March 15, 2012

The Proper Person to Renew an Assigned Lease

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Cases Considered:

C & H Properties Inc. v Amos (Discount Thrift Store), 2012 ABQB 106

Carelessness with respect to assignments and subleases can easily jeopardize commercial tenants' rights to renew their leases. Many tenants assign or sublet their rented commercial premises without seeking their landlord's consent, which is usually required by the terms of their lease. Many commercial tenants do not seem to know the difference between assignments and subleases. Neither do they appear to realize that when they assign their lease, they lose the right to renew the lease and only their assignee has that right, whereas if they sublet then they retain the right to renew the lease. Perhaps that is why commercial lease negotiation consulting appears to be a growing business in North America. However, despite some assistance from a consultant in this case, the tenant was never able to overcome a lack of attention to details in the lease or their confusion about the difference between an assignment and a sublease.

The applicant and landlord, C & H Properties Inc., owns the Westgate shopping complex in North Edmonton, having purchased it from Ironwood III Assets Inc. on January 28, 2010. As part of the transaction, C & H was given a copy of the lease in question. It was a five year lease — from November 1, 2004 to October 31, 2009 — between a former owner of Westgate, Krozelle Building Ltd., as landlord, and the Children's Rescue Foundation ("CRF") as tenant. We are told very little about this lease. For example, even though the tenant's ability to assign or sublet and the tenant's option to renew the lease were at the heart of the case, neither they nor any other provision of the lease are quoted.

At the time of its purchase of Westgate, C & H also received an estoppel certificate executed by Nazia Amos on behalf of CRF, identifying CRF as the tenant and denying any material changes to the lease. An estoppel certificate is a document designed to give a third party, who is usually a prospective buyer of the landlord's property, important information about the relationship between the landlord and one of their tenants.

At the time of its purchase of Westgate, C & H also received an April 27, 2009 letter signed by Ashley Amos on behalf of CRF and addressed to Ironwood, the former landlord, purporting to exercise an option to renew under the lease for two further five year terms.

However, the Westgate premises originally leased to CRF were in fact occupied by Patricia Amos operating as Discount Thrift Store ("DTS"). On January 15, C & H was provided with a Statutory Declaration by Ironwood confirming CRF was the proper tenant and confirming Ironwood never consented to an assignment of CRF's lease to DTS. C & H was also provided

with a second estoppel certificate executed by Nazia Amos on behalf of CRF which identified DTS as a sub-tenant of CRF.

Soon after C & H became the registered owner of the Westgate shopping complex, C & H decided there was no authorized sublease between CRF and DTS, i.e., no sublease had been consented to by Ironwood, the landlord at the relevant time. CRF was therefore in default under the lease and C & H issued a Notice of Default and Termination on February 5, 2010.

However, on February 5, 2010, C & H was contacted by CRF's agent, Bruce Best. Best is a Professional Commercial Lease Consultant with an organization called The Lease Coach, which advertises itself as "America's #1 Authority on Lease Negotiating for Tenants" and has offices in both Edmonton and Calgary. Best provided C & H with a copy of a letter signed by Krozelle Building Ltd., the original owner of the shopping centre, which appeared to be Krozelle's written consent to the assignment of the lease by CRF to DTS. The letter also indicated it relieved CRF of any of its obligations under the lease.

C & H was skeptical. They conducted a number of corporate and trade name searches and found that CRF had been struck from the registry of non-profit corporations and the trade name "The Discount Thrift Store" was registered to a corporation that had been struck from the corporate registry. C & H took the position that, because neither CRF nor DTS were valid and subsisting entities, neither had capacity to occupy the premises under the lease.

In May 2010, C & H was given a copy of an undated assignment of lease executed by CRF as assignor and by Patricia Amos, operating as DTS, as assignee. Patricia Amos signed for DTS and Ashley Amos, her son, and Nazia Kahn, now Nazia Amos and her daughter-in-law, signed for CRF.

Despite these and other documents produced by CRF and DTS, C & H remained skeptical and maintained its position that DTS was not an entity entitled to renew the lease and as such was an over-holding month-to-month tenant.

On October 22, 2010, Patricia Amos produced for the first time a copy of a letter dated April 27, 2009 and signed by her on behalf of DTS that purported to give notice to Ironwood that DTS — not CRF — wanted to exercise the renewal option in the lease.

Notice of renewal was required to be given within six months of the expiry of the Lease so a notice of renewal given April 27, 2009 was well within the prescribed time period. With respect to the April 27, 2009 notice of renewal by CRF given to C & H on its purchase of Westgate in January 2010, and with respect to the April 27, 2009 notice of renewal by DTS given to C & H on October 22, 2010, Nazia Amos testified that Bruce Best of The Lease Coach provided a blank form of a letter to be used to exercise the renewal option and Ashley Amos prepared the two April 27, 2009 letters based on Best's precedent. Nazia Amos testified she delivered both April 27, 2009 letters to the same person she gave the monthly rent to at Ironwood's offices. Both notices were in one envelope marked "Ironwood," together with a month's rent. Nazia Amos also testified that copies of the renewal notices were delivered to Ironwood by registered mail, courier, and fax.

Mr. Justice Peter Michalyshyn, after providing some background to the dispute and summarizing the evidence of Nazia Amos with respect to the creation and delivery of the two notices of renewal, turned to Patricia Amos' evidence. He indicated (at para 29) that her affidavit evidence

and her evidence given on examinations on her affidavit "defies summary." He also concluded (at para 29) that "Patricia Amos was evasive, at times defiant, and overall an entirely unbelievable witness." She did not testify at trial even though the Order setting out the questions to be answered at the trial of the issues before Justice Michalyshyn required her to do so. It was said that she suffered from stress as a result of the legal proceedings but no adequate medical evidence was ever produced to substantiate that point, even though she had been ordered to provide a medical opinion when she initially refused to be examined on her affidavit.

Ironwood's commercial property manager produced a file on CRF which included leases, legal documents and correspondence. That file included the April 27, 2009 letter from CRF purporting to exercise the option to renew. It did not include a second letter of April 27, 2009 from DTS purporting to exercise an option to renew.

Thus Ironwood admitted that it had received the required notice to renew from CRF. However, if CRF was not the tenant — if it had assigned its lease to DTS — then CRF was not the proper person to exercise the option to renew. An Order of September 7, 2011 stated the questions to be answered following the viva voce hearing before Justice Michalyshyn as follows:

> 1. Did Nazia Amos personally deliver two notices of renewal on behalf of both Patricia Amos o/a Discount Thrift Store ("DTS") and Children's Rescue Foundation ("CRF") to Ironwood III Assets Inc. ("Ironwood") on or around April 27, 2009?
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> 2. Did Patricia Amos send two notices of renewal by registered mail to Ironwood on or about April 27, 2009?

If the answer to either question was that only the renewal notice in the name of CRF was delivered to Ironwood, then the third question was:

> 3. Were the CRF renewal notice and/or subsequent events effective to renew the lease on behalf of DTS?

To summarize, the stated issues were whether DTS had given notice of its intention to renew the lease and, if not, whether CRF's notice was effective on behalf of DTS. The Court also considered two other issues: whether C & H had waived its right to terminate the lease by accepting rent and whether the Court should grant DTS relief from forfeiture.

Justice Michalyshyn begins his analysis (at para 38) by noting that credibility was a central issue. Having found that Patricia Amos' evidence lacked credibility, what was he to make of her failure to give *viva voce* evidence at the trial of the issues? Justice Michalyshyn relied upon the decision of Associate Chief Justice Wittmann (as he then was) in *Howard v Sandau*, 2008 ABQB 34, concerning the drawing adverse inferences against a party for their failure to call a witness in a civil case. Justice Michalyshyn exercised his discretion to presume the evidence Patricia Amos failed provide would adversely affect her case? He considered (at para 43) four factors accepted as significant in determining whether he should exercise such discretion and found there was no legitimate explanation for the failure to call Patricia Amos, that she clearly had material evidence to provide, that she provided the best evidence of the letter allegedly signed by her for DTS, and that her testimony was within her exclusive control. As a result, doubts were intensified about whether Patricia Amos signed a DTS letter exercising the right to renew on April 27, 2009, and whether she took any steps to deliver such a letter by any means.

In addition, Justice Michalyshyn found Nazia Amos to be a less credible witness than the Ironwood property manager. As a result, he answered the first two stated questions in the negative: the evidence did not show that both notices were delivered or sent by registered mail to Ironwood.

That left the issue of whether the CRF notice of renewal was effective to renew the lease on behalf of DTS. Despite there being questions about the validity of the assignment of the lease by CRF to DTS, C & H accepted that this assignment did exist. After all, a valid assignment meant that DTS was the tenant and therefore the proper person to exercise the option to renew. If there was no assignment, then CRF would have remained the tenant and been the proper person to give notice. And since CRF did exercise the option to renew, that would have meant that C & H would have been stuck with Patricia Amos as a tenant for another ten years. And in case acceptance of the assignment seem like sharp practice on C & H's part, Justice Michalyshyn was careful to note that C & H took pains to confirm who Patricia Amos said the proper tenant was and received her June 21, 2010 estoppel certificate in which she confirmed DTS was the true tenant. C & H was entitled to rely on Patricia Amos' representations and she was not entitled to challenge them.

CRF's notice of renewal was not effective on DTS's behalf because, according to Justice Michalyshyn, the effect of the assignment from CRF to DTS was to extinguish any rights CRF had under the lease. This is quite an extravagant claim, but an assignment certainly does extinguish the assignor's right to renew a lease and make the assignee the tenant and therefore the party in privity of estate with the landlord. CRF's notice was therefore ineffective on DTS' behalf.

DTS then raised the issues of estoppel and relief from forfeiture. The estoppel issue was based on the argument that C & H had waived its right to terminate the lease by accepting rent and by seeking the last estoppel certificate from Patricia Amos. However, C & H had served a Notice of Default and Termination within days of becoming the owner of the Westgate shopping complex it and accepted rent from DTS only as an over-holding tenant with a periodic, month-to-month tenancy. On the relief from forfeiture issue, C & H argued that relief from forfeiture must involve the loss of a right and in this case DTS did not lose a "right" but rather, at most, an opportunity to seek to exercise a right by giving notice under the lease. The so-called option to renew – for that is how it is referred to throughout the case – is never quoted so it is unclear whether DTS had a right to renew. Justice Michalyshyn does not comment on the merits of this argument, so nothing more can be said about this interesting argument.

Justice Michalyshyn dealt with both the estoppel issue and the relief from forfeiture request in the same way, by relying on a well-known equitable maxim to note that that Patricia Amos did not come before the court with clean hands and therefore could not succeed in having the lease renewed on any grounds arising in equity. With respect to her request for relief from forfeiture, he added that there was nothing unjust or unfair in C & H relying on its strict legal rights.