IN THE SUPREME COURT OF BELIZE A.D. 2006

CLAIM NO. 31 OF 2006

BETWEEN

(RAUL DANIELS	**CLAIMANT**
(	
(AND	
(	
(GUSTAVO PEREYRA	**DEFENDANT**

Coram: Hon Justice Sir John Muria

Hearing: 26 April 2007
Judgment: 30 May 2007

Advocates:
Mr. Oswald Twist Esq. For the Claimant
Ms. Naima B. Badillo for the Defendant

J U D G M E N T

Delivered this ***30th*** **day of** ***May*** **2007**

Landlord and Tenant – agreement to rent premises for 1 year 11 days – tenants terminated tenancy after 3 weeks — whether premises fit for habitation

Parties – defendant executed agreement on behalf of another – defendant's case conducted in name of the "real party" – power of the Court to proceed against the "real party"

Claim for rent for unexpired period – claimant mitigated loss – counterclaim for deposits – whether entitled to reimbursement of rent and security deposits

MURIA J.: By an agreement dated 18 May 2005("the rent agreement") the landlords, Mr. Raul Daniels and Mrs. Valerie Daniels of 16414 Stuebner-Airlines Rd, Apt 701, Spring, Texas, USA ("the landlords"), rented their three-storey house at No. 20, 3rd Street, Santa Rita Layout, Corozal Town, Corozal District, Belize, to the tenant, Mr. Gustavo D. Pereyra of Las Vegas Hotel & Casino, Belize/Mexico Border, Corozal District, Belize ("the tenants"), for a term of one year and eleven days, commencing on 20th May 2005 and ending on 31st May 2006 at a monthly rental payment in advance and a security deposit.

Pursuant to the rent agreement, the tenants moved into the house on 18 May 2005 and paid the sum of $5,180.00 USD being for one month's rent in advance and one month's security deposit ($4,400.00 USD) and eleven (11) days rent ($780.00 USD) for the month of May 2005. The payment was made to the designated Bank Account of the landlords in Texas, USA. So far so good. However, on 6 June 2005, the managers and the CEO and President of the Las Vegas Hotel and Casino, Mr. George Hardie, moved out of the house following complaints over the presence of rats in the house. They have never returned to the house since. The Claimant was very unhappy about the action of the Defendant and now claims the rent loss for the one year, plus costs, less the amount paid in advance as rent advanced and security.

The Claimant's case is that the Defendant was in breach of the agreement when he moved out of the house only three weeks after the commencement of the rent agreement. It is part of the Claimant's case that the rent agreement was between the landlords and the Defendant, Gustavo Pereyra himself, and had nothing to do with Las Vegas Hotel & Casino, hence the other employees of the Las Vegas Hotel

& Casino and its CEO, Mr. George Hardie, had nothing to do with the rental agreement., so that any complaint from them about the state of the house is irrelevant. The sole parties to the rental agreement, as far as the Claimant is concerned, were the landlords and the Defendant, Gustavo Pereyra. Thus, when the Defendant moved out of the house on 6 June 2005, he was in breach of the rental agreement.

The Defendant on the other hand, denies any breach on his part of the rent agreement. The Defendant's case is that he entered into the rent agreement with the landlords, not on his own accord but for and on behalf of Las Vegas Hotel & Casino of which he was the Vice President at the time. Hence, following the execution of the rental agreement, the Managers and the CEO of the Las Vegas Hotel & Casino moved into the house. The payment of the one month rent in advance, security deposit and the eleven (11) days' rent were paid by Las Vegas Hotel & Casino and not by the Defendant himself.

As to the claim of breach of the rent agreement, the Defendant says that it was the Claimant who was in breach for allowing the premises to be infested with rats, thereby justifying the tenants vacating the premises. Consequently, the defendant counterclaimed for refund of the deposits made.

The Issues

There are a number of issues which clearly needed to be determined and the followings appear to be the central nes. First and foremost is the question of whether the Defendant entered into the rental agreement with the landlords for himself or for Las Vegas Hotel & Casino; secondly, whether there is a breach of the rent agreement when the Defendant moved out of the house on 6 June 2005;

thirdly, whether claimant is entitled to the one (1) year's lost rent; and fourthly, whether the Defendant is entitled to be paid back his deposits.

Parties to the rental agreement

The starting point must be the rent agreement itself and the circumstances giving rise to the agreement. It is therefore necessary to ascertain how and why the rent agreement came to be concluded between the parties.

There is evidence of a discussion or meeting between Mr. George Hardie and the Claimant prior to the making of the rental agreement. This evidence came out from both the Claimant in cross-examination and Mr. Hardie who states that in May of 2005 he had discussions with the Claimant regarding accommodation for his Managers. Asked if Mr. Hardie offer an extra US$200.00 for the rent, the Claimant agreed that Mr. Hardie offered to pay extra $200.00. Mr. Hardie is the CEO and President of Las Vegas Hotel & Casino. Following that discussion, Mr. Gustavo Pereyra (the Defendant) who is the Vice President of the Las Vegas Hotel & Casino, entered into the rental agreement with Mr. and Mrs. Daniels over the house in question on 18 May 2005. Mr. Pereyra did not stay in the premises. When asked how long he had spent in the house, he replied "*only about five minutes or shorter.*" In fact the evidence shows that those who occupied the rented premises Wilfredo De Santos, Marshall Kaplan and Jazmin Morrell who were the various Managers of the Las Vegas Hotel & Casino. The upper floor of the house was reserved for the use of the President of the Company, Mr. George Hardie.

On the question of payment of the rent, the Defendant stated in evidence that he did not make any payment personally to the Claimant. Such payment, he said, would be made by Las Vegas Hotel & Casino. The Claimant in his evidence

agreed that the Defendant did not pay him the rental money. He acknowledged that the amount of US$5,180.00 was paid into his account in the United States. The Defendant in his evidence stated that payments for bills including house rental were taken care of by the Las Vegas Hotel & Casino.

The Claimant's case is premised against the defendant personally. However, on the evidence, both from the Defendant and Claimant, it is quite obvious that the rental agreement entered into on 18 May 2005 was between the Claimant and the Defendant who was acting on behalf of Las Vegas Hotel & Casino. The submission of Mr. Twist that Mr. Pereyra was acting on his own behalf and not on behalf of Las Vegas Hotel & Casino runs counter to the evidence now before the Court both from the Defendant and his own client. As the evidence clearly establishes, the Defendant had not acted in his own personal interest when he executed the agreement. I find that the rental agreement signed by the parties on 18 May 2005 was in fact between the Claimant and Las Vegas Hotel & Casino.

The defence conducted its case in this action on the footing that Mr Gustavo Pereyra is not the Defendant, but rather it is Las Vegas Hotel & Casino. Yet no steps have been taken by either party to ensure that the proper defendant is named. Whether consciously or unconsciously, the conduct of the Defendant's case was fought on the understanding that the claimant's claim was against Las Vegas Hotel & Casino which, strenuously defended the Claimant's claim by relying on the evidence of its Managers, President and Vice President. Hence, the defence that the tenants/occupants were justified in vacating the rented premises on the 6 June 2005 because the house was unfit for habitation.

It is obvious to the Court that the real dispute is between the Claimant and Las

Vegas Hotel & Casino whose managers and officials (the real tenants) had vacated the premises on 6 June 2005. The real defendant, therefore, in this dispute is Las Vegas Hotel & Casino. The case law authorities established that the matter could be dealt with on this basis, since the *real party* (defendant) to the litigation and the one substantially in control and benefited from the transaction here in Las Vegas Hotel and Casino who must now be the defendants. See *Dymocks Franchise Systems (NSW) Pty Ltd -v- John Todd and Others* [2004] 1 WLR 2807; (21 July 2004) Privy Council Appeal No. 8 of 2001; *Knight v FP Special Assets Ltd* (1992) 107 ALR 585; *Metalloy Supplies Ltd (in liquidation) v MA (UK) Ltd* [1997] 1 WLR 1613. The case of *Dymocks* concerns the power of the Court to make an order against a non-party to pay costs. Dymocks successfully appealed to the Board but was unable to get the respondents to pay its costs, both in the Court of Appeal and Privy Council, as ordered by the Board. Dymocks petitioned for an order to have the non-party paid the costs. The non-party which was joined as a third party to the petition for costs, was a company owned by the family of one of the respondents and to whom the respondents owed substantial sums that had been advanced by the third party. The evidence before the Court established the third party was closely involved in, as well as having control over the appeals, both in the New Zealand Court of Appeal and in the Privy Council. The Board granted the petition, ordering the non-party to pay the petitioner's costs. Although *Dymocks* is concerned with the Court's power to make order against a non-party who in fact is the real party, in my judgment, the principle equally applies to a case such as the present one where the *real party*, though not named but nevertheless steps in and defended the action.

Whether vacation of the premises a breach

The second issue is whether the tenants breached the rent agreement when they

moved out of the house on 6 June 2005. To determine this issue, the reason(s) for the vacation of the house must be considered. The Defendant did not deny that the Managers of Las Vegas Hotel & Casino who were occupying the house at the time vacated the house on 6 June 2005. The reason for doing so, as it appears from the evidence, was that the house was infested with rats. In this regard, two questions need to be ascertained. Firstly, whether there were rats in the premises as alleged by the Defendant; and secondly, whether, if there were, it was sufficient reason to justify vacation of the premises by the Defendant.

The evidence of the presence of rats in the house came from George Hardie, the President and CEO and Wilfredo DeSantos, the Slot Manager of the Las Vegas Hotel & Casino. Mr. Hardie's evidence was that shortly after moving into the house, he noticed a number of things were not right with the house and more seriously, with the presence of rats in the house. Consequently, he wrote on 3 June 2005 to the Claimant setting out his complaints. That letter is in the following terms:

"Dear Mr. Daniels:

> *I had planned to express to you my disappointment in the house we recently rented, namely the house keeper and other items such as the garage doors (which are not working and we don't wish to park our cars on the street) and several of the TVs are inoperable. The filthy carpets on the second and third floor aren't even tacked down, discoloured to the point that no one can walk on them barefoot and other minor things did not make us comfortable when we moved in.*
>
> *Additionally, the housekeeper never has cleaned the refrigerator and many of the drawers have been cleaned out. She insists also in putting mothballs in all the drawers that stink up the clothes and towels. While these problems could have been corrected, last night I ran into an intolerable situation. Our Cage Supervisor came from the U.S yesterday and selected a room on the second floor; I am (was)*

using the room on the third floor. We were attempting to purchase and install air conditioners (as I now realize that you never had air conditioning in the house).

Two nights ago, I went upstairs to the third floor kitchen, adjoining my bedroom and a small sitting area. I reached for a bottle of water and was two feet away from a giant rat that was sitting on top of the counter. The rat did go around to the other side of the counter but made no real attempt to get away. Obviously, where there's rat, there's a nest of rats in the house. Mr. Roosevelt Blades had driven us there and was bringing some items up to the third floor when he also met a rat brazenly coming down the stairs (and the lights were on). I am very concerned that our new Cage Supervisor or the other gentlemen staying there would see this, panic, quit and go back to United States when they became aware were are rats in the house. We are not paying $2,200.00 per month to live in a rat infested house.

Obviously no bait or poison has been put out to keep rats out of your house (your housekeeper must have seen droppings) and there's no telling how long it will take to eliminate them from the premises nor no telling how many there are! I immediately left and took a room at Tony's for the evening and will stay there until I can find other accommodations.

I am obligated to move my people to a safer environment where they will not be subject to possible rat bite and potential disease.

Mr. Gustavo Pereyra will get in contact with you to resolve this issue. That has been extremely upsetting, to say the least.

Sincerely,
(Signed)
George G. Hardie
President & C.E.O."

The letter was hand-delivered to the Claimant by one Mr. Roosevelt Blades. There was no acknowledgement of receipt of that letter from the Claimant. However, by

a letter dated 17 June 2005, the Claimant's Attorney wrote to the Defendant giving him notice of the intended claim for breach of contract for vacating the premises on 6 June 2005. I think it is not without notice that Mr. Twist's letter of 17 June 2005 made reference to Mr. Hardie's letter of 3 June 2005 although not specifically so Mr. Twist stated: "My client denies the allegation in your letter and even if your allegation was true that give you no right under the said contract to terminate the agreement." Mr. Hardie, however, did not receive any response to his letter of 3 June and so a follow up letter from Mr. Hardie was sent on 20 June 2005.

I do not think it can be seriously said by the Claimant that there was no complaint about rats in the rented premises. Mr. Hardie as well as Mr. DeSantos saw rats in the house. The complaint was made to the Claimant in the letter of 3 June 2005. On reading the letter of 17 June 2005 from the Claimant's attorney, the Court can safely assume that the Defendant's letter of 3 June 2005 was known to the attorney and that was reflected in the contents of the letter of 17 June 2005. On the evidence, I am satisfied that there were rats seen in the house.

Were the tenants justified in vacating the house by reason of the presence of rats in the rented house? This is a question of both fact and law. The evidence demonstrates that the presence of rats in the house had caused concern and anxiety to the tenants. Mr. Hardie said that they were troubled by the fear of diseases and other health hazards that may arise from rat bites and rat infestation. For these reasons the tenants took the decision that it would be preferable to vacate the premises, despite the fact that they had just paid the amount of $5,180.00 USD. This is where the sting lies in this case, which the claimant is unhappy about.

It is one thing to have a reason for doing an act, but it is another thing to show that such a reason justifies doing the act complained of. This, I think, is more particularly so in a case such as the present one where the parties are bound by, not only, a tenancy over a house but also a contract which governs their relationship. The terms of that contract must be observed by both parties: see the Canadian case of *Highway Properties Ltd v Kelly Douglas & Co. Ltd* 17 D.L.R. (3d) 710. See also the Australian case of *Buchanan v Byrnes* (1906) 3 C.L.R. 704. Thus the terms of the rental agreement between the claimant and defendant must be considered in order to ascertain whether the action taken by the defendants in vacating the house in the manner that they did was justified in law.

The circumstances which caused the defendants to vacate the premises were set out in the letter dated 3/6/05 from Mr. Hardie to the claimant. In that letter, Mr. Hardie informed the claimant of the various matters which the defendants were not happy about after moving into the house. These include, garage doors not working, TV sets not working, carpet fittings and discoloured, refrigerator not cleaned by the housekeeper, putting mothballs in the draws by housekeeper, no air conditioning and existence of rats in the house. For those reasons the defendants had to vacate the house and they actually did so three days later, that is, on 6/6/05.

It is important to note the contents and effect of the letter of 3/6/05. in my view it was not a notice to the landlord to repair or mend the problems mentioned in that letter. It was a letter, advising the Claimant that they (defendants) were vacating the premises and thereby terminating the rental agreement, because of the problems mentioned in that letter. Further, it is also significant to note that the letter of 3/6/05 was not a notice of intention to terminate the rental agreement. I shall deal with the question of notice of termination later in this judgment. Suffice

to say now that had the letter was intended to be a Notice before termination the rental agreement, I am sure, Mr. Hardie could have said so.

The thrust of the defendants' case, and indeed in the submission by Counsel for the defendant, is that because of the problems stated in the letters, in particular, the presence of rats in the house, the premises was "not fit for occupation," and the defendants were entitled to terminate the agreement. Counsel referred to *Halsbury's Llaws of England,* 4th Edition, Vol. 27 paragraph 274 where the learned author stated:

> *"On the letting of a furnished house, there is an implied condition that it is in a fit state for habitation at the commencement of the tenancy, and if this condition is not fulfilled the tenant is entitled to repudiate the contract at once. He need not wait to give the landlord an opportunity for effecting repairs. It is a breach of the condition if there are substantial defects in the drainage; if the house or any part of it is so infested with vermin as to be a source of serious inconvenience to the occupants; or if there has been recent infectious illness, and the house has not been properly disinfected; but not if there are merely ordinary defects of repair which can be easily remedied. To fulfil the condition it is not enough that the landlord believes the house to be in a fit state for habitation; it must in fact be reasonably habitable."*

Thus counsel submitted that the evidence of rats in the house demonstrated that the house was not fit for occupation.

As pointed out in the passage cited above, the implied condition that a rented house is fit for habitation must exist at the commencement of the tenancy. In the present

case, the evidence by Mr. Hardie in cross-examination is that prior to the signing of the rental agreement, he had discussions with the claimant in May 2005 and that he was satisfied with the house. In his written witness statement he said:

> *"6. I was shown a house located at #20 3rd Street, Santa Rita Layout, Corozal Town, Corozal District, owned by Mr. Raul Daniels which contained seven or eight bedrooms that seemed to be attractive, with a small kitchenette and a master bedroom on the third floor.*
>
> *7. We decided to rent the house from Mr. and Mrs. Daniels."*

The other Managers of the Las Vegas Hotel and Casino moved into the house in or about 17th or 18th May 2005. Mr. Hardie moved into the house the end of May or beginning of June 2005. Mr. Pereyra did not move into the house although he said he had been in the house for only about "five minutes or shorter." Despite the contents of the letter of 3/6/05, there was no evidence to show that at the commencement of the tenancy agreement, the house was not fit for habitation. On the contrary, the evidence is that the house was reasonably habitable. Mr. Jonathan Garbutt stated in his witness statement that he was occupying the said house prior to it being rented to the defendants and he never saw rats, mice or rodents. He said the house was always kept clean and tidy. I find that the premises satisfied the implied condition that it was fit for habitation when the defendants entered into the rental agreement with the claimant on 18/5/05.

Did the matters raised in Mr. Hardie's letter of 3/6/05 change the state of the house for habitation by the defendants? This is a question of facts. The evidence before the court is that the major reason for the defendants vacating the premises was the

presence of rats in the house. Having found that the house was in a fit state for habitation at the commencement of the tenancy, I am satisfied also on the evidence that despite the subsequent discovery of the problems mentioned in the letter of 3/6/05 no complaint was made to the claimant about any of the problems mentioned with a view to remedying them. Mr. Pereyra did not complain to the claimant. Mr. De Santos did not complain to the claimant because "Mr. Raul was so good to me. So I would not want to embarrass him." He said he, however, complained to the caretaker, Mr. Carmen. Mr. Hardie did not complain to the claimant except to inform the claimant by letter on 3/6/05 of the problems about the house and that they (defendants) were moving out of the house, which they did three days later. There was no notice to the claimant to remedy the matters complained of. One would have expected that a notice to remedy the problems complained of within a time period would have been given to the claimant and only after the landlord (claimant) had failed to carry out his responsibilities that the tenant (defendants) would take the next step to terminate the agreement.

There was no mention of notice to remedy default in the agreement. However, even if the agreement did not specify the requirement of notice to remedy the problems complained of, the law implies reasonable notice for taking remedial acts by the landlord upon a complaint by the tenant. Only where the landlord has failed to carry out his obligation to remedy the problems complained of will the tenants be entitled to take steps to repudiate the tenancy agreement. This is not what happened in this case and there is no evidence to show that the landlord/claimant had refused to remedy the problems complained of to him. I find that there was no notice given to the claimant to remedy any of the complaints. However, even if the letter of 3/6/05 could be said to be a notice to him, it was not reasonable notice to

enable the landlord/claimant to remedy the situation complained of. In any case, in the absence of breach by the landlord of the implied condition that the house was in a fit state for habitation, the defendants were not entitled to unilaterally repudiate the rental agreement and if the rats were the reason for vacating the premises, the defendants cannot terminate the agreement without reasonable notice to the claimant.

Clause 15 of the Agreement requires notice to be given by landlord to the tenant of any default committed by the tenant and requiring the tenant to cure the default with 30 days. If the tenant fails to cure the default within the period stated, the landlord may terminate the agreement on notice of not less than 30 days to the tenant. There are therefore two notices required under Clause 15 which the landlord must fulfil. On the other hand, the agreement is silent on the requirement of notice for the landlord to cure any default on his part and for the tenant to terminate the agreement for breaches by the landlord.

It is here that we have to turn to the common law for assistance. Under common law, a tenant can terminate his tenancy before the term of the tenancy runs out provided the required notice to do so as provided in the tenancy agreement is complied with. The same may be said for the landlord. If, however, there is no notice period mentioned in the tenancy agreement a suitable period may be agreed to by both the landlord and tenant. If the landlord and tenant are unable to come to an agreement, in the absence of the any breach by either parties, the tenant will have to wait until the tenancy ends before he can leave.

The present case, however, concerns an alleged breach by the landlord of the rent

agreement, causing the tenants to leave the rented premises. There is no suggestion here that the tenants vacated the house in order that the landlord remedied the problems stated in the letter of 3/6/05. The tenants had terminated their stay in the rented premises, effectively terminating the agreement. Viewed in the light of the evidence before the Court, even if there is something to be said for complaints raised by Mr. Hardie in his letter of 3/6/05, the action taken by the defendant in vacating the rented premises, thereby effectively unilaterally terminating the rent agreement was in breach of the terms of the said agreement.

Whether entitled to rents for unexpired period

By his statement of claim the claimant asks for one year's rent in the sum of $52,800.00 together with costs (specified in the statement of claim) and interest at 12% per annum, less security and rent deposits ($4,400.00). In a case such as the present one, the landlord may well elect to treat the rent tenancy as continuing in which case, he would retake possession with the tenant paying the rent or terminate the agreement and claim rent due to the unexpired period and damages. The claimant has taken the latter option which perhaps is the appropriate option in the circumstances.

The evidence is that there were attempts to rent the premises after the defendants left. The claimant succeeded in renting the premises in the months of September 2005 to October to December 2005 to Christopher Allnatt at $2,000.00 USD and to Jeffery Serland at the rent of $2,000 USD, giving the Claimant a loss of $800.00 USD or BZD1,600. The claimant was unsuccessful in his attempts to rent the premises in months of June to August 2005 and January to May 2006, representing a loss of $17,600.00 USD or BZD35,200.00. The total amount of rent loss during the unexpired period was $18,400.00USD or BZD36,800.00. There was no

evidence to counter that claimant's evidence in this regard and the court accepts one figure of $18,400.00 USD or $36,800.00 BZD as the rent loss for the unexpired period of the rent agreement.

There is also the evidence of the deposits in the sum of $4,400.00 USD or $8,800.00 BZD. The defendants counter claim for the refund of this sum (more specifically, $3,959.99 USD) while the claimant claims that the amount he accounted toward the rent due. Refigure of $3,959.99 represents 24 days in June 2005 and security deposit. Clause 16 of the Rent Agreement provides that the

> *"Tenant shall deposit with Landlord on signing of this agreement two months rent as security deposit for the performance of the Tenant's obligation under this agreement, including and without limitation the surrender of the possession of the premises to the Landlord as herein provided. If Landlord applies the deposit or any part thereof to cure any default of the Tenant, the Tenant shall on demand of the Landlord deposit with the Landlord the amount so applied so that the Landlord shall have the full deposit on hand at all times during the term of this agreement. If deposit is not utilized during the term of this agreement, such deposit will be reimbursed or utilized as rent* ***on termination of this agreement****."*

Under, this clause, the landlord is obliged to return the deposit to the tenant if it is not utilized during the "term" of the agreement. No doubt, if no rent is due and unpaid, or no default is ocassioned during the term of the agreement, then the defendants must be reimbursed with their deposit. On the other hand where rent is due and unpaid or costs provided for under the agreement is incurred, the landlord

is entitled to keep the deposit to compensate for unpaid rent and other costs provided for under the agreement. In the present case, in my judgment, the claimant is entitled to keep the deposit and apply it toward the unpaid rent for the unexpired period of the rent agreement.

Counter-claim

In the light of the finding that the Claimant is entitled to keep the deposits and apply them toward the rent due and unpaid, the Counter-claim clearly cannot succeed. Consequently, the counter-claim by the defendants must fail.

The result is that the claimant is entitled to the sum of $18,400.00 USD or $36,800.00 BZD less $4,400.00 USD or $8,800.00 BZD giving the claimant the sum of $14,000.00 USD or $28,000.00 BZD.

Conclusion and Order

There will be judgment for the claimant in the sum of $14,000.00 USD or $28,000.00 BZD together with interest at the rate of 6% per annum until payment. The claimant shall also have his costs of this action, such costs to be taxed if not agreed. I order accordingly.

Hon Justice Sir Mr. John Muria