LDPD 1992/2018

[2019] HKLdT 13

**IN THE LANDS TRIBUNAL OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

APPLICATION NO LDPD 1992 OF 2018

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BETWEEN

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| NG YIH LIN ELAINE | Applicant |
| and |  |
| GROB EDOARDO EMILIO | Respondent |

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| Before: Mr Alex NG, Member of the Lands Tribunal |
| Date of Trial: 4 February 2019 |
| Date of Judgment: 4 February 2019 |
| Date of Reasons for Judgment: 27 February 2019 |

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REASONS FOR JUDGMENT

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1. This is an application filed by the applicant for recovery of possession of the suit premises and rent, and order for mesne profits and costs. At the conclusion of the trial on 4 February 2019, I ordered that the respondent do deliver vacant possession of the suit premises to the applicant, do pay the applicant arrears of rent / mesne profits and cost, but subject to a relief until 18 February 2019, with reasons to be handed down in writing. I now do so.

*Background*

1. The applicant filed the application on 24 October 2018, stating that there is a tenancy between the parties for 2 years from 1 June 2018 at monthly rent of $20,000, and the respondent failed to pay rent from 1 October 2018. In addition, there was a shortfall of rent payment in the sum of $200 for the period from 1 August 2018 to 30 September 2018.
2. The respondent filed a Notice of Opposition on 29 October 2018 and stated that he had already paid full amount of monthly rent at $20,000 in both August and September 2018 respectively. The respondent alleged that the applicant had provided wrong information to the tribunal, had refused to pay repair costs previously incurred by him, had hidden relevant facts in the application including structural defects and had delivered the suit premises to him with faults. He further alleged that the applicant had refused to care for structural repair and fair wear and tear of the suit premises, which are the duties of the landlord, and the suit premises were then about 40% uninhabitable. He also mentioned about harassment, discrimination and fraud, and that the applicant had not signed on the tenancy agreement in person.
3. At the call-over hearing on 7 December 2018, there was no dispute between the parties that the respondent had not made any actual payment of rent from 1 October 2018. The respondent mentioned a number of facts and issues, and submitted that his loss and costs were greater than the rents as claimed by the applicant, and therefore could support him not to pay rent from 1 October 2018. In the circumstances, I directed the parties to file witness(es) statement(s), and fixed a further call-over hearing on 11 January 2019. I also ordered the respondent to pay into the tribunal interim payments in the total sum of $80,000 respectively on 17 December 2018 and 2 January 2019, being the interim rent / mesne profits from 1 October 2018 to 31 January 2019, which would be kept in the tribunal until further order.
4. On 17 December 2018, the respondent filed an application to review the decision made on 7 December 2018. He asked to (1) change the trial judge / member because the applicant and I have the same surname, (2) defer the deadline for filing of supplemental witness statement for a week because he would be travelling in Christmas, and (3) reschedule the further call-over hearing to a later date. Further, since he considered that the applicant had confiscated the deposit, the suit premises were then uninhabitable, and his loss and expenses were high, he disagreed to make payments to the tribunal which covered a period prior to the last hearing. The applicant replied on 20 December 2018 and objected to the review. I decided on 20 December 2018 not to review the decision made on 7 December 2018.
5. On 10 January 2019, the respondent filed an interlocutory application and asked for leave to file supplemental witness statement out of time. At the further call-over hearing on 11 January 2019, I granted leave to the respondent to file supplement witness statement by 14 January 2019 and then fix the trial on 4 February 2019. Since the respondent had not made the interim payments as ordered on 7 December 2018, I ordered the respondent to make interim payment in the sum of $80,000 again on or before 14 January 2019.
6. On 29 January 2019, The respondent filed another application to review the decision made on 11 January 2019. In addition to the requests for change of trial judge / member and audio recordings of the previous hearings, which should not be parts of an application for review, the respondent said that the decision on interim payment was unfair and unbalanced and favored the applicant. I decided before the trial on 4 February 2019 not to review the decision made on 11 January 2019.

*Trial on 4 February 2019*

1. The respondent was absent at the trial on 4 February 2019. In fact, in the morning before the trial, the tribunal received a telephone call from a person who claimed to be the respondent and advised the tribunal that he could not attend the trial on that day. In addition, the tribunal also received a fax at 9:05 am on 4 February 2019 from a person who claimed to the respondent and requested to reschedule the trial to another date. The fax contained copies of boarding passes flying from Hong Kong to Zurich on 30 January 2019 and a letter dated 2 February 2019 written in German and translated in English, which stated that the respondent was a patient suffered from illness and could not make the planned trip in the period from 2 February 2019 to 9 February 2019.
2. The applicant objected to defer the trial. I then decided to continue the trial because the said telephone call and fax were not a formal application and their identities could not be confirmed too. The respondent should have known the trial date and prepared for the trial. He was present when the trial was fixed. In his 2nd application for review, he also stated that he was fine to attend the trial on 4 February 2019. While the respondent failed to make interim payments as ordered on 7 December 2018 and 11 January 2019, I then considered that it was not appropriate to postpone the trial, but the respondent’s grounds of opposition and witness statements should be reviewed and considered in the judgment.
3. The respondent had not presented his grounds of opposition clearly and orderly. Nevertheless, as revealed in the respondent’s documents including his witness statements, I summarize his opposition briefly as follows: -
   1. He had already paid full amount of monthly rent at $20,000 in both August and September 2018, which can be supported by his bank account records.
   2. The applicant had made misrepresentations on the extent of the suit premises.
   3. The applicant had hidden the problems of the suit premises and delivered the suit premises to him with faults.
   4. The applicant had refused to pay repair costs incurred by him, which were known and should be borne by the applicant.
   5. The applicant had refused to repair and breached the tenancy, and as a result parts of the suit premises were uninhabitable.
   6. The applicant had harassed / discriminated him.
   7. The applicant had not signed on the tenancy agreement in person and / or the applicant’s signature in the tenancy agreement was unclear.
   8. His loss and costs in this regard were greater than the rents as claimed by the applicant.

*(1) Shortfall of $200*

1. As shown in the respondent’s bank account records, the respondent had paid monthly rent of $20,000 on 8 August 2018 and 7 September 2018 respectively by bank transfer from Zurich to Hong Kong. However, as shown in the applicant’s bank account records, the applicant received $19,900 only in each month of August and September 2018.
2. While I trust the bank account records of both parties, I accept the applicant’s submission that the shortfall of $200 were likely the bank charges in overseas transfer. In any event, since the monthly rent was agreed at $20,000, I consider that the respondent should have a duty to pay $20,000 each month that could be received by the applicant in full amount, unless there were other agreements between the parties. There is no evidence that the parties had discussed about overseas transfer and bank charges when they entered into the tenancy, and I therefore agree that there was balance of arrears of rent from 1 August 2018 to 30 September 2018 in the sum of $200.

*(2) Misrepresentations*

1. The respondent contended that after he signed the tenancy agreement, he was then aware that the premises as advertised and were shown to him were not the suit premises as described in the tenancy agreement. He said that he was trapped and a wrong roof was leased with no BBQ set, table and chairs as originally promised by the applicant and seen by him during the inspection, but he also said that an agency commission in the sum of $10,000 had already been deducted because of this mistake.
2. The applicant agreed that there was such mistake committed by the agent but the respondent had then decided to settle the dispute with the agent and there was a settlement agreement among the applicant, the respondent and the agent. I accept that there was a settlement agreement in this regard. In any event, I do not accept that this dispute if any could support the respondent not to pay rent at all from 1 October 2018.

*(3) Hidden Problems*

1. The respondent contended that before the execution of the tenancy agreement an air-conditioner was damaged, a stove was not working, an exhaust hood was not installed properly and there were structural problems, which should have been fixed by the applicant before the handover, and hence a sub-total sum of $25,500 together with his time costs at hourly rate of $5,850 could be offset from the rent.
2. The applicant replied that all these defects as alleged by the respondent if any should have been satisfied by the respondent through prior inspection, and hence the respondent should not be allowed to make any claims and / or set-off retrospectively. I note that the tenancy agreement had not mentioned the air-conditioner, the stove, the exhaust hood and the particular condition of the suit premises. I consider that, unless the lease has special stipulations, the applicant being a landlord has no implied duty to guarantee the condition and use of the suit premises, and the respondent being a tenant should have examined the condition of the suit premises and satisfied the condition upon lease commencement.

*(4) Repair Costs*

1. The respondent argued that the applicant had directed the respondent to make repair to the suit premises and had also agreed to deduct the respondent’s costs from the rent. The applicant replied that the applicant had just agreed to repair the stove, but had not directed the respondent to make the repair nor agreed to any rent deduction, which could be revealed in the WhatsApp messages between the parties in the period.
2. Having consider the evidence filed by the parties, I accept the applicant’s submission that there was no agreement on deduction of the respondent’s repair costs from the rent. I consider that an agreement in this regard could not be implied too. The applicant had asked the respondent on 16 September 2018 for a date to repair the stove that could be acceptable to the respondent, but the respondent then replied on 21 September 2018 only and said that “it is fixed now”.

*(5) Duty of Repair*

1. The respondent submitted that the applicant should have the duty of repair but the applicant breached the repair covenant in the tenancy. The applicant said that before the arrears of rent payment in October 2018 the respondent had asked for repair of the stove only on 25 August 2018 and so far the applicant had agreed to repair the stove only. The applicant further said that the applicant did not know about the problem of the air-conditioner as alleged by the respondent until 12 October 2018 when the respondent had failed to pay rent on time and the applicant had then already commenced to chase up the outstanding rent. The applicant also submitted that the tenancy agreement has no repair clause.
2. While the tenancy agreement had not specified the repair duty, there is no evidence that except for the stove there was agreement on repair. In the circumstances, I agree with the applicant that the applicant had not breached the tenancy agreement. I accept that, as commented in *Hong Kong Tenancy Law* (6th edition) 149, “The express or implied covenant of quiet enjoyment given by the landlord is not a covenant to repair, nor can a duty for the landlord to carry out repairs be deduced under the implied statutory obligations upon a supplier of goods and services to use reasonable care and skill. This is because a lease is not a package of services and the only service that the landlord supplies is completed by the landlord putting the tenant into exclusive possession of the premises.”

*(6) Harassment / Discrimination*

1. The respondent had not explained clearly how his allegations of harassment and discrimination could support him not to pay rent from 1 October 2018, while he continues to occupy the suit premises. Even if the respondent may sue the applicant because of harassment and / or discrimination, I consider that harassment and discrimination if any are not sufficiently connected to the claim for rent and therefore are not an arguable defense in this application.

*(7) Tenancy Agreement*

1. The respondent complained that the applicant had not signed on the tenancy agreement in person and the representative of the applicant, son-in-law of the applicant, was acting for the applicant without Power of Attorney, but he had not explained clearly how could these support him not to pay rent from 1 October 2018.
2. It is undisputed that the respondent had obtained possession of the suit premises after the parties executed the tenancy agreement, the applicant is the landlord in the tenancy agreement and the rents from July to September 2018 were paid by the respondent to the bank account of the applicant. I consider that in these circumstances the respondent’s occupation of the suit premises could base on the tenancy between the parties only. If the respondent does not accept the applicant as the landlord and / or the validity of the tenancy agreement, he would have no position to occupy the suit premises at all.

*(8) Loss and Costs*

1. In the set-off as submitted by the respondent, he said that in addition to the reimbursements, and his loss and damages, he had spent over 28 hours in dealing with the problems caused by the applicant and his time costs should be calculated at $5,850. While the monthly rent of the suit premises is $20,000 only.
2. No doubt, I consider that the total amount of set-off as submitted by the respondent is disproportionate to the problems as alleged by him in his witness statements and many items thereof particularly the time costs should have been mitigated even if he is entitled to his said set-off. Further, some items thereof should actually be costs of these proceedings. In any event, since the respondent failed to establish all his defenses, which are discussed in the above paragraphs, I consider that no set-off should be allowed.

*Conclusion*

1. Accordingly, I decided that there were arrears of rent and the applicant succeeded in this application. Nevertheless, since no relief was granted by the court before in the same tenancy, I granted a relief to the respondent until 18 February 2019. If the respondent could pay into the tribunal on or before the relief expiration date all the arrears of rent / mesne profits, including all arrears of rent / mesne profits due on or before the date of payment, together with the costs as ordered, the respondent be relieved from the forfeiture and the lease of the suit premises be reinstated.

*Costs*

1. The applicant asked for costs in the sum of $16,271, including time costs and the fees paid by the applicant to a property agency which filed the application for the applicant. I consider that the property agency which is not a legal representative should not be entitled to any legal costs. Above all, having considered the nature of this case and the time for hearing and trial, I summarily assessed the applicant’s costs at $4,500 only.

(Alex NG)

Member

Lands Tribunal

The applicant was represented by Mr Luu Kien Nghia

The respondent was not represented and did not appear