

WAVERLY MANAGEMENT LTD. v. SOBIE and DUNN

Queen's Bench, Lutz J.

Judgment — June 18, 1985.

Landlord and tenant — The relationship — Creation of the relationship — Order appointing receiver-manager in foreclosure proceedings creating landlord-tenant relationship — Act requiring persons in position of landlord to refund security deposits — Receiver-manager obliged to refund deposits to tenants even if receiver not obtaining deposits from former landlord.

The appellant was appointed receiver-manager of an apartment complex pursuant to an interim order granted in foreclosure proceedings. The respondents were tenants of the foreclosed owner and had provided a security deposit to the former owner. The respondents vacated the property some time following the appellant's appointment. When the appellant refused to return their security deposit, the respondents successfully sued in the small claims division of the Provincial Court. The appellant appealed.

Held — Appeal dismissed.

The relationship of landlord and tenant may be created even though the person in the position of landlord is not an owner. The appellant assumed the role and responsibilities of a landlord through the order appointing it receiver-manager and through its actions. Although "landlord" is not defined in the Landlord and Tenant Act, the appellant was responsible to the respondents for the security deposit under s. 40 of the Act, since the appellant had acquired the "interests of the [former] landlord". Thus, the appellant was liable to pay the security deposit even though it had not recovered the same from the former owner.

Cases considered

R. and Touche Ross Ltd. and Property Stewards Western Ltd., Alta. Prov. Ct., Beaudry Prov. J. (not yet reported) — considered.

Statutes considered

Interpretation Act, R.S.A. 1980, c. I-7, s. 10.

Land Titles Act, R.S.A. 1980, c. L-5, ss. 1(s), (x), (y), (z), 111, 112(1).

Landlord and Tenant Act, R.S.A. 1980, c. L-6, ss. 19(1) [am. 1982, c. M-18.5, s. 60], 27, 39, 40.

Law of Property Act, R.S.A. 1980, c. L-8, ss. 44(1), 45(1) [re-en. 1984, c. 24, s. 5], (1.1) [en. 1984, c. 24, s. 5], (2), (3).

Authorities considered

Kerr on Receivers, 16th ed. (1983), p. 3.

Woodfall, Landlord and Tenant, vol. 1, c. 1, p. 3.

[Note up with 19 C.E.D. (West. 2nd) *Receivers*, s. 32; 20 C.E.D. (West. 3rd) *Landlord and Tenant*, II, 1; 22 Can. Abr. (2d) *Landlord and Tenant*, II, 1; 34 Can. Abr. (2d) *Receivers*, VIII, 1.]

APPEAL from decision awarding judgment to respondents for amount representing security deposits.

W. Lirenman, for appellant.
Respondents in person.

(Calgary No. 8401-32924)

18th June 1985. LUTZ J.:— This is an appeal from a decision of His Honour Irwin Blackstone Prov J., who, on 22nd November 1984, gave judgment to the respondents for the sum of \$347 together with costs of \$8 against the appellants following a trial in the Provincial Court of Alberta. At the same time a default judgment was entered against Skygate Towers Ltd.

The appeal to this court was argued on 4th April 1985, at which time I dismissed the said appeal, and undertook to publish my reasons for judgment.

The facts are not in dispute. The respondents were residential lessees of Skygate Towers Ltd. and paid a \$300 security deposit to Greenwall Properties Ltd. as property manager and agent therefor, for premises at #607, 1030 - 16 Avenue S.W., Calgary, on 10th February 1983. The suite in question was part of an apartment complex on lands that became subject to foreclosure proceedings by the Canada Life Assurance Company, as mortgagee. Pursuant to an order of Master Cairns granted on Tuesday, 28th February 1984, the appellant was appointed receiver-manager of the subject and other lands. The lands were registered in the mortgagee as owner on 11th October 1984, pursuant to an order of foreclosure.

Paragraph 2 of the said order reads as follows:

2. AND IT IS FURTHER ORDERED that Waverly Management Ltd., as receiver and manager, shall pay the proceeds of any rents, profits and other moneys collected or received by it as follows:

(a) first, towards any fees and disbursements which may be allowed (as provided by paragraph 3 below) to Waverly Management Ltd. as and by way of remuneration for its services as receiver-manager;

(b) second, in payment of normal operating expenses and utilities;

(c) third, in payment of taxes, local improvement charges and other municipal assessments accruing due or owing in respect of the mortgaged lands and premises;

(d) fourth, in reduction of the claims of the Plaintiff for the outstanding mortgage arrears from time to time in care of its solicitors, Messrs. Macleod Dixon, 1500 Home Oil Tower, 324 - 8th Avenue S.W., Calgary, Alberta, T2P 2Z2, including such costs and expenses (including legal costs on a solicitor and client basis) as may be allowed by this Court.

(e) fifth, the balance (if any) remaining shall be paid into court subject to the further order of this Court upon application by an interested party.

Paragraph 4 of the said order was as follows:

4. AND IT IS FURTHER ORDERED that Waverly Management Ltd., as receiver and manager, shall have all such powers as this Court may from time to time deem expedient, or as are inherent in the office, and without restricting the generality of the foregoing, shall have the power, from time to time:

(a) to lease and re-let the mortgaged lands and premises, or any part thereof;

(b) to terminate leases or obtain possession (or both) with respect to the mortgaged lands and premises, or any part thereof;

(c) to collect the rents, profits and other receipts arising from the mortgaged lands and premises, or any part thereof;

(d) to restrain and pursue other remedies available at law or in equity for rent in arrears in the same manner and with the same right of recovery as a landlord;

(e) to borrow such sums as it may in its discretion deem necessary to improve, preserve and maintain the lands and the business and undertaking thereon;

(f) such other powers as may be deemed just and necessary by this Court from time to time.

Paragraph 6 of the said order reads as follows:

6. AND IT IS FURTHER ORDERED that the Defendant, Skygate Towers Ltd. shall at once deliver over to the receiver and manager all the books, documents and papers of every kind, and all damage or security deposits and post-dated cheques received from or in respect of the mortgaged lands and premises which Vista View Apartments Ltd. has in its power or possession relating to the business and undertaking relating to or on the mortgaged lands and premises.

The respondents, pursuant to a proper notice in that regard, terminated the tenancy effective 31st March 1984. On that date the premises were vacated and the respondents received a damage report from the appellant indicating no damages had been incurred by the respondents; however, the appellant refused to return the \$300 security deposit and interest thereon, on the ground that as receiver-manager it did not receive the same and by virtue of its position, it was not obliged so to do. The respondents retaliated by issuing a small claims summons.

The appellant submitted that its position was akin to that of a

custodian and it could only be responsible to account for moneys received.

The respondents argued that the appellant, by virtue of the order, occupied the position of landlord or owner, and as such was responsible to reimburse them, a position that in my view is sustainable.

A receiver-manager in law is an impartial person and, when appointed by the court, is given the responsibility to collect and receive, during the proceedings in which he is appointed, the rents, issues and profits from the subject lands, for distribution amongst those persons entitled: *Kerr on Receivers*, 16th ed., p. 3.

Pursuant to the order of Master Cairns, above, the appellant enjoyed the following benefits:

- (i) to collect rents and profits and other moneys;
- (ii) to pay operational expenses;
- (iii) to pay itself for services rendered;
- (iv) to lease and relet;
- (v) to terminate leases or obtain possession;
- (vi) to restrain and pursue other remedies available at law or in equity for rent in arrears in the same manner and with the same right of recovery as landlord;
- (vii) to borrow such sums as it may in its discretion deem necessary to improve, preserve and maintain the lands and the business and undertaking thereon;
- (viii) to employ assistants, including solicitors, for the purpose of preserving the property and assets and carrying on the business and undertaking;
- (ix) to demand books, documents, cheques, damage or security deposits from Skygate Towers Ltd.;
- (x) to do all the above without security or bond.

Counsel for the appellant agreed that if damages to the suite in question for which the respondents were responsible had been caused that exceeded the damage deposit, the appellant would, pursuant to the order, have the right and the obligation to pursue the same against the respondents.

Section 45(1) of the Law of Property Act, R.S.A. 1980, c. L-8, provides for the appointment of a receiver as follows:

45(1) Notwithstanding section 41, after the commencement of an action on

- (a) a mortgage of land other than farm land, or
- (b) an agreement for sale of land other than farm land,

to enforce or protect the security or rights under the mortgage or the agreement for sale the Court may do one or both of the following:

- (c) appoint, with or without security, a receiver to collect rents or profits arising from the land;
- (d) empower the receiver to exercise the powers of a receiver and manager.

(1.1) If

- (a) a mortgage of land or an agreement for sale referred to in subsection (1) is in default, and
- (b) rents or profits are arising out of the land that is subject to that mortgage or agreement for sale,

the Court shall, on application by the mortgagee or vendor, appoint a receiver where the Court considers it just and equitable to do so.

Section 45(2) and (3) reads:

(2) The proceeds of rents or profits collected by the receiver, less any fee or disbursements, which may be allowed by the Court to the receiver by way of remuneration, shall be applied

- (a) in payment of taxes accruing due or owing on the land in receivership, and
- (b) in reduction of the claims of the mortgagee or vendor against the land in receivership.

(3) A receiver appointed pursuant to this section may distrain for rent in arrears in the same manner and with the same right of recovery as a landlord.

Section 44(1) of the said Law of Property Act reads:

44(1) The effect of an order of foreclosure of a mortgage or encumbrance is to vest title of the land affected thereby in the mortgagee or encumbrancee free from all right and equity of redemption on the part of the owner, mortgagor or encumbrancer or any person claiming through or under him subsequently to the mortgage or encumbrance, and

- (a) the order operates as full satisfaction of the debt secured by the mortgage or encumbrance, and
- (b) the mortgagee or encumbrancee shall be deemed a transferee of the land and becomes the owner thereof and is entitled to receive a certificate of title for it.

It is argued that the effect of this statutory provision is that, upon the order of foreclosure, all existing or subsisting leases, including that of the respondents', ceased.

In this case, if I adopt that argument, then I say that the appellant chose to recognize and adopt the respondents' lease through its conduct; in particular, it chose not to seek vacation of the premises upon its appointment and accordingly it caused, in my view, the assumption or recreation in law of the landlord-tenant relationship for the limited purposes referred to herein.

No order for possession directed to the respondents as tenants was sought or if sought, was enforced under s. 27 of the Landlord and Tenant Act, R.S.A. 1980, c. L-6.

"Transfer", "transferee" and "transferor" are defined in s. 1 of the Land Titles Act, R.S.A. 1980, c. L-5, as follows:

(x) "transfer" means the passing of any estate or interest in land under this Act, whether for valuable consideration or otherwise, as well as the instrument of transfer in the prescribed form;

(y) "transferee" means the person to whom any interest or estate in land is transferred whether for value or otherwise;

(z) "transferor" means the person by whom any interest or estate in land is transferred, whether for value or otherwise.

Sections 111 and 112(1) of the said Land Titles Act read as follows:

111 On the registration of a transfer of any mortgage, encumbrance or lease, the estate or interest of the transferor, as set forth in the instrument, with all the rights, powers and privileges thereto belonging or appertaining, passes to the transferee, and the transferee thereupon becomes subject to and liable for all the same requirements and liabilities to which he would have been subject and liable if named in the instrument.

112(1) By virtue of every such transfer the right to sue on any mortgage or other instrument and to recover any debt, sum of money, annuity of damage thereunder, and all interest at the time of the transfer in the debt, sum of money, annuity or damages, are transferred so as to vest them in law in the transferee thereof.

I now turn to the Landlord and Tenant Act, R.S.A. 1980, c. L-6. Section 19(1) thereof reads as follows:

19(1) Subject to the *Land Titles Act* and the *Law of Property Act*, a person who acquires the reversionary interest of the landlord or the leasehold interest of the tenant has all the rights and is subject to all the obligations based on the real covenants relating to the tenancy, during the time that he holds the interest.

Section 39 of the Landlord and Tenant Act provides for the return of the security deposit upon termination of a tenancy.

Section 40, in Pt. 4 of the said Landlord and Tenant Act, that deals with security deposits, reads as follows:

40. A person who acquires the interest of a landlord in residential premises has the rights and is subject to the obligations of the previous landlord with respect to a security deposit paid to the previous landlord in respect of the residential premises.

The issue for determination, then, is whether the appellant acquired, upon its appointment, "the interest of a landlord".

In the unreported decision of Beaudry *Prov. J., R. and Touche Ross Ltd. and Property Stewards Western Ltd.*, the learned Provincial Court Judge said:

There is no dispute of the fact that Touche Ross Limited and Property Stewards Western Ltd. were properly appointed by an order of the court as receiver-managers of all the apartment complex involved, namely the complex known as Bel-Air Apartments in the city of Edmonton. There can be no question that from the moment of their appointment, they became landlords as such of that apartment complex, within the meaning of the Landlord and Tenant Act (though that term is not defined in the Act). That they were landlords with respect to their daily operations of the complex, there can be no doubt. But, in my view it does not mean that because they became landlords they necessarily acquired the interest of the previous landlord in the residential premises, within the meaning of s. 40 of the Act. The appointment of the accused as receiver-managers, by virtue of the court order, whether made under the authority of s. 45 of the Law of Property Act of Alberta, or under s. 13 of the Judicature Act of Alberta, or under the inherent powers of the court, or from all three sources combined, which had the effect of making them landlords of the apartment complex, did not and would not result in my view in the accused acquiring the interest of the previous landlord. The only logical interpretation that can be given to the designation "interest" in s. 40 of the Landlord and Tenant Act is that it means "proprietary" interest, in my view. If this interpretation is correct, and I believe it to be so, then the court order made appointing them as receiver-managers could not possibly give them a proprietary interest, as the court itself at that stage did not possess the power to do so. They could only acquire a proprietary interest by foreclosure proceedings, whereas the only acquisition which the court gives them at the time, and did in fact give them, was possession of the lands in question, but certainly no proprietary interest or title to the lands. This also eliminates any concept that the accused could have acquired the interest of the previous landlord whether by attornment, or by simply acting as or holding themselves up or representing themselves as landlords.

Not having acquired the interest of the previous landlords, but being merely managers and landlords pro tem of the premises in question, the

receiver-managers were under no legal obligation to reimburse Lori Decker her deposit, given to the previous landlords.

And see authorities referred to therein.

The reasoning of Beaudry Prov. J. is, in my view, too broad. Interest of a landlord, even on a liberal interpretation, must in my view be confined to that interest as it relates to security deposits only in the context of the setting of s. 40 in Pt. 4 of the Act and cannot on any reasonable interpretation refer to the interest of a landlord in toto, in the sense that it refers to a freehold. The statute is in my opinion remedial legislation in nature. Section 10 of the Interpretation Act, R.S.A. 1980, c. I-7, says:

10 An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

Secondly, there is nothing in the Land Titles or Law of Property Act that derogates from that.

"Landlord" is not defined in any of the three statutes referred to. Had "landlord", referred to in s. 40 of the Landlord and Tenant Act, been meant to mean that which Beaudry Prov. J. held it did, it would have used the word "owner" as defined in the Land Titles Act, s. 1(s), which reads as follows:

(s) "owner" means a person entitled to any freehold or other estate or interest in land, at law or in equity, in possession, in futurity or expectancy.

One can be a landlord without being an owner.

In Woodfall, Landlord and Tenant, vol. 1, c. 1, p. 3, the learned author said:

The relationship of landlord and tenant may be created in a variety of ways. In the first place, there may be an express grant by way of demise, the distinguishing feature of which is that the lessor, by suitable operative words, thereby grants and conveys to the lessee a leasehold estate in the land. Such a grant will in fact, upon the principle of estoppel, create a relationship of landlord and tenant even where the grantor has no such right in the subject-matter of the demise as would entitle him to make the lease which he purported to grant.

The Landlord and Tenant Act is a creature of statute and in my view, though not defined in the said Act, the appellant is landlord for purposes of the security deposit.

Finally, it is to be noted that paras. 2(c) and (d) of the order appointing the appellant read as follows:

(c) third, in payment of taxes, local improvement charges and other municipal assessments accruing due or owing in respect of the mortgaged lands and premises;

(d) fourth, in reduction of the claims of the Plaintiff for the outstanding mortgage arrears from time to time in care of its solicitors, Messrs. Macleod Dixon, 1500 Home Oil Tower, 324 - 8th Avenue S.W., Calgary, Alberta, T2P 2Z2, including such costs and expenses (including legal costs on a solicitor and client basis) as may be allowed by this Court.

Appellant on the one hand argued that it is obliged to pay only those obligations for which it received funds, such as damage deposits, but on the other, acknowledged that obligations owing or accrued as set forth in subparas. (c) and (d) shall be paid. It seems to me that the order in question on the appellant's submission would permit it to prefer specific creditors to others.

The appellant has clothed itself in the master's order with all the indicia and accoutrements of the office of landlord insofar as the respondents as tenants are concerned, and as such must, in my view, in equity discharge the obligations that naturally flow from same, including reimbursement to the respondents for their security deposit paid by them in good faith.

The appeal is therefore dismissed with costs.

Appeal dismissed.