Citation: Moosa v. Hill Property Management Group Ltd., 2014 ONSC 3717
Court File No. 07-CV-336872PD2
Date: 20140721

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
ABU MOOSA and NAIYARA RAHMAN Plaintiffs	*Al Burton* for the Plaintiffs
- and -	
HILL PROPERTY MANAGEMENT GROUP LTD. Defendant	*Thomas Hanrahan* for the Defendant
	Heard: At Toronto: January 28, 29, and 30, 2014

M.A. SANDERSON J.

REASONS FOR DECISION

Introduction

[1] The Plaintiffs Abu Moosa ("Moosa") and Naiyara Rahman ("Rahman") are the owners of a freehold townhome at 5032 Mariner Court, Mississauga ("the property.")

[2] Hill Property Management Group Ltd. ("Hill Property") offers management services to property owners. The Plaintiffs sue Hill Property for damages arising out of an alleged breach of a property rental management contract and alleged negligence in connection with the management of the property.

[3] On July 23, 2006, Mr. Jason White, a tenant Hill Property had procured on behalf of the Plaintiffs, apparently caused an explosion and fire at the property while operating a methamphetamine lab ("meth lab.") Ever since, the property has been uninhabitable.

[4] Moosa had obtained tenants' insurance that was in force on the day of the fire. However, another court has already held that no coverage was available to the Plaintiffs under

that policy because it contained an exclusion for damages arising from illegal activities [the tenant's operation of the meth lab].

[5] The quantum of damages has been agreed at $575,000. The sole issue to be decided by this court is whether Hill Property has any liability to the Plaintiffs under the contract, or in negligence.

Facts

[6] The Plaintiffs Moosa and Rahman have owned the property since 1999.

[7] In October/November 2003, Moosa, a certified purchasing professional, decided to accept what he thought would be a two-year employment contract in Qatar. Since the Plaintiffs intended to return to Canada thereafter, they decided to rent the property in the interim.

[8] On November 5, 2003, the principal of Hill Property, Warren Hill ("Hill"), sent the Plaintiffs a brochure ("the brochure") describing the services offered by Hill Property. Moosa gave evidence that he reviewed it thoroughly. He chose Hill Property, in part, because of its philosophy as described at page 2:

> Our philosophy would be to reluctantly accept a vacancy, if necessary, rather than risk losses and possible damages by accepting a less than quality tenant who cannot pass our stringent qualification process. This process will include such checks as employment and income verification, full credit history and follow-up on personal references. When we recommend a tenant to you, they have passed significantly more than what the industry would consider a good investigation process.

[9] The brochure included a sample management contract ("the Sample Contract") that Moosa thoroughly reviewed. He said that on March 15, 2014, when he signed the contract presented to him dated March 3, 2004 (the "March 3 Contract"), he did not appreciate that paragraph 3 differed from the Sample Contract.

[10] Moosa gave evidence that when he and his wife signed the March 3 Contract, Warren Hill told them that it was identical to the Sample Contract. Moosa said he relied on that express representation and did not re-read the March 3 Contract. He and his wife simply signed it.

[11] Section 3(c) of the Sample Contract had provided as follows:

> The owner agrees with the Manager as follows:
>
> to indemnify the Manager from any and all liability, damages… it may incur or be subject to in acting as the Manager for the Owner, and to save it harmless from all damage suits in connection with the management and operation of the property except where such damage suits arise from the negligence of the Manager and or mismanagement of the property. [Emphasis added.]

[12] Section 3(c) of the March 3 Contract provided:

> The owner agrees with the Manager as follows:
>
> to indemnify the Manager from any and all liability, damages and expenses whatsoever which it may incur or be subject to in acting as the Manager for the Owner, and to save it

> harmless from all damages in connection with the management and operation of the property except where such damage suits arise from the gross negligence of the Manager. [Emphasis added.]

[13] The Brochure included the following at p 5:

> For those individuals who choose to take responsibility for insurance coverage on the property as well as paying the related premiums, we require an indemnity that [the Manager] is not in any way liable for any problems that arise from uninsured or underinsured claims.

[14] Section 2(o) of the March 3 Contract [identical to s. 2(m) in the Sample Contract] under the heading Insurance provided as follows:

> Unless otherwise agreed in writing by both parties, the Owner agrees to arrange, maintain and pay premiums for insurance coverage (including fire…etc.)… the Owner shall indemnify and save harmless the Manager from any and all liabilities, damages, costs suits or activities growing out of … any damage to property occasioned by use and occupation of the demised premises… by any tenant…any breach, violation…of any covenant…in the residential lease…

[15] Both the Sample Contract and the March 3 Contract provided that Hill Property would inspect the property once per year and could inspect for illegal uses once per month.

[16] Hill agreed that Hill Property was to act as the "eyes and ears of the owner."

[17] Moosa gave evidence that before he signed the contract, Hill told him that Hill Property would visually inspect all rooms three times per year.

[18] Hill gave evidence that he had no specific recollection of his discussions with the Plaintiffs. He maintained that before they signed the March 3 Contract, he reviewed it line by line with them. He agreed in cross examination that he did not specifically point out the difference between s. 3(c) in the Sample Contract and s. 3(c) in the March 3 Contract.

[19] Moosa gave evidence that Hill asked him later to sign a document with respect to property insurance. Relying upon Hill's representation that by signing, Moosa was simply acknowledging that he was responsible for arranging his own property insurance, Moosa signed it as requested. Hill did not ask the co-Plaintiff to sign or provide either of the Plaintiffs with a copy.

[20] In early April 2004, the Plaintiffs left for Qatar.

[21] Moosa gave evidence that he contacted Hill a few days later to inquire whether Hill Property had found a tenant.

[22] In late April, Benjamin Croome ("Croome"), a Hill Property employee, called Moosa advising that a potential tenant had been located and that background checks were being conducted.

[23] On April 23, 2004, Hill Property and Mr. Jason and Mrs. Adina White entered into a lease for the property.

[24] Moosa said that before April 23, 2014, Hill Property personnel never discussed the Whites with him, or asked him to approve them as tenants. Hill property never shared the information obtained from or about the Whites or advised that they had not obtained a credit

check, verified employment information or employment history, or checked out references on the Whites. They never explained the risks of the tenancy, including those arising out of their failure to obtain those checks from or about the Whites. Moosa said he was relying on Hill's earlier oral representations and the written representation in the brochure about Hill Property's stringent tenant screening process, and its philosophy to "accept a vacancy if necessary … rather than risk losses and possible damages … by accepting a less than quality tenant who could not pass Hill Property's stringent qualification process." At that time Moosa understood the Whites must have passed a qualification process significantly more stringent than what the industry would consider a good investigation process.

[25] Hill gave evidence that Hill Property followed its standard procedure in vetting the Whites as tenants. It obtained a record of the Whites' bank balance ($6,621), as well as a letter from Meadowvale Ford setting out an offer of employment to Mr. White, contingent on receipt of written documentation confirming his eligibility to work in Canada. Hill conceded Hill Property did not verify Mr. White's actual employment at Meadowvale or the level of expected income for either Mr. or Mrs. White. It attempted to do a credit check but was told by the Credit Bureau of Southern Ontario that it was unable to provide a U.S. credit report. Hill Property did not request any personal credit information from or about the Whites. It did not ask for prior employment history, seek, obtain or follow up on personal references. Hill conceded he later learned that Mr. White never worked at Meadowvale Ford.

[26] Hill Property did obtain confirmation that the Whites had obtained the policy of tenants' insurance, with a one year term providing $1 million in liability insurance that was required under clause 12 of the lease.

[27] Moosa gave evidence that he did not learn the Whites were living in the property until June 2004, when he received a statement of account for the month of May 2004 from Hill Property. Moosa said he called Warren Hill and asked him if all checks had been done on the Whites. Hill told him they were very good tenants - a husband, wife, and two children. In cross-examination, when Hill was asked whether he had advised Moosa that he had not obtained a credit history, had not checked personal references, did not know White's income level etc., Hill said he could not specifically recall the discussion. However, he said his policy was to discuss risks with every owner.

Default In Rental Payments

[28] By July of 2004, the Whites' rental payments were late. Moosa said he and Hill had repeated discussions about that. In September or October of 2004, Moosa said he told Hill he thought an eviction order should be obtained. Moosa said Hill recommended keeping the Whites as tenants. The Whites were not evicted. In the months that followed, the Whites repeatedly were in default under the lease/failed to keep their rental payments current.

[29] At the time of the fire, the arrears were $2,667 [before offsets for the last month's rent.]

Inspections Of The Property

[30] Hill Property performed inspections of the property in December 2004, January 2005, and on October 12, 2005. Gerald Wells, a handyman for Hill Property, gave evidence that he was at the property on October 12 and October 17, 2005. He put a filter in the furnace in the

basement, checked the plumbing, made sure everything was working, and looked through whole house. Nothing seemed out of order.

[31] There was no evidence about any inspections inside the property after October 2005.

[32] Croome said he attended frequently at the property to pick up rent. He was there for instance on April 27, 2006. The property was tidy. He had no concerns.

The Explosion and Fire

[33] On July 23, 2006, Mr. White was seriously injured in the explosion and fire.

[34] Moosa's children told him that their house was on fire. They had been contacted about the fire on the internet by friends from Mississauga.

[35] It was Moosa who advised Hill that there had been an explosion and fire at the property.

Subsequent Events

[36] In October 2006, Hill Property withdrew its management services.

[37] The Plaintiffs sued to recover their losses from both their insurer [on their homeowner's policy] and from Hill Property. As already noted, their action against the property insurer has already been dismissed.

Findings of Fact

[38] I accept Moosa's evidence and I find that at the outset, Hill Property failed to advise the Plaintiffs about the dearth of information it had gathered about and from the Whites. It did not discuss the attendant risks with them. Moosa relied on the written representation in the brochure regarding the rigour of Hill Property's screening process as well as Hill Property's representation that the Whites were good tenants.

[39] Had Hill Property provided full information in April of 2004, I find it more likely than not that Moosa would have refused to accept the Whites as tenants. While Hill Property had no contractual obligation under the March 3 Contract to obtain the Plaintiffs' approval of the Whites as tenants, given the representations it had made orally and in the brochure about its stringent screening process, it should have notified the Plaintiffs about the fact that the promised screening procedures had not been followed and about the attendant risks.

[40] The Plaintiffs had initially decided to engage Hill Property because Hill Property had promised it would diligently undertake a process of stringent screening and would not risk losses and damage by accepting a less than quality tenant who could not pass its qualification process.

[41] Once Hill Property accepted the Whites as tenants, the rental payments were in arrears almost immediately. I accept Moosa's evidence he called Hill and suggested the Whites be evicted. Hill Property was legally in a position to obtain vacant possession on October 18, 2004, unless the Whites had paid $3,050 before October 17, 2004. Since the $3,050 had not been paid by that date, Hill Property could have evicted the Whites on October 18, 2004. Hill urged Moosa not to evict the Whites.

[42] I find on a balance of probabilities that had Hill Property advised Moosa that the Whites could be evicted as of October 18, had the Plaintiffs been aware that Mr. White was

not working at Meadowvale Ford, that Hill Property had not obtained a credit check or employment history on Mr. White, had not checked references on either of the Whites, Moosa would have instructed Hill to proceed with the eviction. Had that happened, the Plaintiffs would not have suffered any loss.

[43] In May of 2005, Hill advised the Whites by letter that he had instructions from the owners to evict them if they did not pay a minimum of $1,800 per month. They did not do so. Hill Property did not take the steps to evict them that it had threatened to take.

[44] In April 2006, Hill Property was again in a legal position to evict the Whites. Rather than so doing, it cancelled a hearing to force their eviction despite the fact that it had not received payment of all the arrears and could have enforced an eviction order.

Breach of Contract Action

1. The Applicable Terms of the March 3 Contract

[45] Since this is a claim in breach of contract by the Plaintiffs against Hill Property for damages in connection with Hill's management and operation of the property, it is provision 3(c) that must be considered here.

[46] Counsel for Hill Property submitted the Plaintiffs are bound by the terms of the March 3 Contract including clause 3(c). Moosa's failure to read it is no excuse. Generally, a party is bound in the absence of fraud or misrepresentation: *L'Estrange v. F. Graucob*, [1934] 2 K.B. 394.

[47] Counsel for the Plaintiffs submitted Hill's failure to draw 3(c) of the March 3 Contract to Moosa's attention estops the Defendant from relying on it: *Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 S.C.R. 1186).

[48] Generally, a party tendering a document for signature is not required to apprise the other party of its terms or to ensure that he reads and understands it.

[49] In *Karroll v. Silver Star Mountain Resorts Ltd.*, (1988) 33 B.C.L.R. (2d) 160, McLachlin C.J.B.C., as she then was, wrote:

> One must begin from the proposition advanced in *L'Estrange v. Graucob* that "where a party has signed a written agreement it is immaterial to the question of his liability under it that he has not read it and does not know its contents" […]

[50] She continued that in "special circumstances," a reasonable person may be required to bring an exclusion of liability to the other party's attention if one party would know that a party signing a document did not intend to agree to the release of liability contained therein. (*Delaney v, Cascade River Holidays Ltd.*, (1983), 44 B.C.L.R. 24 (C.A.), and *Tilden Rent-A-Car v. Clendenning*, 1978 O.J. No. 3260 (C.A.).

[51] Relying on *Karroll*, above, the Defendant submitted there was no special relationship imposing a duty on Hill to bring the exclusions to the Plaintiffs' attention:

[52] I am of the view that Hill Property, having provided a Sample Contract containing different terms from the March 3 Contract he was presenting to Moosa for signature, was obliged in the circumstances here to bring the differences to the Plaintiffs' attention. Sample

contracts are provided to prospective contracting parties to allow them the opportunity to review their terms, perhaps seek legal advice, and suggest changes.

[53] I have accepted Moosa's evidence that Hill not only failed to mention the significant difference between 3(c) in the Sample Contract and 3(c) in the March 3 Contract, he positively misrepresented to Moosa that the March 3 Contract was the same as the Sample Contract. The Plaintiffs relied on that misrepresentation to their detriment.

[54] Even if Hill had simply failed to point out the difference, that would have been precisely the kind of misrepresentation by omission contemplated in *Karroll*. In those circumstances, Hill would have known that Moosa was not consenting to the terms set out in the March 3 Contract where they were different from the terms set out in the Sample Contract: Moosa was expecting them to conform to the terms in the Sample Contract.

[55] Hill represented the March 3 Contract to be the Sample Contract. The Plaintiffs understood the March 3 Contract they were signing to be identical to the Sample Contract. To put the Plaintiffs in the same position they would be in but for the misrepresentation, where the terms in the March 3 Contract differ from those in the Sample Contract, the terms of the Sample Contract must govern.

[56] The Defendants are estopped from relying on s. 3(c) of the March 3 Contract, having represented that the March 3 Contract was the same as the Sample Contract.

[57] The March 3 Contract must be read as if it contained clause 3(c) in the Sample Contract.

[58] Given this conclusion, it is not necessary to consider whether clause 3(c) in the March 3 Contract was unconscionable.

Application of the Law to the Facts

[59] Given that I have found that the March 3 Contract must be read as if it contained clause 3(c) in the Sample Contract, it remains to be determined whether Hill Property mismanaged the property or whether it was negligent.

2. Breach of Contract

[60] Hill Property specifically undertook to employ a stringent qualification process for potential tenants, to accept "a vacancy, if necessary, rather than risk losses and possible damages by … a less than quality tenant."

[61] Having promised to use a standard higher than the industry standard in screening prospective tenants [i.e., not to accept tenants others in the industry might accept], I find Hill Property did not fulfill its own self-imposed contractual standard. It failed to vet the tenants in the manner it had promised. It did not do a credit check or obtain an employment history. It did not obtain or confirm references. No income verification was done. In accepting the Whites as tenants and in failing to inform the Plaintiffs regarding the dearth of information gathered on the Whites and the risks attendant on their acceptance as tenants, the Defendant breached its contract with the Plaintiffs.

[62] For reasons already enumerated, I have found on a balance of probabilities that had Hill complied with its contractual obligations, Moosa would have instructed Hill Property to enforce the eviction of the Whites in October 2004.

[63] I therefore find that Hill Property mismanaged the property, breached its contract with the Plaintiffs and caused the Plaintiffs' losses, agreed at $575,000.

Concurrent Liability in Contract and Tort

[64] In *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, the Supreme Court of Canada recognized that there may be concurrent liability in contract and tort.

[65] Le Dain J. wrote at p. 205:

> What is undertaken by the contract will indicate the nature of the relationship that gives rise to the common law duty of care, but the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by the express terms of the contract. It is in that sense that the common law duty of care must be independent of the contract.

[66] The Supreme Court further clarified the test to be accepted in *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12:

> In our view, Le Dain J.'s use of the words "created" and "depends" indicates the meaning of this passage is simply that for concurrent tort liability to be available there must be a duty of care in tort that would exist even in the absence of the specific contractual term which created the corresponding contractual obligation.

And at paragraphs 15 and 16:

> In our view, the general rule emerging from this Court's decision in *Central Trust Co. v. Rafuse* is that where a given wrong prima facie supports an action in contract and in tort, a party may sue in either or both, except where the contract indicates that the parties intended to limit or negative the right to sue in tort. This limitation on the general rule of concurrency arises because it is always open to parties to limit or waive the duties which the common law would impose on them for negligence. This principle is of great importance in preserving a sphere of individual liberty and commercial flexibility. […]
>
> Viewed thus, the only limit on the right to choose one's action is the principle of primacy of private ordering -- the right of individuals to arrange their affairs and assume risks in a different way than would be done by the law of tort. It is only to the extent that this private ordering contradicts the tort duty that the tort duty is diminished. The rule is not that one cannot sue concurrently in contract and tort where the contract limits or contradicts the tort duty. It is rather that the tort duty, a general duty imputed by the law in all the relevant circumstances, must yield to the parties' superior right to arrange their rights and duties in a different way. In so far as the tort duty is not contradicted by the contract, it remains intact and may be sued upon. […]

[67] At the time the Plaintiffs signed the March 3 Contract re Management of the property, Hill understood the Plaintiffs were agreeing to be bound by a limitation of liability clause in the Sample Contract [which limited the right of the Plaintiff to claim damages from Hill Property except for liability arising from negligence and mismanagement. The Plaintiffs did not agree to exclude a right to claim in negligence.]

The Negligence Action

[68] In order to succeed in a claim for negligence, the Plaintiffs must prove on a balance of probabilities that Hill Property owed a duty of care that it breached and that that breach caused the Plaintiffs' injuries.

(a) Was there a duty of care?

[69] In my view, the relationship between the Plaintiffs and Hill Property was sufficiently proximate to render the damages reasonably foreseeable and to justify the imposition on Hill Property of a duty of care to the Plaintiffs. It acknowledged in its brochure that a less than quality tenant could cause losses and damages. The parties were dealing directly with each other. The Plaintiffs looked to the Defendant to be their eyes and ears, to stringently screen potential tenants and to competently manage the property for them. There are no sufficient policy reasons to limit the duty of care beyond the limit contained in 3(c) of the Sample Contract. Damages caused by Hill Property's breaches of its duty of care were foreseeable. There is no concern about indeterminate liability here.

(b) Standard of care

[70] Counsel for the Plaintiffs called Mr. John Gelston ("Gelston") to give evidence on the standard of care of property managers and risk management practices. He was qualified as an expert in risk management for property managers. He has been teaching risk management to property managers for approximately 20 years at the Building Owners and Managers Institute, an educational institute for property managers.

[71] Gelston opined that Hill Property breached the standard of care of a reasonably prudent property manager in the screening of the Whites and in managing the ongoing relationship with them.

[72] Gelston also highlighted the importance of continuing to exercise proper diligence when red flags such as the frequent payment of rent in cash and mounting arrears arise. He stated there were several steps that a prudent property manager should take in the circumstances. None of those steps were taken by Hill Property.

[73] Gelston opined that Hill Property's actions with respect to the screening of the Whites and the ongoing management of the tenants did not meet even a minimal standard of care. He opined that Hill Property fell below the required standard of care in screening the Whites as tenants. He highlighted the importance of obtaining a credit history, employment history and verifying income as critical elements in determining whether to accept a prospective tenant. He mentioned the failure to canvass their previous landlords to obtain references, and the failure to obtain the Whites' employment history. Although he obtained a letter from Meadowvale Ford, on its face, White's employment was conditional on his being able to work legally in Canada. The letter did not set out White's expected earnings. Before signing the lease, Hill Property did not confirm that White could legally work in Canada or that White was indeed working at Meadowvale Ford.

[74] Once the Whites occupied the property, their rent was routinely late. Gelston opined that a prudent property manager would have looked into the reasons for the tenants' late payment.

[75] When paid, the rent was often paid in cash. Gelston opined that cash payments can be a red light for proceeds of crime. At the very least, the circumstances should have triggered further inquiries: a credit report, more frequent inspections, confirmation of employment, etc. Hill Property did not sufficiently react to the warning signs, including late payment and payment in cash, and take appropriate steps to evict.

[76] Gelston gave evidence that after the Whites' tenant's policy expired on April 23, 2005, Hill Property failed to ensure that they maintained tenants insurance as required under clause 12 of the lease. After April 23, 2005, Hill Property did nothing to ensure that the Whites had obtained appropriate replacement coverage.

[77] Counsel for Hill called Lucille Yates to give evidence about the standard of care owed by property managers in the selection and screening of tenants. She opined that Hill Property acted reasonably in securing the Whites as tenants. She said it is more difficult to find tenants in Mississauga than downtown Toronto. Workers with stable incomes in Mississauga can often afford to buy. When tenants are coming from another country, there are instances when credit checks cannot be obtained. In 2004-2006 she said she could often, but not always, obtain credit checks from Equifax on tenants coming from the United States. She would sometimes rent without credit checks. She said she would be leery, if, before the lease was signed, tenants advised they would be paying rent by cash. She opined that the letter from Meadowvale was a reasonable confirmation of employment and said she generally does not follow up on personal references. She testified that she generally interviews prospective tenants and exercises her own judgment.

[78] However, she said before she agreed to rent to the Whites, she would have emailed the owners and informed them of the situation.

[79] She admitted that in situations where there are few documents or sources of information available, she would monitor a tenant more closely. If payment were sporadic, she would try to find out why. She would be quick to take steps towards eviction.

(c) Was the Duty Breached?

[80] I accept the evidence of Gelston. In my view, Hill Property fell below the standard of a reasonable property manager in failing to adequately screen the tenants or discuss the risks of leasing to the Whites [given the dearth of information from and about them], and in not advising the Plaintiffs to evict the Whites as tenants in October 2004 when eviction was legally possible. After continuing rent arrears, it should have evicted the Whites when in a legal position to do so in 2005 and 2006.

(d) Was there sufficient causation?

[81] In my view, Hill Property's negligence caused the harm suffered by the Plaintiffs. Had Hill Property properly screened the tenants and discussed the absence of information on the Whites and the associated risks, the Plaintiffs would not have accepted them as tenants. The loss would not have occurred. Had Hill taken adequate steps and pursued eviction when legally entitled to do so, the loss would not have occurred.

[82] Had Hill Property followed up to ensure renewal of a $1 million policy of tenant's insurance [with no exclusion for illegal activity], the loss would not have occurred.

[83] Although both experts supported a duty to be more vigilant, to do more inspections, there is no evidence as to when White started his illegal meth lab and it is impossible to know whether more frequent inspections would have prevented the loss.

Conclusion

[84] For the aforementioned reasons, I have found the Defendant Hill Property's mismanagement, breaches of contract and negligence specified above caused the damage to the Plaintiffs' property.

[85] Damages were agreed in the amount of $575,000.

Disposition

[86] Judgment for the Plaintiffs will be entered against Hill Property Management in the amount of $575,000 plus pre-judgment interest.

[87] The parties may make submissions on costs in writing not exceeding 5 pages on or before August 25, 2014.

M.A. SANDERSON

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M.A. SANDERSON J.

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