
CANADA / JUDGMENT

Ahmed v. Alam

2011 BCSC 1922

COURT

Supreme Court of British Columbia

DECIDED

5 October 2011

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2011 BCSC 1922 Ahmed v. Alam

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ahmed v. Alam,

2011 BCSC 1922

Date: 20111005

Docket: S116523

Registry: Vancouver

Between:

Kamal Uddin Ahmed

Plaintiff

And

Qais Alam

Defendant

Before: The Honourable Mr. Justice Cullen

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

N. Ahmed

Counsel for the Defendant:

K. Johal

Place and Date of Hearing:

Vancouver, B.C.

October 4, 2011

Place and Date of Judgment:

Vancouver, B.C.

October 5, 2011

- [1] THE COURT: This is an application brought by the plaintiff in this commercial landlord and tenant dispute arising out of a notice delivered to the plaintiff tenant from the defendant landlord dated August 11, 2011, terminating the lease for late payment of rent, and the landlord's re-entry into the premises on September 22, 2011.
- [2] The lease was entered into by the parties on September 1, 2009. It was a renewal of an earlier lease between the parties. The leased premises at 666 East Broadway in Vancouver housed two businesses operated by the plaintiff and his brother, a grocery and meat store, and a restaurant. Both businesses served a niche market, the Bangladeshi Muslim community in the Lower Mainland. According to the plaintiff, the businesses support two families and two employees, and were "highly successful". He deposed that he has "invested probably over \$300,000 in total in this business". He also asserts that all of his investment is tied up in the premises.
- [3] The provisions of the lease said to be material to this dispute read as follows:
4. Upon 10 days notice, the Landlord may terminate the tenancy under this Lease if the Tenant has defaulted in the payment of any portion of the Rent when due.
 5. Upon 10 days notice, the Landlord may terminate the tenancy under this Lease if the Tenant fails to observe, perform and keep each and every of the covenants, agreement, stipulations, obligations, conditions and other provisions of this Lease to be observed, performed and kept by the Tenant and the Tenant persists in such default beyond the said 10 days notice.
- ...
7. Subject to the provisions of this Lease, the Tenant will pay a base rent (the "Base Rent") of \$2,700.00 (twenty-seven hundred) per month for the Premises, which includes a monthly charge for the Parking (collectively the "Base Rent").
 8. The Tenant will pay the Base Rent on or before the First day of the month of each and every month of the term of this Lease to the Landlord at 1033 East 39th Ave., or at such other place as the Landlord may later designate.

9. The Base Rent for the Premises will increase over the Term of the Lease as follows: Base rent will be increase every 5 years by 5%.
10. The Tenant will be charged an additional amount of \$10.00 per day for any Rent that is received after the due date.
- ...
30. Both parties agreed the rent of \$4,000.00 (four thousand) GST included per month include property taxes Building insurance, City utility bill (Water and sewer) and all applicable Goods and Services TAX. It is understood and agreed that the year 2006 shall be considered as the base year. The property Taxes for the year 2006 is \$7,924.61, City utility bill \$1800 and bulding insurance \$1800.00. Any increase in these expences over the term of the lease shill be paid by the lessee to the lessor as additional rent.
- ...
41. Any waiver by the Landlord of any failure by the Tenant to perform or observe Provisions of this Lease will not operate as a waiver of the Landlord's rights Under this Lease in respect of any subsequent defaults, breaches or nonperformance and will not defeat or affect in any way the Landlord's rights in respect of any subsequent default or breach.

[4] The notice of termination dated August 11, 2011, reads as follows:

Dear Sir:

Re: Unpaid Rent for 666 E. Broadway Avenue, Vancouver, BC (the "Premises")

We are counsel for Mr. Qais Alam.

We confirm that pursuant to Commercial Lease Agreement dated September 1, 2009, you agreed to lease the above Premises for a term [of] five years (the "Lease"). Pursuant to the terms of the lease, you agreed to pay monthly total rent of \$4,000.00 (paragraph 30) payable on the first day of every month (paragraph 8).

You have paid only \$2,000.00 for the June, 2011 rent, and did not pay the August rent by August 1, 2011.

You are in default of payment of rent for June and August, 2011. We hereby give you notice pursuant to paragraphs 4 and 5 of the Lease that the Lease is terminated effective August 21, 2011. You are required to vacate the Premises by August 21, 2011.

You must also be mindful of the provisions of paragraph 23 of the Lease, which sets out our client's rights upon re-entry.

A copy of the Lease is enclosed herewith.

Yours truly,

CGM Lawyers

- [5] The plaintiff concedes that the payment of rent was not always timely. He asserts in his affidavit, however, that throughout the tenancy, the landlord acquiesced in the late payments, and the "delayed" payments of June and August 2011 rents were done with "the express agreement and consent of the landlord".
- [6] The plaintiff asserts that the motive for the defendant to terminate the lease, despite his waiver of reliance on the strict terms of the lease and express agreement regarding the June and August rental payments, arises from a joint venture that he and his brother entered into with the defendant in 2010. According to the plaintiff, the joint venture involved the importation of seafood for use in the ethnic Bangladeshi market in the Lower Mainland. At some point, the plaintiff and defendant had a falling out arising from their enterprise which was being carried out under the aegis of a limited company. The plaintiff says it was then that the defendant's attitude toward him and the lease changed and that led to the notice of termination and re-entry onto the premises in August and September of 2011.
- [7] The plaintiff seeks substantial damages for the interruption of his business, as well as punitive damages due to what he characterizes as the defendant's breach of the lease agreement.
- [8] In this application, the plaintiff seeks that he be granted relief from forfeiture and be permitted to re-enter and re-occupy the premises to resume his business. He also seeks an order that the notice to terminate the lease be set aside and the lease be affirmed. In the alternative, he seeks interim orders granting the same relief.
- [9] The plaintiff says there is a clear economic imbalance between the parties, in that if the relief he seeks is not granted, he stands to lose his investment in his business, as well as a substantial ongoing profit, and the value of the perishables, which he estimates at approximately \$50,000, in the two premises.
- [10] At stake for the landlord, according to the plaintiff, is his rental income, which the plaintiff submits would not be imperiled if the application were granted. He deposes that he cleared the arrears on the rent on August 11, 2011, the day he received the notice of termination.
- [11] The defendant, for his part, disputes the plaintiff's version of the events. He asserts that he "frequently reminded the plaintiff of his obligations to pay his monthly rent in accordance with the terms of the lease" and "accepted each monthly payment under protest", that is each delayed monthly payment under protest. The defendant also referenced the increase in the expenses or operating costs contemplated by paragraph 30 of the lease, and deposed that when he brought the subject of the increased expenses owing by the plaintiff up, the "plaintiff would become aggressive and would flatly refuse to pay any of the increased expenses".

- [12] He also deposed to threats the plaintiff made against him and his involvement of the police in the dispute between them.
- [13] The defendant, while acknowledging that the plaintiff provided him with cheques to cover the arrears of rent on August 11, 2011, asserts that one cheque for \$1,000 was lost. He also asserts the plaintiff owes him a \$4,000 damage deposit, \$2,480 representing an accumulation of penalties for the late payment of rent from February 2010 to March 2011, and \$1,600 from May 2011 to August 2011. The defendant also claims that the plaintiff owes an additional \$3,532.40 representing the unpaid increases in expenses or operating costs referred to in paragraph 30 of the lease.
- [14] The defendant disputes the plaintiff's claim of investing in the realm of \$300,000 in his business, questions whether, given the many delayed rental payments, the business is successful as claimed by the plaintiff, and contends that the relationship between the landlord and tenant is irreparably broken because of the plaintiff's disregard of his obligations under the lease and behaviour towards the defendant.
- [15] He submits granting the relief sought is not, in the particular circumstances of this case, justified.
- [16] The centrepiece of the application is s. 24 of the Law and Equity Act, which reads as follows:
- The court may relieve against all penalties and forfeitures, and in granting the relief may impose any terms as to costs, expenses, damages, compensations and all other matters that the court thinks fit.
- [17] As this is an interlocutory application, based on affidavits not subject to cross-examination, I am not in a position to make determinations of contradictory evidence. The plaintiff's assertion that the defendant conducted himself so as to waive the provisions of the lease, that he expressly agreed to late payments of the June and August rents, and that his decision to terminate the lease was motivated by extraneous factors cannot be resolved on this application. Similarly, the defendant's contentions to the contrary and his assertions of the plaintiff's behaviour, including aggressive responses to requests for payments and threats of violence, are not susceptible to resolution on this application.
- [18] There is some evidence that the parties did, for a time, exist in a harmonious relationship in the previous lease and after renewal, given that they agreed to embark on a joint venture together. While there is no doubt relations between them have deteriorated leading to this situation, it is not entirely clear on the materials before me what substance there is to all of the financial issues claimed by each of the parties. So far as the defendant is concerned, it does not appear there is any provision in the lease for a damage deposit which is claimed.

- [19] It also appears under the lease that the increased expenses forming part of the rent under paragraph 30 are not due and owing until the end of the year in which they are claimed. As well, the defendant, although setting forth the "operating costs" with some particularity, has not apparently provided supporting invoices or documents for them.
- [20] So far as the penalty payments are concerned, the plaintiff concedes they may be correct, but is not able to confirm that the \$1,000 cheque dated August 28, 2011, was not cashed. He concedes that it would likely be subject to replacement if that were the case.
- [21] Counsel for the plaintiff points out, however, that the plaintiff has been out of the premises since September 22, 2011, and his claim for damages for lost income, which he claims to be recoverable because of the defendant's waiver, estoppel, or collateral agreement must be taken into account in engaging the economic imbalance between the parties.
- [22] From the perspective of the plaintiff, it is not clear how much of an investment he has in the business or what sort of profit is at stake. For these reasons, this is not an appropriate case to make a final order or make any order based on any finding that may embarrass the trial judge in due course.
- [23] I thus decline to make an order based on the allegations of waiver, estoppel, or a collateral contract. In my view, this is, however, a case where it is appropriate to make an order permitting the plaintiff to re-enter and re-occupy the premises on an interim basis and grant him interim relief against forfeiture. In coming to this conclusion, I have considered the authorities provided to me by both counsel: *Gleneagle Manor Ltd. v. Finn's of Kerrisdale Ltd.*; *H.Y. Louie v. Whistler Noodle Company Ltd.*, 2002 BCSC 1120; 677815 B.C. Ltd. v. *Mega Wraps B.C. Restaurants et al*, 2005 BCSC 503; and *Triple Holdings v. Kontzamanis*, 2004 BCSC 394.
- [24] In the latter case, Truscott J. held as follows at paras. 48 and 49:
- [48] I recognize that in cases where the landlord can be fully compensated by money, the courts lean towards granting relief from forfeiture.
- [49] However, I have concluded in this case that relief from forfeiture should not be granted. In my view the landlord cannot be completely compensated by money for rent. The tenant's past breaches involving failure to obtain and/or confirm insurance, failure to pay utilities, failure to maintain the premises, and failing to physically occupy the premises, are more than the landlord should have to bear. In addition the failure to pay rent on this lease has been so numerous that I do not think the landlord should have to put up with the tenant any longer.

- [25] In the present case, while there are some alleged parallels to the circumstances in Triple Holdings, there are also some dis-similarities. Here, it is not alleged that there is a failure to maintain the premises or occupy the premises, or that there was a failure to obtain or confirm insurance. While there is an allegation of a failure to pay in full the increased expenses paid by the landlord, there is a dispute whether the landlord has identified the increased expenditures for the tenant in the period prior to this dispute arising.
- [26] Also, while there is an allegation that the plaintiff has misconducted himself in several ways, that is disputed and cannot be determined on the basis of the countervailing affidavits.
- [27] Similarly, while it is so that the plaintiff has not paid penalties for late payment of rent, it is not clear on the evidence whether the defendant sought payment of the penalties or whether the relations between the parties were, as the plaintiff contends, friendly and not in strict adherence to the terms of the lease until the dispute arose over the joint venture.
- [28] It may be that this is a case where, after hearing and determining the evidence, the trial judge finds the landlord should not have to put up with the tenant any longer, or it may be that the plaintiff's contention that he should be entitled to the final relief he seeks and some damages are appropriate. That, however, remains to be seen. In the meantime, as noted, I see this as a case where the asserted positions of the parties creates a significant financial imbalance which should be remedied on an interim basis until the facts can be properly determined.
- [29] I will grant the application as sought, but only on an interim basis with the following conditions: The plaintiff will supply the defendant with 12 post-dated cheques for rent due, commencing October 1, 2011, in the amount of \$4,000. The plaintiff will, within 10 days, provide the defendant with a certified cheque for \$2,119.44 for the increase in expenses for 2010 owing under paragraph 30 of the lease, subject to the defendant supplying the plaintiff with satisfactory supporting documentation for the costs as claimed.
- [30] The plaintiff will provide the defendant with a certified cheque for an amount representing the increase in expenses for 2011 claimed by the defendant and supported by satisfactory documentation for the increase in costs as claimed for that year by the end of January 2012.
- [31] The plaintiff will pay the sum of \$1,000 in replacement for the cheque dated August 28, 2011, in that amount, subject to confirmation that it has not been cashed. The plaintiff will pay the sum of \$4,080 into his counsel's trust account to be held for the benefit of the defendant as payment of the penalties incurred due to late payment of rental payments. The amount is not to be paid out without agreement of the parties or further order of the court.
- [32] Costs will be in the cause.

"Cullen ACJ."

The Honourable Mr. Justice Cullen

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/11/19/2011BCSC1922.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/ahmed-v-alam-2011>

Prepared on 29 October 2026 · Esheria