

Arora v Wieleba, 2016 CanLII 37551 (ON SCSM)

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Court File No. 2047/15 (Kitchener)
ONTARIO
SUPERIOR COURT OF JUSTICE
(SMALL CLAIMS COURT)

<p>B E T W E E N:</p> <p>SUSHIL ARORA</p> <p>Plaintiff</p> <p>-and-</p> <p>EVELINA WIELEBA</p> <p>Defendant</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Mr. A. Arora</p> <p>Counsel for the</p> <p>Plaintiff</p> <p>Mr. T. Ellis</p> <p>Paralegal for the</p> <p>Defendant</p>
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REASONS FOR JUDGMENT

1. Judgment was reserved due to a lengthy docket. For the following reasons, the plaintiff's claim is dismissed with costs.

Nature of the Dispute

2. The plaintiff is the defendant's former landlord and sues for seven months of rent in the total amount of \$4,375. The defendant denies liability stating that she signed the lease under duress, that s. 12(4) of the *Residential Tenancies Act, 2006*, is a complete defence, and that the plaintiff failed to mitigate his damages.

Review of Evidence and Findings of Fact

3. The plaintiff prepared a lease for 12 months at \$625 monthly rent per person for four people. The tenants including the defendant signed the lease on February 20, 2014, for a term of September 1, 2014 to August 31, 2015 (Exhibit 1, pp. 1-6 to 1-9). The plaintiff had signed beside a handwritten summary of the lease terms on the upper right side of the first page. The tenants signed their respective signature lines on page 3 of 5, having apparently made a few amendments to the pre-printed terms of

the form of lease. Such changes made it a counter-offer to the version signed by the plaintiff before he sent it for signature by the tenants.

4. The plaintiff testified and I find that once he received the version signed by the tenants, he signed it also - which must mean on page 3 of 5 - and then sent one signed version to only one of the tenants (McLean). Neither party produced that version at trial.

5. On August 8, 2014, the defendant gave notice by email that her plans had changed and she did not intend to take possession (Exhibit 1, p. 2-6). The plaintiff declined her request to release her from the lease.

6. In late August 2014, after she had given the notice dated August 8, 2014, the defendant signed a new version of the lease as did two of her prior co-tenants and one new tenant (Brady) who had by then replaced one of the prior tenants (Ali) who had backed out of the arrangement. This second version of the lease was not requested by the plaintiff but when he received it, he signed it and provided a copy as before, to one tenant only (McLean). Neither party produced a copy of that version of the lease at trial. The copy produced at trial without the landlord's signature on page 3 of 5 is undated and has a few minor differences compared to the original lease. The main point is that one of the tenants other than the defendant had been changed.

7. The defendant found a sub-tenant (Rodriguez) to take her place for September through December 2014 and he paid the

rent for those months directly to the plaintiff.

8. On January 6, 2015, the defendant offered the plaintiff \$550 to settle the rent for January 2015 (Exhibit 1, p. 2-28). That offer was not accepted. She testified and I accept that was all she could afford at that time. There was no further payment or offer of payment after the plaintiff referred her to deal with counsel from that point forward.

9. The defendant served a Tenant's Notice to End the Tenancy (Form N9) dated August 22, 2015. It is not clear why she gave such notice at all given her earlier notice dated August 8, 2014, nor why she would give only 9 days' notice at the end of the 12-month term.

10. The plaintiff's claim is for the remaining 8 months of the lease after the sub-tenant (Rodriguez) left, less one month's rent paid by the defendant as last month's rent.

Analysis

11. I find as a fact that the plaintiff never gave to the defendant a copy of either version of the lease after they were signed by him. He provided a copy of each to only one of the four tenants but not the defendant, as he himself testified.

12. Counsel submitted in closing argument that I should find as a fact that a copy was provided to the defendant as an attachment to an email dated January 9, 2015 (Exhibit 1, p. 2-30). But the attachment was not produced in evidence nor was a copy

of either version of the lease signed by the plaintiff on page 3 of 5 produced at trial. On a balance of probabilities I am not prepared to find that whatever was attached to that email as a pdf file was a copy of the lease signed by the landlord.

13. That being the case, I agree with the submission that s. 12 of the *Residential Tenancies Act, 2006, S.O. 2006, c. 17*, is a complete defence. Section 12(2) requires that if a lease is in writing, “the landlord shall give a copy of the agreement, signed by the landlord and the tenant, to the tenant within 21 days after the tenant signs it and gives it to the landlord.” Failure to comply is addressed by s. 12(4) which provides:

(4) Until a landlord has complied with subsections (1) and (2), or with subsection (3), as the case may be,

(a) the tenant’s obligation to pay rent is suspended; and

(b) the landlord shall not require the tenant to pay rent.

14. Neither representative referred to any caselaw which applies s. 12(4). I have found *Solowiej v. Murray*, [1986] O.J. No. 1992 (Dist. Ct.), and *Swerdon v. Kieran*, [1986] O.J. No. 1632 (Dist. Ct.), both holding that the tenant’s obligation to pay rent will be revived upon delivery of a copy of the lease by the landlord, even if late.

15. This is not a case where a copy of the lease signed by the landlord was delivered later than the 21-day period contemplated by the section. It appears and I find that even during the litigation,

assuming for the sake of argument that providing a copy after litigation commenced would revive the tenant's obligation to pay rent, no copy of the lease signed by the landlord was provided to Ms. Wieleba.

16. Section 12(4) suspends the obligation to pay rent and prohibits the landlord from requiring the tenant to pay rent. On these facts I find those provisions remain operative today. Therefore the plaintiff's claim must be dismissed.

17. Regarding the defence of duress, I find no merit in that argument. The defendant was an adult at the time she was threatened by the plaintiff with the possibility of adverse effects on her future credit should she fail to pay the rent claimed. The facts of this case go no significant distance towards a finding of duress.

18. In any event the execution of the second version of the lease in late August 2014 would appear to have no effect on the rights and obligations as between these two parties. The defendant was otherwise liable under the original lease and it is not apparent what exchange of consideration occurred between these parties to support the second version of the lease. Its net effect would appear to be nothing more than an agreement to change one of the four tenants other than her. The fact the plaintiff agreed to let another tenant (Ali) out of the original lease did not oblige him to release the defendant also.

19. As for the defence of mitigation, the defendant failed to establish any failure to mitigate on the landlord's part. I accept the plaintiff's evidence that it is almost impossible to replace one of

several tenants sharing a rental unit once the academic year is already in progress.

20. But for my conclusion respecting s. 12, I would have granted this claim in full.

Conclusion

21. The plaintiff's claim is dismissed with costs. This was a half-day trial and given the amount in issue, I fix the defendant's costs at \$700.00 all-inclusive.

May 26, 2016

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Deputy Judge J. Sebastian
