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A Cautionary Tale about Suing in the Name of the Correct Legal Entity

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Case Commented On: *2040497 Alberta Ltd v Samateh*, 2019 ABPC 321 (CanLII)

In 2017, Abdoulie Samateh was sued by his landlord for rent in arrears – or was he? He was sued by William Masri, and Masri was the sole owner of 2040497 Alberta Ltd, as well as its president, secretary and treasurer. And it was 2040497 that was the landlord of the apartment rented to Samateh, not Masri. And so when the 2017 action went to trial on April 23, 2019, Assistant Chief Judge Gordon W. Sharek dismissed the landlord's claim because the party suing – Masri – was not the landlord. He also dismissed a counter-claim by the tenant because the tenant called no evidence to support his claimed loss of personal property. One month later 2040497 sued its former tenant, Samateh, for the same rental arrears, as well as for damages. But 2040497 also lost, this time following a trial in December 2019. Judge Sandra L. Corbett decided that 2040497's action was *res judicata* and also an abuse of process, and she awarded enhanced costs of $1,825 to the tenant. She held that 2040497 was wrong to sue because it tried to relitigate matters that had already been decided by ACJ Sharek in the first action. Many landlords who run their business through a corporation (and others operating small businesses) might be shocked to learn that they might have only one chance, when suing, to name the correct legal entity. If they get it wrong, there might be no "do over." In addition, there might be a monetary penalty for what Judge Corbett called "litigation misconduct".

We do not know much about the reasons ACJ Sharek decided the first action the way he did in April. No written reasons are available. Judge Corbett indicated that she listened to his oral reasons for his decision (at para 6). She said that those reasons confirmed that the facts in both actions that gave rise to the claim for rent arrears were the same, that the landlord's claim was dismissed "in its entirely [sic]" because the wrong party was named as landlord, and that no costs were awarded to either party (at para 6). There is no indication of when it became apparent before ACJ Sharek that the wrong legal entity had been named as landlord. Was it only after the trial had concluded? There is no indication of whether or why it was too late for the landlord to file an amended claim. There was no indication of whether the tenant would have suffered prejudice if an amendment had been allowed. There was no indication why no costs were awarded to either party by ACJ Sharek.

Neither do we know how much, if any, rent was in arrears or how much the landlord or the tenant claimed in damages. We only know that Judge Corbett awarded costs in Column 2, which includes claims in the $12,501 to $25,000 range.

But we do know the reasons Judge Corbett dismissed the landlord's second action and called it an abuse of process and litigation misconduct. Judge Corbett's decision depends upon two things: the

legal fiction that a corporation is a separate legal entity and, more importantly, the doctrine of *res judicata*.

My colleague, Howard Kislowicz, recently wrote about the nature of a corporation in 2017 CanLIIDocs 3567. In examining what a corporation is in Canadian law (at 364-372), he noted that it was decided more than 100 years ago that corporations are separate legal persons (at 364, citing *Salomon v A Salomon and Company Limited*, [1897] AC 22 (HL)). This idea is seen in contemporary statutes such as Alberta's *Business Corporations Act*, RSA 2000, c B-9, s 16(1): "A corporation has the capacity and, subject to this Act, the rights, powers and privileges of a natural person." The idea that a corporation is a "legal fiction", rather than a real entity, is identified by Kislowicz as "one of the dominant underlying assumptions of Canadian corporate law" (at 366).

Despite the settled nature of the "corporations as separate legal entity" idea, many small business owners do treat their corporations as imaginary entities, conflating their corporations with themselves. Even Canadian courts treat corporations as the *alter ego* of the relevant individuals in certain contexts (at 366-68). In the case before Judge Corbett, we see the conflation of Masri and 2040497 in the application of the doctrine of *res judicata*, as well as in the landlord's initial error.

As for the more important doctrine of *res judicata*, it comes in two types, issue estoppel and cause of action estoppel, each with their own slightly different test. Both are briefly reviewed by Judge Corbett (at paras 7-13), relying on one recent Court of Appeal judgment, *864503 Alberta Inc v Genco Place Properties Ltd*, 2019 ABCA 80 (CanLII), and two recent Queen's Bench decisions, *McLeod v Alberta*, 2019 ABQB 812 (CanLII), and *Booth v Christensen*, 2019 ABQB 878 (CanLII). According to Judge Corbett (at para 8) and the Court of Appeal decision in *Genco Place* (at paras 24-25, quoting Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths Ltd, 1992) at 997-98) issue estoppel "prevents the contradiction of that which was determined by the previous litigation, by prohibiting the relitigation of *issues already addressed*," whereas cause of action estoppel "prevents the fragmentation of litigation by prohibiting the litigation of matters that were *never actually addressed* in the previous litigation but which properly belonged to it" (emphasis added). In other words, issue estoppel is about litigating the same issue twice. Cause of action estoppel is about litigating issues in a second case that should have been, but never were, addressed in an earlier case.

After setting out the test for both types of *res judicata*, but without stating why, Judge Corbett applied the test for cause of action estoppel (at paras 15-23). Given the difference she noted between the two types, the logical inference is that ACJ Sharek "*never actually addressed*" the landlord's claim for arrears of rent. Had ACJ Shaek actually decided that arrears of rent were or were not owing, then issue estoppel would have been the appropriate choice because it prevents the re-litigation of "*issues already addressed*."

Unfortunately, due to the lack of information about ACJ Sharek's decision, it is difficult to assess Judge Corbett's decision that this case was the cause of action estoppel type of *res judicata* or that it met the four-part test for establishing cause of action estoppel (at para 14). On the first of the four parts, she decided that there was a final decision by ACJ Sharek because he dismissed both the landlord's claim and the tenant's counterclaim (at para 15). On the third criterion, she decided that the causes of action in the two cases were not separate and distinct, but arose from the same

facts (at paras 21-22). And on the fourth criterion, Judge Corbett held that the basis of the claims in both actions had been argued (at para 22). The fact that the landlord added new damages claims for the removal of furniture and appliances and a resulting inability to re-rent the apartment (at para 20) did not matter because those damages *could* have been argued in the first action.

More interestingly, Judge Corbett also held that the second part of the four part test – the need for the party/ies in the second action to be the party/ies to the first action or "a privy" with those parties – was also fulfilled (at para 16-19). She defined "a privy of a party" as "a person who has a right to participate with a party in a proceeding or who has a participatory interest in the outcome" (at para 18, quoting *XY, LLC v Canadian Topsires Selection Inc*, 2014 BCSC 2017 (CanLII), at para 89, itself quoting Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 4th ed (Toronto: Butterworths, 2015 at 83-85) and held that 2040497 had a participatory interest in the outcome of the first action and it was just to hold 2040497 bound by the first action for two reasons. The first was that 2040497 had an interest in that action "but chose not to participate" (at para 19). Can characterizing Masri's error in naming himself and not his corporation as the landlord be summarized as the corporation "choosing" not to participate? The second reason was that the "juridical identity" of Masri in the first action and of 2040497 in the second action was the same (at para 19), with "juridical identity" being understood as their *legal* identity and not their *physical* identity (per *Roberge v Bolduc*, 1991 CanLII 83 (SCC), [1991] 1 SCR 374). This second point seems at least a little ironic as it was the juridical identity from Masri's perspective (i.e. conflation of the two legal entities) that caused the whole problem in the first place.

After finding that the doctrine of *res judicata* applied, Judge Corbett declared a mistrial and dismissed both the landlord's claim and the tenant's counter-claim (at paras 24-25). She then exercised her inherent jurisdiction to find 2040497's action an "abuse of process" because it tried to re-litigate "facts that were already decided" (at para 26). However, the only fact decided by ACJ Sharke was that Masri was not the landlord. The claim for rent in arrears was dismissed, but whether that claim was proven was not decided. Judge Corbett's understanding of the "facts that were already decided" seems too broad. The narrower fact that actually was decided, i.e. that Masri was not the landlord, might not have justified her finding of an abuse of process.

Finally, based on her finding of *res judicata* and an abuse of process, Judge Corbett awarded the tenant enhanced costs of a factor of two times Column 2 of the Provincial Court Tariff of Recoverable Costs, which is part of Practice Note 2: Costs in Provincial Court Civil. Column 2 is for claims in the $12,501 - $25,000 range. She used a multiplier of two on the basis of "litigation misconduct" in suing for rent arrears twice (at para 27).

What are the lessons to take away from this cautionary tale if you are a landlord or another type of businessperson who operates through a corporation? First, make sure that, when you sue, you use the correct legal entity. You may only get one chance and if you pick wrong, you may not be able to sue for what is owed to you – and you may have to pay costs to the person who owes you. You might think paying the person who owes you money for the costs of being dragged into court once – the time you used the name of the wrong legal person – would be enough punishment and that you should still be allowed to collect the money owed to you. But you might be wrong, depending on how the judge deciding the case exercises their discretion. Even if *res judicata* is made out, the

judge has the discretion to allow the second and proper action to continue. Abuse of process is also a discretionary call.

This case had some other, harsher lessons for the landlord in this case. We do not know why his claim could not be amended before ACJ Sharek. We do not know if ACJ Sharek intimated that the right thing to do was to sue in his corporation's name. Even if all a judge says is that the only reason you lost was because you named the wrong legal entity as landlord, it might not be unreasonable, if you are a self-represented litigant, to think that the thing to do would be to sue again and name the right legal entity as landlord.

In this case, suing again in the right name resulted in dismissal of the landlord's claim for rent in arrears and damages without anyone ever deciding that the landlord was not owed the money. That seems like a hard lesson for a self-represented small businessperson to learn. But the lessons in this case were even harsher. Not only was the landlord's action dismissed, it was also labelled an "abuse of process" and costs against the landlord were enhanced (i.e. doubled) because of the landlord's "litigation misconduct." Now those findings are part of both the individual's and his corporation's history with the Alberta courts, and they might bring these two self-represented litigants one step closer to being declared vexatious litigants some day in the future. On top of that, the landlord had to pay the tenant $1,825 in costs for the second action, regardless of whether or not the tenant actually owed for rent in arrears or damages.

This hardly seems like the result the Canadian Judicial Council had in mind when it adopted its "Statement of Principles on Self-represented Litigants and Accused Persons," or the Supreme Court of Canada when it endorsed that Statement in *Pintea v Johns*, 2017 SCC 23, [2017] 1 SCR 470. Under "Promoting Rights of Access," that Statement says that "Judges, the courts and other participants in the justice system have a responsibility *to promote opportunities for all persons to understand and meaningfully present their case*, regardless of representation" (at 2, emphasis added). There was no meaningful presentation of the landlord's claim in this case. We don't even know if rent or damages were owed because both judges who heard the case refused to decide that question. The only thing that mattered was that Masri made the not uncommon error of naming himself, and not his corporation, as the legal entity allegedly owed money – and he did not get the opportunity to fix his mistake.

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