

Court of Queen's Bench of Alberta

Citation: Rachar v. Litvak, 2009 ABQB 441

Date: 20090730
Docket: 0710 00330
Registry: Red Deer

Between:

Harlan Rachar and Foothills Livestock Co-Op

Applicants

- and -

Donald Litvak

Respondent

**Reasons for Judgment
of
J.T. Prowse, Master in Chambers**

Introduction

[1] Harlan Rachar owned cattle over which Foothills Livestock Co-op held security. Rachar placed these cattle on land provided by Donald Litvak. During summer the cattle grazed on that land and during winter they were also fed with Litvak's feed. Litvak went unpaid and, while he was out of the country on vacation, Rachar removed the cattle from the land. The issue is whether Litvak has a valid lien on the cattle for his unpaid bills.

[2] Litvak claims a lien under the *Livery Stable Keepers Act* ("LSKA") for the period up to November 1, 2005, and another lien under the successor legislation, the *Animal Keepers Act* ("AKA") for the period after that date.

Issues

[3] The issues are:

- is Litvak restricted to claiming a lien only under the LSKA?
- what is the consequence of Litvak failing to post a notice under the LSKA?
- does Litvak's lien fail because he did not own the land he made available?
- was Litvak an "animal keeper" even though he provided only some services to the cattle?
- was Litvak's lien cancelled because Rachar removed the cattle to prevent them from starving?

Is Litvak restricted to claiming a lien only under the LSKA?

[4] Litvak's involvement with the cattle in question began in 2004 and lasted until 2007. The LSKA was in force until November 1, 2005 when it was replaced with the AKA. Foothills argued that Litvak's rights, if any, must be under the LSKA alone, due to the transitional provision in section 13(2) of the AKA, which states "A lien that is created under the former Act continues as if the former Act were not repealed, and the former Act continues to apply in respect of those liens".

[5] In my view this transitional provision simply means that Litvak's involvement with the cattle prior to November 1, 2005 might give him a lien under the LSKA, and his involvement after November 1, 2005 might give him a lien under the AKA. If Litvak were totally successful he could hold concurrent liens under both Acts.

What is the consequence of Litvak failing to post a notice under the LSKA?

[6] Litvak did not post a notice pursuant to Section 7 of the LSKA until March 14, 2006, more than four months after the LSKA was replaced by the AKA. Section 7 of the LSKA states:

Every livery stable keeper, boarding stable keeper or sales stable keeper shall hang or post a copy of this Act in a conspicuous place in every stable owned or operated by the keeper and in case of non-compliance with this section the keeper is not entitled to the benefit of this Act

[7] While the LSKA does not say so expressly, in my view it is not sufficient for a keeper under the LSKA to post a notice after he has stabled, boarded or cared for animals. The notice must be posted while he stables, boards or cares for the animals. Accordingly I rule that Litvak has no lien under the LSKA.

Does Litvak's lien under the AKA fail because he did not own the land which he made available?

[8] Foothills argues that Litvak does not have a lien because the lien is a possessory lien, and the land which Litvak made available for Rachar's cattle is in fact owned by a corporation, 1060495 Alberta Ltd. ("106"), and not by Litvak. I am not persuaded by this argument. Litvak had an ownership and management relationship with 106 under which 106 allowed Litvak to make the land available for the purpose of hosting Rachar's cattle. As between Rachar and Litvak, Litvak made the lands available, and the technical ownership of the land is not alleged to have interfered with Rachar's cattle using the land pursuant to the arrangement between Rachar and Litvak.

Was Litvak an "animal keeper" even though he provided only some services to the cattle?

[9] Foothills argues that Litvak was not an "animal keeper" entitled to a lien under the AKA because Litvak did not supply the cattle in question with all of the services which are typically supplied by a "keeper" of cattle. In a more common scenario the keeper would bring the cattle onto his land, and also feed and care for them.

[10] Litvak's involvement with the animals was under a unique arrangement with Rachar.

[11] During the winter Rachar's cattle were placed on 106's land, where Litvak had food stored for the cattle. Rachar would attend on that land regularly, using Litvak's food, water and equipment to feed and water the cattle. If the cattle needed medical attention it would be Rachar's responsibility to provide it.

[12] During the summer the cattle were put out to pasture, mostly on land provided by 106 and the rest on land provided by Rachar. If the cattle needed medical attention it would again be Rachar's responsibility to provide it.

The definition of an "animal keeper" under the AKA

[13] An 'animal keeper' under the AKA 'means a person who receives payment for boarding, feeding or caring for an animal that is owned by another person'.

[14] Counsel for Litvak relies on the use of the word "or" in the above definition. It is only necessary, he submits, for the lien claimant to either board, or feed, or care for an animal. I do not agree with that submission.

[15] Counsel for Foothills says that the spirit and intent of the Act is that one must be a "keeper" of an animal to have a lien, and in the unique factual circumstances of this case, it was Rachar, not Litvak, who was caring for (and hence "keeping") the cattle in question. To interpret the AKA otherwise, says Foothills, would allow someone who delivered hay to a someone else's land to be considered an "animal keeper" even though his role was limited to supplying feed.

Custody and possession of animals under the AKA

[16] In my view, it is not necessary for an “animal keeper” to provide all the services traditionally supplied to animals (in this case cattle) in order to qualify for a lien under the AKA. It is necessary, however, for the lien claimant (in this case Litvak) to have been in custody and possession of the cattle. So, if the cattle were in the custody and possession of Litvak, he is entitled to a lien even if he only boarded and supplied feed for the cattle, but left the care of the cattle up to Rachar.

[17] Custody and possession is a necessary aspect of a lien claimant’s case because the AKA, in essence, provides for a statutorily authorized possessory lien. This flows from section 2(2) of the AKA which states (emphasis added):

In addition to all other remedies provided by law, an animal keeper may detain in the animal keeper’s custody and possession the animal and any gear in relation to the animal and may sell the animal or gear by public auction or in any other commercially reasonable manner

So if a lien claimant, such as Litvak, never had “custody and possession” of the cattle in question, he can hardly “detain” and sell the cattle to enforce his lien.

The evidence on Litvak’s custody and possession of the cattle

[18] There was a dearth of direct evidence concerning Litvak’s custody and possession of the cattle when this application was first argued. Consequently I adjourned the hearing to allow the parties to file further affidavits.

[19] Litvak’s further affidavit asserts that Rachar could not remove the cattle without Litvak’s permission, and that the cattle were removed without his permission when Litvak was holidaying in Cuba. Rachar’s further affidavit does not deny this. As a result I conclude that Litvak was an ‘animal keeper’ who had custody and possession of the cattle within the scope of the AKA. The limited scope of services provided by Litvak does not invalidate his claim for a lien under the AKA.

Was Litvak’s lien cancelled because Rachar removed the cattle to prevent them from starving?

[20] Rachar’s further affidavit raised this issue. Rachar says that Litvak refused to continue to feed the cattle, and that, on a public policy basis, Rachar was justified in taking possession of the cattle to prevent them from starving. The result, says Rachar, is a lawful end to Litvak’s possession, and therefore a lawful end to Litvak’s lien under the AKA.

[21] I agree that there is a public policy which should cause the court to interpret the AKA in a way consistent with the welfare of animals. However, if it was just the welfare of animals which was at stake (and Rachar’s affidavit did not make it clear that matters had advanced to the point where the cattle were in fact in jeopardy):

- Rachar and Foothills could have as easily brought feed to the cattle as removing the cattle to feed them
- Rachar and Foothills could have offered Litvak a priority lien for feed provided from that time onwards
- the court could allow Rachar and Foothills to remove the cattle on an emergency basis without prejudice to Litvak's lien.

In other words, it is not necessary to cancel Litvak's lien in order to facilitate the humane treatment of the animals in question. In my view, the unauthorized removal of the cattle by Rachar and/or Foothills did not cancel Litvak's lien.

Conclusion

[22] For the reasons given above, I conclude that Litvak has no lien under the LSKA but does have a lien under the AKA for food and boarding provided on and after November 1, 2005. Counsel may speak to costs.

Heard on the 16th day of June, 2009.

Dated at the City of Red Deer, Alberta this 30th day of July, 2009.

J.T. Prowse
M.C.C.Q.B.A.

Appearances:

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James A. Hunter
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