

# Commercial property market a tale of two regions

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For Law Times

The lingering economic downturn has impacted commercial real estate properties throughout Ontario quite differently.

In major centres in the southern part of the province, for example, a significant number of retail and industrial closures have led to insolvencies.

But aside from passing on files to bankruptcy practitioners to assist property owners with liquidating assets, many real estate lawyers have been infusing some creativity into their work in order to facilitate options for commercial clients challenged with balancing their books.

For example, Joanna Board of Daoust Vukovich LLP in Toronto is a litigator whose practice caters to commercial property owners and landlords. She says the majority of her work during the past year has focused on assisting landlords with managing lease agreements with tenants whose businesses have been faltering.

"Generally, I've been dealing with lease interpretation issues," says Board, who mainly represents landlords within the Greater Toronto Area.

She says many clients have come to her after receiving a request from a tenant in a shopping mall or a manufacturing site asking for a rent reduction, a revision in the terms of the lease or some other type of concession to lower costs.

But unlike during a more buoyant economy, landlords are reluctant to simply evict or sue tenants who fall delinquent on their rent or expenses.

"The tenant says they're struggling and they want out, but the landlord doesn't want to let go" without filling the

space with someone else, says Board. To assist, she tries to find a resolution so that landlords can give tenants a break without losing their shirts.

"There are some things I found this year that were different than other recessions. We found that tenants are scrutinizing their additional rent charges a lot more carefully like the costs they pay for utilities, administrative costs in a shopping centre, parking, snow removal, maintenance fees.

"We also found that this year more of the tenants were withholding rent on the basis [that] they were being overcharged or disputing how taxes are allocated to the various tenants in a shopping centre."

Board first tries to help the landlord understand any options available under the terms of the lease. She then arranges for the parties to talk. "If it was just a dispute over the costs, it would be more of a discussion," she says.

If an agreement doesn't come about through discussions, she will leverage mediation or arbitration to reach a deal between the two parties. In some cases, "it's been very effective," she notes.

"In terms of landlord remedies, if there's been a rental default, then a landlord can terminate the lease. But in a downed economy, the question is, are you going to have a replacement tenant?"

So in the case of a blatant default,

one alternative she has resorted to more frequently over recent months is advising the landlord to issue a control letter. It terminates the lease agreement for less than the mandated penalty while enabling the tenant to continue operations on a month-to-month basis.

"Landlords are in the business of running a business, not a charity, but sometimes they'll realize that a business is struggling," she says. "A control letter will terminate the lease and reinstate the tenant on a short-term arrangement while the landlord markets the space. Then the agreement can be terminated on 30 days notice." Alternatively, the tenant can stay on if business picks up.

In more drastic scenarios, landlords have taken measures to seize a tenant's goods and call in a bailiff to dispose of the assets through an auction to recoup the money owed.

"If a landlord decides to restrain before a secured creditor decides to exercise their rights, the landlord has first rights" to the funds recovered, Board explains.

"In this economy, when everybody's looking to get their money, you want to be first in line. So if you can get ahead of the banks, it's something you have to take into consideration."

In a worse-case scenario, the landlord will litigate, although Board acknowledges property owners are being "much more

scrutinizing of tenants" by researching their net worth to ensure it would be worth it to take a matter to court.

Most of her clients over the past several months have had tenants in the manufacturing and retail sectors. The types of resolutions have differed markedly from previous recessions, she notes.

"I think this time things may have been more uncertain in terms of nobody really [seeming] to know how bad it was going to be. There was that eerie silence at the beginning of the year" before clients started to call.

Yet in the northern Ontario city of Thunder Bay, the commercial property market has been fuelled with a sense of resilience.

"We've kind of been in a recession since probably the early 2000s," observes Nick Melchiorre, a partner at the Thunder Bay law firm of Weiler Maloney Nelson. But rather than dropping further into an abyss due the global recession, the city has been gaining momentum.

"From a lawyer's point of view, there's a lot of activity in retail commercial development from big-box stores to hair salons starting up," says Melchiorre.

He says there's also been a surge during most of 2009 in multi-residential building projects. The city has also been a beneficiary of the federal government's infusion of money for infrastructure projects. As well, the province opened a research hospital in the city several years ago that draws leading professionals.

All of those developments have served to bolster retail. "The retail sector here is healthy," Melchiorre says. "It's a different economy than it was 10 years ago. We relied on natural resources historically, but I would attribute the rebound to diversification." **LT**



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