parties and their counsel, the parties were able to narrow the issues between them in this proceeding:

1. The defendants abandoned their argument that the lease was frustrated and terminated with no further obligations owed to the landlord.

2. The tenant admitted that it breached the lease and the rent abatement agreement and owed damages to the landlord arising from those breaches.

3. The tenant accepted the landlord's damages calculations, except for the treatment of a $60,000 deposit paid by the tenant upon signing the lease.

4. Ms. Ruthiran abandoned her argument that she never entered into any agreement to guarantee the tenant's performance under the lease. She accepts that the guarantee is valid and enforceable and, if the tenant is found to owe any money to the landlord, she is jointly and severally liable to the landlord for those amounts.

5. The landlord abandoned its claim for damages representing the economic difference between the tenant's rental obligations for the balance of the 10-year term and the revenue to be earned from the new tenant who entered the space in July 2023. This, in turn, permitted the tenant to abandon its submissions that the landlord had failed to mitigate its damages when it entered into an improvident or under-market lease with the new tenant.

I am grateful to the parties and counsel for these sensible concessions. They allowed for an efficient and focussed hearing on the remaining issues. I must determine if the landlord proved that there is no genuine issue requiring a trial with respect to:

1. the landlord's damages, and, in particular, the amount of the tenant's deposit that remains available to be credited against the landlord's damages;

2. whether the landlord acted reasonably to mitigate its damages between the date it terminated the lease when it signed a lease with the new tenant; and

3. the tenant's counterclaim for conversion and unjust enrichment.

As I will explain, and particularly given the concessions described above, the landlord satisfied me that there are no genuine issues requiring a trial.

Legal principles applicable to motions for summary judgment

Summary judgment is an important tool for enhancing access to justice where it provides a fair process that results in a just adjudication of disputes: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R.

87, at paras. 4-6. Used properly, it can achieve proportionate, timely, and cost-effective adjudication. On a motion for summary judgment, I am to first determine if there is a genuine issue requiring a trial based only on the evidence before me, without using the enhanced fact-finding powers under rule 20.04(2.1).

On a motion for summary judgment, the court assumes that the parties have each advanced their best case and that the record contains all the evidence that would be led at trial. Each party is obliged to put its best foot forward. The parties are not permitted to sit back and suggest that they would call additional evidence at trial.

I am satisfied that there is no genuine issue requiring a trial based on the evidence before me. Here the summary judgment process provides me with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable, and proportionate procedure, under rule 20.04(2)(a). I am able to reach a fair and just determination on the merits of the action on this motion for summary judgment. The process allows me to make the necessary findings of fact and apply the law to the facts. Deciding the merits of this case on a motion for summary judgment is a proportionate, more expeditious, and less expensive means to achieve a just result.

Issue one: damages and the credit for the deposit

The parties agree on the legal principles applicable to the calculation of damages for breach of a lease. Justice Perell put it this way in *Morguard Corporation v. Bramalea City Centre Equities*, 2013 ONSC 7213, at para. 46:

> The proper measure of damages for a terminated lease is the unpaid rent to the date of the breach (the arrears of rent) plus the present value of the loss of the future rent, which is the present value of the unpaid rent for the unexpired period of the lease less the actual rental value of the premises for that period ... The proper calculation of the Landlord's damages is present value of the unpaid future rent for the unexpired period of the lease less the actual rental value of the premises for that period plus reasonably foreseeable consequential losses.

The landlord is obliged to prove its damages. I am entitled to assume on a motion for summary judgment that the landlord has led all available evidence and that there would be no additional evidence available at trial.

The parties agree that the landlord has proved its damages with respect to damages attributable to the tenant's failure to pay the abated rent in 2021, the arrears for 2022, and the legal fees for the

preparation of the notice of rent default. These damages total $40,096.36.

The parties agree that the landlord has proved its damages with respect to damages attributable to unpaid basic and additional rent for the period January 2023 to July 2023 (subject to the defendant's argument about reasonable efforts to mitigate damages, which I will address in the next section). These damages total $109,263.42.

The parties agree that the landlord has proved its damages with respect to special damages attributable to locksmith fees, legal fees to collect the arrears, and fees to re-lease the premises. These damages total $32,221.77.

Therefore, the parties agree that the landlord suffered $181,581.57 in damages arising from the tenant's breach of the lease. The parties also agree that the tenant paid a deposit of $60,000 when it entered the lease and that the tenant is entitled to a credit of any remaining amounts of the deposit against the damages it owes.

The tenant concedes that the landlord proved that it applied the deposit against the additional rent owing by the tenant for four months. The additional rent was $3,902.16 per month, so four months' additional rent totals $15,608.64, which when deducted from the original $60,000 deposit leaves a $44,391.36 balance.

The landlord agrees that it applied the deposit funds to the four months of additional rent. However, the landlord submits that it also applied the deposit funds to first month's rent, and March 2021 rent, leaving a balance of only $18,535,80. This is explained in footnote 90 of the landlord's factum:

> The initial deposit in accordance with the Lease was $60,000. The remaining $41,464.20 was applied to first month's rent, additional rent payments for four months, and March 2021 rent.

Notably, footnote 90 does not cite to the evidence filed on the motion. This stands in stark contrast to the balance of the landlord's factum, which is heavily and accurately cross-referenced to the record. I could find no support in the evidence for this calculation. Counsel for the landlord conceded that the landlord's record keeping with respect to how the deposit was applied was not as rigorous as it could have been. Counsel for the landlord indicated that there was support for the landlord's calculations in some brief handwritten notes, but those were not part of the record before me. In any event, if those notes had formed part of the record, I doubt that they would have been sufficient to discharge the landlord's burden of proof.

I am entitled to assume that the landlord has led all available evidence on this motion for summary judgment and that there will be no better evidence available at a trial of this action. I find that there is no genuine issue requiring a trial with respect to the application of the deposit funds. I find that the landlord has not proved that it applied the deposit funds to the tenant's obligations, except for the $15,608.64 of additional rent for four months. Therefore, I find that the tenant is entitled to a credit of $44,391.36 against the damages owed of $181,581.57.

I find that the landlord has proven damages of $137,190.21.

Issue two: mitigation of damages

The parties agree that the landlord must take reasonable steps to avoid loss. Landlords are subject to the normal rules of mitigation when advancing a claim for damages arising from breach of contract. An innocent party may not recover damages that it ought reasonably to have avoided: *2506045 Ontario Inc. v. Gaskell and Rahmaty*, 2023 ONSC 5809, at para 40. The court will not assess the conduct of an innocent party on a standard of perfection. As the court held in *Malatinszky v. Miri,* 2020 ONSC 16, at para. 82:

> In assessing the innocent party's efforts at mitigation, the courts are tolerant, and the innocent party need only be reasonable, not perfect; in deciding what is a reasonable way to mitigate the effects of a breach of contract, the innocent party is not to be held to too nice a standard; it need only act reasonably, using what it knows then, without hindsight, and it need not do anything risky.

The tenant alleges that the landlord failed to mitigate its losses. The landlord must prove that this defence raises no genuine issue requiring a trial.

At trial, the tenant would have to prove on a balance of probabilities not only that the landlord failed to take reasonable efforts to find a substitute, but also that a reasonable profitable substitute could be found: *Southcott Estates Inc. v. Toronto Catholic District School Board*, [2012] 2 SCR 675, at para 45.

If the landlord can demonstrate that it took steps to mitigate its losses, the onus shifts to the tenant to establish that those efforts were not reasonable. In the real estate context, retaining a real estate agent, soliciting prospective tenants, showing the premises and advertising the unit for lease (by placing a sign in the window and advertising in an online marketing brochure posted on the landlord's website) have all been found to constitute appropriate efforts to mitigate by a landlord: *1212763 Ontario Limited v. Bonjour Café*, 2012 ONSC 823, at para. 65; *Calloway REIT (Westgate) Inc. v. Elita's Perfect Touch Hair Studio*,

2019 ONSC 5755, at para. 30.

As noted, the landlord is not seeking to recover any damages from the tenant for the period after it signed a lease with the new tenant, Dashvapes, on July 17, 2023. Therefore, the terms of the Dashvapes lease are irrelevant to the assessment of whether the landlord mitigated its losses. Although the tenant originally submitted that the landlord had acted improvidently by accepting too little in rent for too much space, it abandoned this argument when the landlord limited its claim for damages up to the date it signed the lease with Dashvapes.

The landlord provided evidence that it listed the premises for lease in January 2023, after giving time for the tenant to attend the premises to retrieve any of its items (which I will address further below). The landlord stated that it received two other offers to rent the space, but both prospective tenants reneged on their offers. It then signed the lease with Dashvapes, on July 17, 2023.

On cross-examination, the landlord's representative confirmed that after it terminated the lease, it retained a real estate agent and listed the property for lease. The landlord confirmed that it attempted to rent the premises for the same amount of rent paid by the defendant. The landlord confirmed that it was unable to locate a copy of the listing agreement, the listing itself, or any correspondence related to the relisting of the premises.

In my view, there is no genuine issue requiring a trial on the issue of the landlord's attempt to re-lease the space. The landlord has provided affidavit evidence that it retained a real-estate agent to attempt to release the space in late January 2023. It has provided evidence that it received a total of three offers between February and July 2023, but the prospective tenants reneged on two of those offers. It produced a copy of an offer to lease dated June 25, 2023, from a company called Connect Pour Inc., which confirms the name of the landlord's real estate agent.

I do not accept the tenant's submission that I should draw an adverse inference because the landlord could not produce a copy of the listing agreement or written correspondence with the real estate agent. The landlord answered the undertaking and indicated that it did not have any such documents in its possession. I decline to draw an adverse inference in these circumstances, particularly where it is clear that the landlord did retain a real estate agent, did receive offers to settle, and did re-lease the property within six months.

I also note that it is difficult to reconcile the tenant's position that the landlord did not take reasonable steps to quickly find a new tenant with the position in its factum that the landlord gave the new

tenant too much space for too little rent with the result that the new lease was "at a rate so far below market as to be unreasonable."

Finally, the tenant led no evidence on this motion for summary judgment that a reasonable profitable substitute could be found more quickly: *Southcott Estates Inc*., at para 45. The tenant was required to put its best foot forward on this motion for summary judgment.

In conclusion, the landlord has satisfied me that there is no genuine issue requiring a trial with respect to its mitigation efforts. I am satisfied that the landlord took all reasonable steps to mitigate the damages it claims.

Issue three: the tenant's counterclaim

The tenant advanced a counterclaim against the landlord for conversion and unjust enrichment. The tenant left approximately $200,000 in custom millwork and a security system behind in the premises after it departed. The tenant submits that the landlord is liable for conversion because the new tenant is using the millwork in its store and that the landlord was unjustly enriched by the value of the millwork. The tenant does not seek summary judgment on the counterclaim in its favour, only that the counterclaim proceed to trial. I find that the landlord has demonstrated that the counterclaim raises no genuine issue requiring a trial. I grant summary judgment in favour of the landlord and dismiss the counterclaim.

The parties agree that the tenant installed custom millwork in the store consisting primarily of display cabinets on the floor and the walls of the store. To take the tenant's case at its highest, I will assume that all the items left behind are chattels and not fixtures. For this reason, I will not consider the landlord's argument that because the items were not identified as "Trade Fixtures" on the plans and, therefore, the landlord obtained a property interest in the millwork and security system on default.

I will first consider the tenant's claim for conversion of the millwork and security system. The tort of conversion "involves a wrongful interference with the goods of another, such as taking, using or destroying these goods in a manner inconsistent with the owner's right of possession": *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727, at p. 746; *Tar Heel Investments Inc. v. H.L. Staebler Company Limited*, 2022 ONCA 842, at para 18.

However, abandonment is a complete defence to an action in conversion: *Simpson v. Gowers et al.*, (1981), 32 O.R. (2d) 385 (C.A.); *2105582 Ontario Ltd. (Performance Plus Golf Academy) v. 375445 Ontario Limited (Hydeaway Golf Club)*, 2017 ONCA 980, at para 52. If the landlord can prove on a balance

of probabilities the tenant's objective intention to abandon the chattels sometime between January 9, 2023, and July 17, 2023, the tenant's counterclaim must fail. In *Simpson*, the Court of Appeal adopted the following definition of abandonment:

> Abandonment occurs when there is "a giving up, a total desertion, and absolute relinquishment" of private goods by the former owner. It may arise when the owner with the specific intent of desertion and relinquishment casts away or leaves behind his property ...

The determination of whether there is a sufficient intent to abandon is a question of fact governed by factors such as the length of time, nature of the chattels, conduct of the parties and context of the case: *1083994 Ontario Inc. v. Kotsopoulos*, 2012 ONCA 143, at paras. 17-18. As I will explain, the landlord has demonstrated that there is no genuine issue requiring a trial regarding the tenant's abandonment of the chattels.

On Friday, January 6, 2023, the tenant walked away from the leased premises. The CEO of the tenant wrote to counsel for the landlord and advised that the tenant was closing the business, and the tenant had removed the cannabis inventory from the store. The tenant advised the landlord that it was looking for a new tenant to which it could assign the lease and advised the landlord that it had left behind the custom millwork with a value of "over $200,000". The email read, in part, as follows:

> We are currently taking our best efforts to find an assignee for the landlord's consideration and approval. We have engaged a real estate agent and will have the listing on the Multiple Listing Service this afternoon. It is our sincere hope that we will secure an assignee for the lease before the end of the month. We hope that the landlord will be cooperative in our efforts to find a replacement tenant.
>
> In the meantime, because we are aware that your client has the right to reentry and our product is highly regulated, we have removed our inventory so that it is not left in the unit should your client decide to take possession. We have left our custom millwork in the unit which has a value of over $200,000. We will use our best efforts to secure a new tenant as quickly as possible.

Given this email, there is no doubt that the tenant knew that it had left the chattels behind. The tenant also appeared to be extremely interested in finding a suitable replacement tenant that would be acceptable to the landlord. The tenant's hopes of assigning the lease (and avoiding the landlord's inevitable claim for damages) evaporated on Monday, January 9, 2023, when the landlord terminated the lease and reserved its rights to sue the tenant for a range of damages:

> The Landlord hereby gives you notice that the Landlord elects to terminate the Lease as a result of your failure to pay rent on the dates required for payment, retaining the right to sue for rent, accelerated rent and other charges accrued due, the right to sue for damages to the date of termination for previous breaches, the right to claim for damages for the loss of the benefit of the Lease over the balance of the term of the Lease, and the right to claim for damages incurred by the Landlord in re-renting the premises.

The landlord advised the tenant that it had changed the locks and put the tenant on notice that the landlord would dispose of any property not removed from the premises by the end of the day January 23, 2024:

> The locks have been changed and possession of the premises taken by the Landlord. Any attempt whatsoever by any person whosoever to gain entry to the premises without the prior written consent of the Landlord is unlawful and any such person will be a trespasser and will be prosecuted to the full extent of the law.
>
> Please be advised that the Landlord shall hold you responsible to direct everyone with an interest in any property within the premises to contact the undersigned immediately and to provide the their proof of their interest in any goods or equipment. Note that all property within the premises will remain in the premises to January 23, 2023, at 5:00 p.m. Perishable goods will be put in the garbage immediately to avoid the creation of an unhealthy environment that would promote vermin and other nuisances. After this time, the Landlord shall dispose of such property without further notice.

I pause here to note that I do not accept the tenant's submission that this letter was unclear or could have led to any misunderstanding on the part of the tenant. The letter is crystal clear and put the tenant on notice: the landlord will dispose of any property left in the premises after January 23, 2023.

I accept that the tenant's stated value of the chattels left behind is a factor that suggests the tenant intended to retain its property. However, this factor standing alone cannot overcome the overwhelming evidence that demonstrates that, viewed objectively, the tenant intended to abandon the property.

Most tellingly, the tenant never followed up with the landlord after the letter of January 9, 2023. The tenant never made any arrangements to come and pick up the chattels. The tenant never asked for an extension of time to come and pick up the millwork, which remained on site until July 2023, when Dashvapes opened for business and began to use the chattels (it replaced the security system). In my view, if the landlord converted the chattels, that happened in July 2023, when Dashvapes began to occupy the premises and use the millwork.

I accept that the tenant now asserts that it wanted to retrieve the chattels. However, this does not raise a genuine issue requiring a trial. Intention may be established objectively, through the process of inference, from the overt acts and conduct of the tenant, and from the circumstances surrounding the tenant's treatment of the property at issue.

The tenant's conduct in this case is very much unlike the situation in *Performance Plus Golf Academy* where the respondent's diligent efforts to retrieve its driving range deck, a deck canopy, a ball shack, driving range barrier net poles, and driving range barrier nets. The Court of Appeal held that the respondent had not abandoned its property:

> [53] Here, the respondent attempted to either negotiate a sale of his assets to the appellant or a time he could retrieve them. The respondent's lawyer sent letters shortly after the termination of the lease indicating the respondent intended to remove the chattels. The respondent attempted to retrieve the chattels multiple times, each time being thwarted by the appellant. As such, there were no facts to suggest abandonment of chattels or trade fixtures in the instant case.

Unlike the respondent in *Performance Plus Golf Academy*, the tenant did not:

a) try to sell the chattels to the landlord;

b) try to negotiate a time that it could retrieve the chattels;

c) send any correspondence indicating that the tenant intended to remove the chattels;

d) attempt to remove the chattels;

e) point to any conduct of the landlord that thwarted its efforts to retrieve the chattels.

The tenant was required to put its best foot forward on the motion for summary judgment. However, the tenant has provided no evidence that it took any steps in almost six months to demonstrate an objective intent to maintain possession of the chattels. The landlord has satisfied me that there is no genuine issue requiring a trial over the issue of whether the tenant abandoned the chattels. I dismiss the tenant's counterclaim for conversion.

In its pleading, the tenant also asserted a counterclaim for unjust enrichment on the same basis as its claim for conversion. The tenant did not make any submissions in support of the unjust enrichment claim in its factum on the motion for summary judgment. In my view, there is no genuine issue requiring a trial in respect of the claim for unjust enrichment because, having abandoned the chattels on the landlord's property, the tenant will not be able to prove the absence of a juristic reason for the landlord's enrichment.

In my view, the landlord has satisfied me that there is no genuine issue requiring a trial with respect to the counterclaim. The counterclaim is dismissed.

The guarantee is enforceable

As noted above, the guarantor no longer challenges the enforceability of the guarantee. The landlord has satisfied me that there is no genuine issue requiring a trial regarding the enforceability of the

guarantee. I grant judgment against the guarantor for all amounts found owing by the tenant to the landlord, including the costs of this proceeding.

Costs

If the parties are not able to resolve costs of this action, the landlord may email its costs submissions of no more than three double-spaced pages to my judicial assistant on or before October 22, 2024. The tenant and guarantor may deliver their responding submission of no more than three double-spaced pages on or before October 29, 2023. No reply submissions are to be delivered without leave.

Additional pages attached: Yes X No

October 15, 2024

Signature of Judge