

In the Provincial Court of Alberta

Citation: Morguard Residential Inc. v. Adams, 2005 ABPC 271

Date: 20050927

Docket: P0590101676

Registry: Calgary

Between:

Morguard Residential Inc.

Plaintiff

- and -

**Lyndon Handito Adams and
Adam Wade Lowes and
Amanda Jane Lowes also known as
Amanda A. Lowes**

Defendants

Reasons for Judgment of the Honourable Judge B. K. O’Ferrall

[1] This is an action for rent payable by one of several joint tenants under a periodic tenancy which came into effect upon the expiration of a prior fixed-term tenancy.

[2] The Plaintiff, Morguard Residential Inc. (hereinafter sometimes referred to as the Plaintiff-landlord), is a property manager who acts as agent for the owner of a residential premise in Calgary, Alberta. I was advised that the owner of the residential premise was some person or entity known as “Bonaventure Park” who or which was also the named landlord under a certain, written Residential Tenancy Agreement dated October 2, 2003 between “Bonaventure Park” as landlord and the Defendants as tenants.

[3] The Plaintiff’s claim in this matter is only against the Defendant, Lyndon Adams (hereinafter referred to as the Defendant-tenant), the Plaintiff having settled with the other Defendant-tenants.

[4] The aforesaid Residential Tenancy Agreement or lease was a fixed-term tenancy agreement which terminated April 30, 2004. It also provided that a month-to-month tenancy could follow the primary term. Clause 2(a) of the lease stated as follows:

“ 2(a) The Landlord and the Tenant agree that the tenancy is to begin on Nov. 01/03 and is to terminate on April 30/04 and notice to vacate is to be served before the first day of the last tenancy month. After which this agreement forms a month to month tenancy, for which notice to vacate must be served on or before the first day of the last tenancy month.”

[5] The wording of this clause leaves a bit to be desired. Ordinarily a “notice to vacate” is something a landlord would serve; but in order to make sense of this clause, I am interpreting “notice to vacate” to mean a notice which the tenant must serve on the landlord to confirm that the fixed-term tenancy, which expires according to the terms of the lease, is not being converted into the periodic tenancy which the lease contemplates. The characterization of this notice may become critical because if this notice is characterized as a notice of termination, then it must comply with Sections 5 and 10 of Residential Tenancies Act. More on that later.

[6] At the end of the fixed term, two of the three tenants remained in possession and the landlord is claiming unpaid rent for that period of possession. Under the lease and the continuation, rent was payable at a rate of \$1,025.00 per month.

[7] In its Civil Claim, the Plaintiff-landlord claimed \$2,750.00 for “outstanding rent” for May, June and July of 2004, less the amount of a security deposit (\$500.00) which the tenants paid under the written lease. The lease did provide that the damage deposit could be applied to the “*payment of rent owing to the landlord by the tenant upon termination of the Agreement*”. The Plaintiff-landlord’s net claim therefore was \$2,250.00 (\$2,750.00 in “outstanding rent” less the \$500.00 security deposit).

[8] Prior to trial, the Plaintiff-landlord received a settlement proposal from two Defendants, Adam Wade Lowes and Amanda Jane Lowes (also known as Amanda A. Lowes) which it accepted. On July 11, 2005, the Lowes paid the Plaintiff \$800.00 and on the following day, the Plaintiff filed a Notice of Withdrawal of its Civil Claim against the Lowes.

[9] The net result is that the Plaintiff now seeks \$1,450.00 against the remaining Defendant-tenant, Lyndon Handito Adams.

[10] Mr. Adams was noted in default when he failed to file a Dispute Note. He claims he was not served with the Civil Claim, although there was an Affidavit of Service on file indicating he was served personally at a pub where he worked. Mr. Adams claims the first notice he received of the Civil Claim was when he received the Notice of Hearing of the claim as against himself and the Lowes who had filed a Dispute Note. In support of his claim, Mr. Adams did appear before me with as a consequence of having received the aforesaid Notice of Hearing. I was spared an inquiry into the truthfulness of either the process server or of Mr. Adams when the Plaintiff-landlord’s agent, Gerard Lucyshyn, consented to a trial of the issue of Mr. Adams’ liability, even in the absence of Mr.

Adams having filed a Dispute Note. I commend and am grateful to Mr. Lucyshyn and his client for their magnanimity.

[11] The problem presented by this case is the Defendant-tenant, Lyndon Adams, did not occupy the premises during the months for which the rent is being claimed. In fact, his evidence, and I believe his evidence, was that he moved out in January of 2004, that he continued to pay his “share” of the rent in February and March of 2004 and that he verbally informed the landlord of his departure when he made his last rent payment on March 3, 2004. I found Mr. Adams’ evidence credible and at least one critical aspect of his evidence is corroborated by the landlord’s tenant ledger which contains a record of Mr. Adams’ payment of his “share” of the March rent.

[12] Under the terms of the fixed-term residential tenancy agreement, Mr. Adams was liable to pay rent until the end of the term. A schedule to the October 2, 2003 Residential Tenancy Agreement did give the tenant the right to “cancel the lease agreement”, but only by paying two months’ rent as liquidated damages. Such cancellation by the “Tenant” would also have required the concurrence and joint action of all three tenants. The lease describes the three tenants as “either individually or collectively called the ‘Tenant’.” In the context of the clause conferring upon the “Tenant” the right to cancel the lease, I would take it that the intention of the parties was that only the tenants as a group had the right to cancel the lease upon notice and payment of two month’s rent.

[13] With respect to the payment of rent, the Residential Tenancy Agreement was clear. The liability to pay rent was joint and several.

“17 When two or more persons comprise the Tenant for the purpose of this Agreement, the Landlord may collect the rents due to the Landlord pursuant to this Agreement from any one, some or all of them.”

[14] So, the Defendant’s liability to pay rent could extend to all of the rent owing under the lease, not just to his “share” as the Defendant referred to it in his testimony. And this liability continued until the end of the term of the lease because I have found that no one tenant had the right to cancel the lease pursuant to Clause (iv) of the Schedule “A” to the lease:

“(iv) If the Tenant decides to terminate the tenancy prior to the full completion of the lease term, the Landlord grants the Tenant the right to cancel the lease agreement by paying two-month’s rent (including current parking charges) as liquidated damages.”

[15] But although the foregoing discussions of the tenant’s obligations under the lease may provide some context for what follows, the real question is what, if any, obligations did the Defendants Adams have under the periodic tenancy which came into effect upon the expiration of the prior fixed-term tenancy.

[16] The Defendant, Lyndon Adams, was not in possession of the demised premises during the months of May, June and July, although his former co-tenant's resided in the demised premises. Not only was Mr. Adams not in possession, but also he verbally informed an employee of the landlord that he had moved out months before the month-to-month periodic tenancy began. That is, he had given notice in March that he had vacated the leased premises in January of 2004. The periodic tenancy did not commence until May of 2004.

[17] The landlord argues that it received no formal notice that this particular tenant had moved out. Furthermore, the landlord argues that when the remaining tenants remained in the premises at the end of the fixed term, it had every reason to believe this responsibility for the rent would continue as before. That is, all three tenants, whether they actually resided in the property or not, were liable for the rent during the fixed term and therefore, all three tenants, whether they actually resided in the property or not, would continue to be liable for the rent in the "continuation" situation.

[18] The tenant argues that he gave the landlord verbal notice that he was moving out. He also argues that he had no duty to inform the landlord of anything at the end of the term of the lease. He argues he would have been entitled to move out at the end of the term without notice to the landlord because the term had ended and his obligations under the lease were also at an end.

[19] The problem with that contention is that Clause 2(a) of the Lease appears to require a "notice to vacate" to be served on or before the first day of the last tenancy month. So I reject the Defendant's argument that he had no obligation to inform the landlord of his intentions on or before the first day of the last tenancy month.

[20] But the tenant argues, in the alternative, he did notify the landlord that he had moved out; and I believe him.

[21] The problem with the contention is that the notification was verbal. If the tenant's "notice to vacate," as the lease called it, is construed as a "notice of termination", then it must comply with section 10 of the Residential Tenancies Act. Section 10 states, among other things, that a notice to terminate a tenancy must be in writing.

[22] But even if this contractual "notice to vacate" is not construed as a "notice of termination" under the Residential Tenancies Act, the lease did require that this notice be "served". Service connotes a written notice which is then "served" on the landlord. So, the verbal notice which the Defendant-tenant gave is ineffective either under the Act or under the lease.

[23] It is my view that, in this case, where there are multiple tenants jointly and severally liable for the rent and other obligations under the lease, there is a rebuttable presumption, that even if one of a number of joint tenants remains in possession, they all remain liable for the obligations under the periodic tenancy which follows the expiration of the fixed term. That presumption perhaps could have been rebutted by proof of a proper written notice by any one or more of the tenants that he or they would no longer be responsible for the rent. It seems to me that it would be unfair, in either a situation where the landlord has agreed to a "continuation" of the lease or in a situation where an

implied tenancy is created by operation of law, to place the onus on the landlord to find out who, if any, of his joint tenants has disavowed any further responsibility as a tenant under either the express or implied tenancy.

[24] Another issue which must be dealt with is the effect of the settlement with the Defendants, Adam and Amanda Lowes. As indicated in Paragraph [7], the Lowes settled with the Plaintiff by paying it \$800.00.

[25] The defence of an accord and satisfaction, if established, could constitute a complete defence to the action against the remaining Defendant. An accord and satisfaction accepted from one of several persons jointly and severally liable for the same debt can be a discharge of all unless there has been an express reservation of the rights of the Plaintiff against the other parties: Nicholson v. Revill (1836) 4 Ad. & E. 675, Sully v. Forbes (1820) 2 B. & B. 38, and Watters v. Smith (1831) 2 B. & Ad. 889. No evidence was adduced with respect to any express reservations; but neither was there any evidence of the notice of the accord and satisfaction.

[26] Accord and satisfaction is a defence which must be established by the Defendant. Other than the Plaintiff's evidence that it discontinued against the other two Defendants, having received \$800.00 from them, I have no evidence of what that settlement involved. Therefore, the defence has not been established.

[27] In the result, notwithstanding that the Defendant had long since vacated the premises and took no benefit from the continuation of the lease, the Plaintiff-landlord's action succeeds. There will be judgment for the Plaintiff in the amount of \$1,450.00. The Plaintiff will have party and party costs in the amount of \$100.00 plus disbursements in accordance with the Provincial Court Fees and Cost Regulations pursuant to the Provincial Court Act. There will also be pre-judgment interest from June 16, 2004 as claimed. The Defendant may have remedies against his co-tenants, although that remains to be determined. The result, in this case, is admittedly harsh; but it was dictated by the Defendant's failure to properly notify the landlord, in accordance with his lease, that he was vacating.

Heard on the 16th day of August, 2005.

Dated at the City of Calgary, Alberta this 27th day of September, 2005.

B. K. O'Ferrall
A Judge of the Provincial Court of Alberta

Appearances:

Gerard Lucyshyn
for the Plaintiff

Self
for the Defendant, Lyndon Handito Adams