

Court of King's Bench of Alberta

Citation: 1218807 Alberta Ltd v Muslim Association of Canada, 2024 ABKB 34

Date: 20240117
Docket: 2003 18579
Registry: Edmonton

2024 ABKB 34 (CanLII)

Between:

1218807 Alberta Ltd.

Plaintiff

- and -

Muslim Association of Canada aka Muslim Association of Canada Inc.

Defendant

**Endorsement
of the
Honourable Justice L.M. Angotti**

- [1] I issued my decision on this matter May 19, 2023. In para 190 of my decision, I stated:
The Landlord provided evidence with respect to the rent owing at various times. However, after April 1, 2021, when both parties agree that the rents owing were \$663,117.15, the calculations revert to a yearly rather than a monthly calculation.

If the parties are unable to determine the calculation of rent owing as of June 30, 2021, they may appear before me to have the calculation determined.

[2] The parties were unable to come to an agreement and were therefore directed to provide me with written submissions as to the calculation of damages. This endorsement is my determination of the final amount of damages, further to para 190 of my decision.

[3] Under the lease, rent and additional rent were payable on the first day of the month, for that month. Thus, while I awarded damages to June 30, 2021, the damages would be those amounts payable as of June 1, 2021.

[4] 1218807 Alberta Ltd. (the “Landlord”) provide a spreadsheet which shows monthly damage calculations as of June 30, 2021, totalling \$773,636.67 (neither this amount nor the amount set out in para 190 of my decision included interest). The Landlord submitted that rent owing after April 1 until June 30 (being payable May 1 and June 1) is \$110,519.52, based on “historical management fee, operating costs, and taxes.” In other words, the Landlord calculated the remaining two months in question on the same basis as they calculated damages for May 1, 2020 to April 1, 2021. The Security Deposit paid by MAC under the Lease would be deducted from the total damages for the entire damages period. Therefore, the outstanding damages are \$671,813.17, plus interest (18% plus prime) and solicitor client costs.

[5] The Muslim Association of Canada (“MAC”) submits that the specific direction in my decision of May 19, 2023, was that the parties would make further arguments on damages for the entire period that MAC was liable, being May 1, 2020 to June 30, 2021, as the trial only addressed liability. They argue that the affidavit evidence of the Landlord for the summary trial was insufficient to establish damages at the level claimed, that property taxes and operating costs are improperly included in the calculation, and that the management fees were not properly determined.

[6] MAC’s counsel is incorrect in their view that “...enforceability of the lease was the issue at the hearing, with the proper calculation of damages to follow.” The Order for Summary Trial, granted June 23, 2021, set out the issues to be determined, including “[h]as the [Landlord] had established it is entitled to damages under the Lease, and, if so, for what amount.” The only variation from that Order, as discussed and agreed to by the parties during the Summary Trial, was the deferment of the assessment of loss of future rents, for the unexpired Lease term beyond the hearing date, due to the need for expert evidence. Such an assessment was no longer necessary, given the conclusion on mitigation that limited the Landlord’s damages to June 30, 2021.

[7] MAC had the full ability to present evidence, engage cross examination, and present arguments as to the appropriate level of damages payable under the Lease from May 1, 2020 to June 1, 2021, at the summary trial hearing on May 4 and 5, 2022. Both parties addressed damages in their evidence, in their written submissions, and during oral arguments. If MAC wanted to dispute the calculation of damages as presented by the Landlord at the hearing, MAC should have done so at the hearing based on the evidence before the Court. MAC’s attempt to now reargue those damages or obtain further evidence with respect to damages is not permitted.

[8] MAC did not take the position, in either its written or oral submissions at the hearing, that any and all damages claimed by the Landlord for the time period prior to the summary trial of May 2022, would require further evidence or argument at a continued summary trial hearing on future dates. Neither did MAC take the position at the summary trial that the calculation of

damages by the Landlord up to and including April 1, 2021 was incorrect. Rather, MAC accepted that amount, as set out in para 198 to 204 of its Reply Brief and further expressed in its oral submissions on damages. This was the basis upon which I stated in para 190 that the parties had agreed to the calculation for the time period. MAC made no submissions on the calculation of damages for any period after April 1, 2021, other than setting out a formula for loss of future rent that MAC submitted would ultimately result in damages equal to the amount owing as of April 1, 2021, being \$663,117.15.

[9] Contrary to the current position of MAC, nothing in para 190 of my May 2021 decision is obiter. It was a conclusion as to the damages amount for which MAC was liable to the Landlord, as of April 1, 2021, being \$663,117.15. The Court's direction to the parties for submissions on calculating the damages was not an invitation for the parties to argue about whether this amount was accurate, given the positions already taken by each party at the hearing. What the Court was unable to determine, on the basis of the material before it, was the amount that would be owing for May and June 2021. Therefore, the direction to the parties was to provide the Court with their calculation of damages for May and June 2021, if they could agree upon that calculation; if agreement could not be reached, the parties could provide their submissions as to what the calculation for those two months should be. There was no consideration of opening up the summary trial for the purposes of providing further evidence or having a further hearing on damages.

[10] However, it was not brought to my attention by either party, until MAC's letter of October 26, 2023, that the calculation of damages included property taxes and that the Lease dealt with the liability of MAC for the payment of property taxes in s 3.12. The parties agreed at the summary trial, based on their written and oral submissions, that MAC is a not-for-profit corporation. Pursuant to s 3.12 of the Lease, MAC would not be responsible for paying property taxes as a result of that designation. Therefore, the Landlord's damages calculation presented at the hearing, to which MAC agreed and which continues to be relied upon by the Landlord, contained a manifest error by including property taxes and GST charged on the same. I find this constitutes an "accident, slip, or omission" that may be corrected by the Court under Rule 9.12 or Rule 9.13.

[11] The Landlord has calculated the damages for May and June 2021, on the same basis that it calculated the damages up to April 2021. As MAC agreed to the calculation up to April 2021, I accept the Landlord's calculation as appropriate to apply to May and June 2021, subject to removal of property taxes (and GST on the same). I reject MAC's calculation as now presented, because it attempts to change the position that MAC took before me at the summary trial as to damages up to April 2021, reargue how damages should be assessed in their entirety, and to use the changed position as the basis for damages in May and June 2021.

[12] Therefore, the total damages for which MAC is liable as a result of its breach of the Lease up to June 30, 2021 is \$616,848.09 (this is the Landlord's final calculation less the property taxes and GST charged on property taxes). From this amount would be deducted the security deposit of \$101,823.50, for a total of \$515,024.59 in remaining damages. As argued before me in the summary trial by the Landlord and consistent with the calculations now presented by the parties, MAC is liable to pay interest on these damages, as set out in s 3.5 of the Lease, at the rate of 18% plus prime.

[13] I agree with MAC's position on the term of the proposed Order relating to solicitor client costs. If there is no agreement at this time on what those costs are, then an amount of costs cannot be included in the Order as they must be assessed. MAC's suggested wording reflects my decision.

[14] The letters of counsel dated October 20, October 26 (two letters), and October 27, with their attachments, have been filed onto the court file.

Heard on the 19th day of May, 2023.

Written submissions on the 20th, 26th and 27th day of October, 2023.

Dated at the City of Edmonton, Alberta this 17th day of January, 2024.

L.M. Angotti
J.C.K.B.A.

Appearances:

Andrew Pozzobon
Borden Ladner Gervais LLP
for the Plaintiff

George Samia
Forum Law LLP
for the Defendant