

# Court of Queen's Bench of Alberta

**Citation: Botar v. Mainstreet Equity Corp., 2010 ABQB 710**

**Date:** 20101116

**Docket:** 0903 18860, 0903 19276

**Registry:** Edmonton

Between:

**Andrew S. Botar**

Applicant

- and -

**Mainstreet Equity Corp.**

Respondent

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**Reasons for Judgment  
of the  
Honourable Mr. Justice J.J. Gill**

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## **Introduction**

[1] These actions concern a residential tenancy. Since 1995 the Applicant has been a tenant in an apartment building in Edmonton owned by the Respondent. He seeks a declaration that his tenancy consists of his apartment, ten storage lockers in a basement storage room and a parking stall, an order requiring the Respondent to consent to a sublease of his tenancy and a judgment for damages to compensate him for lost sub-rental income since January 2001.

[2] The Respondent denies the claims. It also submits that the claims are barred under the *Limitations Act*, R.S.A. 2000, c. L-12.

## Issues

- 1. Is the Applicant entitled to a declaration that his tenancy consists of his apartment, ten storage lockers in a basement storage room and a parking stall, an order requiring the Respondent to consent to a sublease of his tenancy and a judgment for damages to compensate him for lost sub-rental income since January 2001?**
- 2. Has the Respondent breached the Applicant's residential tenancy agreement?**

## Evidence of the Applicant

[3] The Applicant became a tenant in the apartment building in April 1995. The landlord at the time was Nordell Holdings.

[4] The Applicant initially lived in a bachelor suite and had use of one storage locker in the basement storage room.

[5] In December 1999 a one bedroom suite became available and the Applicant was approved to move into it. The building manager at the time was Ms. Maija Korhonen.

[6] On December 2, 1999 the Applicant spoke with Mr. Ron Hinz , a manager with Nordell Holdings. The Applicant alleges that Mr. Hinz told him that they needed to get work done on the two apartments (the suite that the Applicant was vacating and the one he was moving into) and if the Applicant assisted in doing this work the Applicant would be paid for any materials he supplied and would be compensated for his labour by getting the exclusive right to use of all ten lockers in the basement storage room. The Applicant would be permitted to do whatever he liked with these lockers including renting them to other tenants. During the month of December 1999 the Applicant completed the requisite work in the two apartments.

[7] On January 6, 2000 the Applicant and his friend Mr. Wilson signed a lease for the one bedroom suite to take effect January 1, 2000. Clause 5 states "this lease is made subject to the following conditions". The lease made no reference to the Applicant having any rights to the storage lockers.

[8] The Applicant also signed a document entitled Accommodation Inspection Report (Exhibit 2). That document was allegedly signed on December 18, 1999 by the Applicant, Mr. Wilson and Ms. Korhonen. Exhibit 2 describes the physical condition of the one bedroom suite that the Applicant is renting effective January 1, 2000. That document contains various handwritten notations including:

"8 storage lockers and access thereto"

“existing 6 storage lockers (from #12) transferred to new suite (#1) and 2 additional storage lockers assigned at no charge (Ron and Maija)”.

[9] The balance of Exhibit 2 is dedicated to a description of the physical condition of the entrance, kitchen, living/dining room, bedroom and bathroom and equipment in the apartment.

[10] The Applicant points to Exhibit 2 as additional evidence of the verbal agreement giving him exclusive and unfettered rights to the 10 storage lockers. The Applicant testified that his rights to the lockers were also verbally approved by Ms. Korhonen.

[11] The Applicant referred to a letter allegedly sent from Nordell Holdings dated January 18, 2000 (Exhibit 4). This letter purports to confirm the verbal agreement relating to the storage lockers. The Applicant does not know who signed or prepared the letter. No one from Nordell Holdings testified. The Respondent objected to the admission of this letter as hearsay.

[12] Exhibit 4 has an interesting history. The Applicant did not realize he had a copy of it until he discovered it on November 1, 2008 after three days of searching old files. He apparently had forgotten about it, but when he was cross-examined in 2008 he remembered the letter and started searching for it. I have concerns about the authenticity of Exhibit 4.

[13] Exhibit 4 is clearly hearsay: an out of Court statement being offered for its truth. It does not fit into one of the recognized hearsay exceptions (eg: business records) nor is it admissible applying the “necessity and reliability” analysis. The letter is therefore inadmissible.

[14] The Applicant referred to a letter dated January 13, 2000 written by him and Mr. Wilson to Mr. Ron Hinz at Nordell Holdings (Exhibit 5). In that letter there is a detailed description of the work that was done to the two apartments and the costs that were incurred by the Applicant. Attached to this letter are copies of drawings, photographs and invoices. The letter confirms that the costs of the materials are to be deducted from the January 2000 rental payment. There is no reference in Exhibit 5 to the storage lockers or to the Applicant receiving any compensation for his work on the two apartments.

[15] The Applicant testified that each of the storage lockers could be rented for \$40 to \$60 a month. Starting in 2000 he had been receiving about \$20 a month for three lockers rented to his friend Mr. Mattias, Ms. Korhonen and another tenant. All payments were in cash and no receipts or documentation concerning these rentals was produced at trial.

[16] The apartment building was sold to the Respondent effective December 1, 2000. On December 4, 2000 the Applicant met with Mr. Reeve, an area manager for the Respondent. Mr. Reeve was given the original copy of Exhibit 4. Mr. Reeve informed the Applicant that the Respondent had a policy of not allocating storage lockers to tenants and the Respondent would not permit him to sublease the lockers. Mr. Reeve asked the Applicant to put any issues he had in writing.

[17] Following that meeting the Applicant wrote a six page letter to Mr. Reeve dated December 8, 2000 (Exhibit 8). The letter dealt with 32 items. Item number 11 is entitled “access to/allocation of storage lockers in building storage room”. It states as follows:

The apartment building was built in 1967, and there is no on-suite storage space within the apartment suites, as required by the current building code. The storage space problem is especially acute in the smaller type (bachelor and one-bedroom) apartment suites. **Instead, there is a building storage room with a locked door, in which there are ten storage lockers. One of these is mine (it was assigned to my apartment suite, and it is included in the rent).** Four other ones are/were assigned to other tenants. Each of these tenants - including myself - has a lock on their respective storage locker. The other five storage lockers have junk (carpet/linoleum remnants, former tenants’ stuff, etc.) in them, with the exception of the building step ladder and vacuum cleaner. These two items could easily be stored elsewhere in the apartment building. In this way, the building storage room could be kept unlocked (a non-locking passage-set could be installed on the storage room door, similar to the one on the laundry room door). Then the tenants – like myself – who have storage lockers in the building storage room – could have direct/unfettered access to their storage lockers. Currently, the tenants have to find and get a hold of the resident building caretaker (Maija Korhonen) in order to have her unlock the building storage room. This bother/inconvenience/trouble would no longer be necessary. Also, the junk from the other five storage lockers could be transferred/disposed of, thereby freeing up these storage lockers for other tenants. Priority could be given to the tenants of the four bachelor suites and twelve one-bedroom suites located within the building. Could you please have your company give this proposal serious consideration and possibly implement it.(emphasis added)

[18] When the Applicant was asked on cross-examination why he did not mention the alleged agreement giving him exclusive control over the 10 lockers, he responded that the wording in the letter of December 8, 2000 was poor.

[19] The Applicant also referred to a handwritten letter sent to Mr. Reeve dated January 1, 2001. The letter states as follows:

As I explained to you at our December 4, 2000 meeting, it would be nice to be able to allocate the other lockers to other tenants (sublet my lockers to them), because I could sure use the extra money. You know I am a person on AISH, Mark and I and Adrian would be able to clean out the junk from the other lockers and put the Mainstreet stuff in the janitor room. I explained all this in number 11 of my December 8, 2000 letter to you but I did not get an answer yet. Could you please allow me to rent out the other lockers to other tenants (sublet them)?

[20] The Applicant received no response to this letter.

[21] The Applicant made reference to a lease that was signed between the Respondent and Mr. Mark Martell (a friend of the Applicant) and Adrian McClung on December 1, 2000. This lease relating to another apartment contains no reference to storage lockers however an Accommodation Inspection Report has a notation referring to “two storage lockers subleased from Mr. Botar at \$40 per month”.

[22] The Applicant recalled two meetings with Mr. Reeve that took place on April 18 and 30, 2001 at the apartment building. At both meetings Mr. Reeve informed the Applicant that the Respondent does not lease storage lockers to tenants but that they would make an exception for the Applicant. But the Applicant could not sublease the lockers.

[23] The Applicant also signed another residential tenancy agreement dated May 12, 2000 in relation to his apartment. There is no reference to the storage lockers in this document.

[24] The Applicant is also making a claim arising from being prevented from renting out his parking space. The Applicant testified that in 2002 the building manager Mr. Sorin Daraban asked the Applicant to prepare a map of the parking spaces in the parking lot. The Applicant prepared the map and sent it with a letter to Mr. Daraban on October 2, 2002 confirming that the Applicant had the right to lease his parking stall and those of other tenants to third parties (Exhibit 11). The letter stated:

Concerning the renting out of parking stalls as per what your father has told us it is a matter between the tenants or tenants and others and no concern to the landlord (Mainstreet Equity Corporation).

[25] Based on this verbal approval from Mr. Daraban the Applicant leased his parking stall and that of other tenants (with their authorization) to various third parties. This lasted for several years until approximately September 2007 when he was told by a representative of the Respondent that he could no longer sublet or assign parking stalls.

[26] The Applicant is also claiming compensation arising from being prevented from subletting his apartment. The Applicant described how in 2006 he wanted to permit his friend Mr. Wilson to move back into the apartment as a sub-tenant. The Respondent refused.

[27] The next event of significance for the Applicant occurred in 2007 when there was a flood in the storage room. The Applicant testified that he helped to clean up the storage area and obtained possession of the last two of his ten storage lockers.

[28] In 2008 the lock on the storage room was changed on two occasions and as a result because the Respondent neglected or was slow to provide the Applicant with a key, the Applicant paid for a locksmith to give him access to the storage room.

[29] The Applicant claims compensation as a result of the Respondent preventing him from subleasing the storage lockers, his apartment and the parking space. The bulk of his claim relates to the failure to being unable to sublease the storage lockers for an extended period beginning in December 2000 when the Respondent took over the building. His research based on rates charged by commercial storage centres suggests that each locker could be rented on average of approximately \$50-60 per month. He is seeking financial damages relating to the storage lockers of approximately \$64,000.

[30] The Applicant claims losses of income from his inability to rent his apartment suite of \$9,000 and his parking stall of \$1,950. There is a claim for \$239.99 for the costs of having a locksmith change the locks on the storage room to give him access. His total financial claim is in the approximate amount of \$75,000.

[31] On cross-examination the Applicant acknowledged that he has a number of medical issues which have caused loss of concentration and memory issues. As a result he has been on AISH since 1995.

[32] He confirmed that he has no written sublease agreements for the storage lockers nor any receipts or proof of payment for rental of the lockers.

[33] Mr. Hinz and Ms. Korhonen did not testify.

[34] The Applicant called Mr. John Parsons who was the building manager in 2006 and 2007. He testified that he went to the Respondent's head office in December 2006 and January 2007 on behalf of the Applicant to talk about the lockers. He was told it was none of his business but that it was recognized that the Applicant had the lockers but was not entitled to sublease them.

[35] The Applicant called a friend John Hill who has been a daily companion of the Applicant since 2007 as a medical assistant and transport assistant.

[36] Mr. Hill recalls the Respondent showing him a copy of the letter from Nordell Holdings (Exhibit 4) confirming the Applicant's rights to the storage lockers. He also recalled a meeting which took place on April 18, 2001 during which Mr. Reeve confirmed the Applicant's right to exclusive possession of the lockers but told the Applicant it was not possible to sublet the lockers. A similar conversation was overheard by Mr. Hill on April 30, 2001. He recalled also having to clean up all the lockers with the Applicant in March 2008 and in 2008 they were locked out from the storage room and had to get a locksmith to obtain entry.

[37] On cross-examination he acknowledged that he gets confused and that his memory is spotty.

[38] Mr. Martell is a former tenant of the apartment building and a friend of the Applicant. He initially moved in with the Applicant in November 1999. He recalled frequent discussions in

November and December 1999 between the Applicant and the building manager Ms. Korhonen concerning the use of a number of lockers.

[39] He recalled renting a storage locker from the Applicant. Ms. Korhonen and another tenant, Mr. Lewis also rented lockers from the Applicant. Mr. Martell was not present when the lease was signed between the Applicant and Nordell Holdings in January 2000. He was present when Ms. Korhonen came with the Accommodation Inspection Report and told the Applicant that all ten lockers would be for his use as compensation for his labour in relation to work he had done on the apartments. He recalls Ms. Korhonen making a notation to that effect on the Accommodation Inspection Report (Exhibit 2).

[40] Mr. Martell testified that Mr. Allan Harvey was the building manager who replaced Ms. Korhonen and he verbally consented to the Applicant subleasing his apartment.

[41] Mr. Martell recalls a lengthy meeting on December 4, 2000 with Mr. Reeve at the Respondent's offices shortly after the Respondent took over the building. He recalls a specific discussion concerning the storage room and lockers and Mr. Reeve confirming that the Applicant would have exclusive access to the lockers. Mr. Reeve advised that it was the Respondent's policy not to allow subletting or assignment of the lockers.

[42] Mr. Martell paid cash or did services for the Applicant for the storage locker that he leased from the Applicant. He also recalls on March 17, 2003 a meeting at the Respondent's office where it was made clear to the Applicant that there was to be no subletting of the storage lockers.

[43] Mr. Martell remembered the Applicant receiving verbal consent from the building manager to sublease his parking space and those of other tenants.

[44] On cross-examination the Applicant acknowledged his testimony at an examination on affidavit on January 27, 2010 where he testified that he was not present at the meeting in December 1999 with Ms. Korhonen and that the conversation with Mr. Reeve on December 4, 2000 was short.

### **Evidence of the Respondent**

[45] Mr. Reeve was a regional manager of the Respondent from August 2000 to 2004 and from 2007 to December 2009. The apartment building in question was under his supervision.

[46] The Respondent took possession of the building in December 2000. Mr. Reeve does not recall a meeting on December 4, 2000 with the Applicant or Mr. Martell.

[47] Mr. Reeve testified that he would never have told the Applicant that he could have access to all storage lockers. It was a policy of the Respondent not to let tenants have control of common areas. In any event any such request and response would have to be in writing.

[48] The Respondent's process for subletting requires a tenant to make a written application. This is followed by credit, background and employment checks. If the applicant qualified after this review process the sublease was allowed. Permission given for subleases was always in writing.

[49] Mr. Reeve does not remember Ms. Korhonen being an employee with the Respondent. Mr. Harvey who was the building manager when the Respondent took over the Building.

[50] The first time he saw the January 2001 letter from Mr. Botar (Exhibit 9) was a few days before the trial. He does not recall any meetings in 2000 concerning Mr. Wilson. There was no request to sublease received from the Applicant in 2000. The Applicant was never told that he had exclusive rights of access to the storage lockers. Tenants could not sublease their parking stalls.

[51] On cross-examination Mr. Reeve acknowledged his testimony at an examination on affidavit he testified he vaguely recalled a meeting on December 4, 2000 with the Applicant.

[52] Mr. Murray was operations manager for the Respondent in 2000 to 2003, VP from 2003 to 2010, and VP Executive in 2010.

[53] The Respondent bought the apartment building December 1, 2000. He saw Exhibit 4 for the first time in 2008 or 2009 when this litigation started.

[54] Mr. Reeve reported to him. All requests for subleases of apartments had to go to head office. A building manager could not give permission to sublease. It was the Regional Manager's responsibility. The process to sublease required an application form for a co-tenant to be completed. A credit and background check was then carried out on the proposed co-tenant. If approved a new lease naming the co-tenant would be prepared. The purpose of the process was to address possible liability issues.

[55] A building manager did not have the right to authorize subleases. All requests and all approvals had to be in writing. Permission was never given verbally. A tenant was not allowed to sublease parking stalls, the tenant was not allowed to sublease.

[56] Mr. Lam is the chief financial officer and chief operating officer of the Respondent. The Respondent has a number of policies in regard to residential tenancies. There is a policy prohibiting subletting and assignment. If someone wants to sublet then a co-tenant application is required and before approval can be granted background checks are completed. The Respondent wants to have control over the selection of tenants so that existing tenants are not negatively affected. Anybody using the apartment must have a direct contractual relationship with the

Respondent because if damages occur the Respondent wants a direct contractual liability with the occupants. No verbal approvals are allowed.

[57] The Respondent does not allow tenants access to storage lockers or control over common areas.

[58] Ms. Korhonen was not an employee of the Respondent.

## Analysis

### 1. **Is the Applicant entitled to a declaration that his tenancy consists of his apartment, ten storage lockers in a basement storage room and a parking stall, an order requiring the Respondent to consent to a sublease of his tenancy and a judgment for damages to compensate him for lost sub-rental income since January 2001?**

[59] The Applicant has failed to prove that there was an agreement with the Respondent that gave him exclusive right to the 10 storage lockers. Quite simply, the Applicant's version of events is not credible and I do not believe it for the following reasons.

[60] Firstly the Applicant alleges there was a verbal agreement with the former owner of the building (Nordell Holdings) which was somehow assumed or confirmed by the Respondent when it bought the building in December 2000. However the letters written by the Applicant at the relevant times in 2000 do not support the alleged verbal agreement but in fact strongly point to there being no such agreement.

[61] I refer to the letter dated January 13, 2000 written by the Applicant to Mr. Ron Hinz at Nordell Holdings (Exhibit 5) which contains a detailed description of the work that he and his friends did in the two apartments "As per our gentlemen's agreement" and the costs that were incurred. This letter confirms that the costs of the materials are to be deducted from the January 2000 rental payment. There is no reference in this letter to the Applicant receiving any compensation for his work on the two apartments and no reference to storage lockers.

[62] Then there is the letter dated December 8, 2000 four days after the Applicant met with Mr. Reeve, at which meeting the arrangement concerning the storage lockers was supposedly confirmed. This long, detailed letter to the Respondent addressed many issues concerning the tenancy. Item number 11 is entitled "access to/allocation of storage lockers in building storage room.". The Applicant wrote:

The apartment building was built in 1967, and there is no on-suite storage space within the apartment suites, as required by the current building code. The storage space problem is especially acute in the smaller type (bachelor and one-bedroom) apartment suites. **Instead, there is a building storage room with a locked door,**

**in which there are ten storage lockers. One of these is mine (it was assigned to my apartment suite, and it is included in the rent). Four other ones are/were assigned to other tenants.** Each of these tenants - including myself - has a lock on their respective storage locker. The other five storage lockers have junk (carpet/linoleum remnants, former tenants' stuff, etc.) in them, with the exception of the building step ladder and vacuum cleaner. These two items could easily be stored elsewhere in the apartment building. In this way, the building storage room could be kept unlocked (a non-locking passage-set could be installed on the storage room door, similar to the one on the laundry room door). Then the tenants – like myself – who have storage lockers in the building storage room – could have direct/unfettered access to their storage lockers. Currently, the tenants have to find and get a hold of the resident building caretaker (Maija Korhonen) in order to have her unlock the building storage room. This bother/inconvenience/trouble would no longer be necessary. Also, the junk from the other five storage lockers could be transferred/disposed of, thereby freeing up these storage lockers for other tenants. Priority could be given to the tenants of the four bachelor suites and twelve one-bedroom suites located within the building. Could you please have your company give this proposal serious consideration and possibly implement it. (emphasis added).

[63] These two (2) letters written contemporaneously to the events are compelling evidence that the Applicant believed that (at most) he had use of one locker. In the face of these letters the Applicant's evidence of the alleged verbal agreement has no credibility.

[64] Secondly the Applicant signed two (2) leases during the relevant period (one dated January 1, 2000, and the other May 12, 2000). Neither of these leases contain any terms relating to the lockers. No credible explanation was provided for these omissions.

[65] The Applicant refers to the Accommodation Inspection Report (Exhibit 2). The *Residential Tenancies Act* R.S.A. 2004 c. R-17.1 describes an inspection report as a document a landlord shall provide “describing the conditions of the premises”. An inspection report is not a contract. Nor is this inspection report referred to in the lease which was signed on or about the same day.

[66] Thirdly even if there was a verbal agreement with the previous landlord, Nordell Holdings (something which I find not proven on the evidence) the Respondent was not a party to that agreement. It received no consideration. It did not acknowledge, accept or take over any such agreement.

[67] Fourthly the Respondent purchased the building without notice of the alleged agreement. The Applicant's evidence is that the first time information or notice of the alleged verbal agreement concerning the lockers was given to the Respondent was on December 4, 2000. The

Respondent bought the building effective December 1, 2000. The Applicant has failed to establish that the Respondent had notice of this agreement.

[68] Fifthly the claim should be dismissed as the Applicant has failed to prove that he suffered any damages. The Applicant provided no credible evidence that there was a market for these lockers, or that they could have been rented for \$50 to \$60 per month.

[69] The Applicant's claims in relation to the storage lockers is dismissed. The Applicant is not entitled to the exclusive use of any of the 10 lockers.

[70] In regards to the parking stall(s), the Applicant was provided with a parking stall as part of his lease. I find that the Applicant did not have the right under his lease to sublet his parking stall or those of other tenants nor did the building manager have authority to allow a sublease of the stall. When it came to the Respondent's attention that the Applicant was renting his parking stall it immediately advised the Applicant to stop.

[71] The claim for any losses relating to a sublease of parking stall(s) is dismissed.

## **2. Has the Respondent breached the Applicant's residential tenancy agreement?**

[72] The Applicant has alleged breaches in relation to his right to sublease his apartment. Under section 22(1) of the *Residential Tenancies Act*, a tenant cannot sublease "without the written consent of the landlord". Under section 22(2) a Landlord shall not refuse consent "unless there are reasonable grounds for the refusal".

[73] The Respondent has a policy (the "policy") relating to subletting or assignment. Any requests to sublet are treated as an application to become a co-tenant requiring a written application and an assessment. The rationale for this policy is that the Respondent wants to know who is living in the building in order to avoid problems for existing tenants and also to have a direct contractual relationship with all tenants to minimize liability issues. This is a reasonable policy .

[74] The Applicant did not provide any credible evidence of requests for subleases that had been denied. The Applicant did not use the co-tenant application process. The Applicant's claim for any losses relating to subleasing his apartment is therefore dismissed.

[75] The Applicant claims for reimbursement of the cost of a locksmith to gain access to the storage room. The Applicant did not have any rights in relation to the storage lockers and therefore did not require a key to the storage room. In any event, if the Applicant did have some right to enter the storage room his access was not interfered with in any actionable way. I accept the evidence of the Respondent that once the building manager was advised of the problem he took steps to remedy it as quickly as possible. The claim for reimbursement of the cost of a locksmith to gain access to the storage room is dismissed.

**The Limitations Act**

[76] The Respondent submits that the Applicant's claim is statute barred. In view of my findings on the merits of the claims I will not address this issue.

**Summary**

[77] The Applicant's claims are dismissed with costs. The parties may make written submissions in relation to the issue of the amount of costs that should be awarded. Any submissions shall not exceed four (4) pages and shall be filed within fifteen (15) days of the date of this decision.

Heard on the 25<sup>th</sup> to the 28<sup>th</sup> day of October, 2010.

**Dated** at the City of Edmonton, Alberta this 16<sup>th</sup> day of November, 2010.

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**J.J. Gill**  
**J.C.Q.B.A.**

**Appearances:**

Andrew S. Botar, Applicant  
Appeared on His Own Behalf

Christopher D.C. Ruttkay  
Warrent Tettensor Amantea LLP  
for the Respondent