Court of Appeal

(Inferior Jurisdiction)

Appeal no: 9/2017/1

Nowasad Orest John William

Vs

Raymond Degabriele

14th May, 2018.

1. By application filed on the 27th January, 2017 plaintiff sued defendant in the Rent Regulation Board for his eviction from the premises 59, Stitches, Triq Srejdak, Cospicua and for payment of rent arrears. The plaintiff referred to the lease contract dated 30th August 1988 wherein it is stipulated that the premises shall be used exclusively as a shop for the sale of clothes. This notwithstanding the defendant converted the shop into a hairdressing salon.

2. In the judgment dated 9th November, 2017 the Rent Regulation Board upheld plaintiff's request. The Board concluded that the landlord had not consented to the change of use, neither expressly or tacitly. Therefore the Board ordered defendant's eviction within forty days from the date of the judgment. Furthermore the defendant was ordered to pay the sum of €4,077.67 as arrears of rent.

3. By application filed on the 23rd November, 2017 the defendant filed an appeal wherein he complains that:

    i. Did not interpret the facts correctly with regards to the issues of change of use and payment of rent.
    ii. The Board failed to consider the defendant's submission that the landlord cannot at the same time, complain about the change of use and ask for the payment of rent.
    iii. The allegation that the defendant was in default of payment of rent, could not have constituted a breach of the lease agreement, upon which the owner could, on the basis of article 9(a)(i) of Chapter 69, recover the possession of the premises. Moreover the rent liquidated by the Rent Regulation Board is incorrect.

4. The plaintiff filed a reply wherein he gave reasons why the appellant's appeal should be rejected.

5. There is no dispute that:

i. On the 2nd October 2012 plaintiff bought the premises together with Matthew Selwyn Gubb. The latter passed away and his share was inherited by plaintiff.

ii. The defendant originally rented the premises by means of a private writing dated 30th August, 1988 to be used as a "boutique tal-hwejjeg" (paragraph [a]).

iii. Paragraph [f] of the contract stipulates, *"Illi l-inkwilin* ***m'ghandu l-ebda dritt li jbiddel id-destinazzjoni ta' dan il-fond*** *minn dak stipulat bhala boutique tal-hwejjeg"*.

iv. Paragraph (i) states, *"Illi wara l-inkwilin jispicca mill-uzu ta' dan il-'boutique tal-hwejjeg', huwa ghandu jirritorna c-cwievet lis-sidien"*.

v. Paragraph (g) states, *"Illi l-inkwilin jobbliga ruhu li josserva dawn il-kundizzjonijiet kollha hawn fuq stipulati, u* ***fl-eventwalita' li jonqos li josserva kondizzjoni anke wahda mill-istess ftehim****, u/jew jonqos li jhallas il-kera ghal-zewg skadenzi,* ***il-proprjetarji jkollhom id-dritt li jitterminaw din il-lokazzjoni immedjatament u awtomatikament, bla ebda kumpens****"*.

vi. The defendant changed the use of the premises from a shop to a hairdressing salon.

vii. By means of a letter dated 29th September 2016, defendant requested the plaintiff to sign an application, *"… to change the license use of the shop from a Boutique to Hairdressing Salon, a copy of which is being enclosed for you to sign…."*

viii. By means of a letter dated 7th November, 2016 the owner refused to sign since he claimed that the premises should only be used as a clothes boutique. The plaintiff demanded that the tenant *"…. Discontinue any ongoing works in the premises with immediate effect, to evict the shop and to return the keys to the undersigned advocate, who he is duly authorising for this purpose, within five (5) days from date of receipt of this letter"*.

ix. On the 27th January, 2017 the plaintiff filed the lawsuit for the eviction of defendant and payment of rent.

6. In his reply, the lessee claimed that architect Karl Ebejer knew that the premises were going to be used as a hair salon. He claimed that the architect was acting on behalf of the plaintiff with regards to application for the issue of a development permit (no. 01713/14), and knew of the changes that were being done in the premises, including the change of use from clothes shop to a hairdressing salon. Therefore, the landlord tacitly gave his consent for the change of use.

7. In the judgment **Carmelo Azzopardi vs Francesco Zammit** 5th October, 1954 (XXXVIII.iii.683), the Commercial Court stated:

"Il-kunsens hu l-akkordju fuq l-istess punt. Jista' jkun anki tacitu jew implicitu; qatt izda prezunt. ***Huwa mehtieg illi l-ezistenza tieghu tkun certa; u fid-dubju ghandu jigi eskluz****"*.

8. The Board disagreed with lessee's defence on the merits, and referred to the testimony of Karl Ebejer;

   "Secondly, Architect Ebejer categorically denied that defendant informed him of the intended change of use. He just went once inside the shop and when he went in it was still a clothes shop. It has not been proven in any manner that Architect Ebejer, in any case, had been given the mandate by the owner to authorise the defendant to change the use of the leased shop".

9. After reading the court file, the court fully agrees with the Board's conclusion. The burden of proof was on the defendant, and there is certainly no evidence that corroborates his version as explained in paragraphs 5 and 6 of the statement of defence (fol. 51). In his affidavit the defendant said that during March 2016 Ebejer had told him that he will inform the owners, *"…. of what I will be doing including also the change of use of the shop from a boutique to a salon"*. That fact, if true, does not mean that the landlord consented to the change of use. Furthermore, the letters dated 29th September, 2016 and 7th November, 2016 are evidence that the landlord did not give his consent to the change of use. Had the landlord given his consent for the tenant to start using the premises as a hairdressing salon, as claimed by the defendant, the probability is that the landlord would not have refused to sign the relevant application. Furthermore, after reviewing Ebejer's testimony the court cannot conclude that the witness was informed of the lessee's intention to start using the premises as a hairdressing salon. Although the defendant claims that the witness *"tried his best to be evasive on the witness stated"*, having reviewed the transcripts the court concludes that the allegation is totally unfounded.

10. The court also refers to a letter dated 1st December, 2016 sent by defendant's legal counsel to the plaintiff. In the letter it is claimed:

    "3. With respect to the change of use, our client after managing to trace your address, after discovering the deed whereby you acquired the property in 2012, had directly asked you, through his letter dated the 29th September 2016, ***for the consent for the change of use of the shop in question from 'boutique' to a 'hairdressing salon', which falls within the same class of shop, and as such does not require a Planning Permit. So again my client is asking you to reconsider your position with respect to this****"*.

    In the letter the defendant did not claim that he informed architect Ebejer of his plans to change the use of the premises. Had the landlord consented to the change of use, there would have been no scope for the defendant to ask

the landlord to reconsider and consent for the change of use of the shop from a shop to a hairdressing salon.

11. In the application the landlord also claimed the sum of €4,131.95 due as rent arrears with effect from October 2012. The defendant claims that the landlord cannot at the same time request the lessee's eviction and payment of rent;

"That denotes also a tacit acceptance on the part of the landlord, and thus all the works done including the change of use, were tacitly consented to, on the basis of this fact too".

12. Prior to the amendments introduced by Act X of 2009, claims for payment of rent were not decided by the Rent Regulation Board. This changed with the enactment of the said legislation. The appellant claims:

"… in rent laws, you only have one (1) of two (2) options, either to proceed for the recovery of the property due to a breach of contract, or else to ask for rent, and thus continue with the lease agreement. This principle has always been the basis in rent laws, and normally, the landlord refuses to accept rent, from the time he starts to object, and then the lessee, has no other option but to deposit the rent in court".

The court does not agree. In this case the defendant is in blatant breach of paragraph (f) of the lease agreement. By application of paragraph (g) the landlord has a right to terminate the lease. The fact that the landlord has asked for the tenant's eviction for the said reason, does not mean that he has to forfeit the rent which the tenant owes for the continued use of the premises. Notwithstanding the breach of contract, the tenant is still occupying the tenement. Therefore, the landlord has a right to claim payment for the continued occupation of the premises by the lessee whether it is rent, compensation or some other form of consideration for using the premises. Neither can the court expect the landlord to first file a case for the tenant's eviction, and subsequently file another case for the payment of the rent arrears. This would involve unnecessary judicial expenses and waste of time.

13. With respect to appellant's fourth complaint, the Rent Regulation Board did not uphold plaintiff's request for the tenant's eviction because there was rent due. In the application filed by the landlord on the 27th January, 2017 he requested the defendants' eviction because of the change of use. In fact he requested the Board to:

"3. Jiddikjara li ***bl-agir tieghu rigwardanti l-uzu tal-fond****, l-intimat ikkommetta ksur flagranti tal-kuntratt ta' kera tat-30 t'Awissu 1988, u li konsegwentement il-kirja hija terminate ipso jure"*.

The plaintiff did not demand a declaration of termination of the lease due to default in payment of rent arrears.

14. On the 20th February, 2017 the defendant filed a schedule of deposit (no. 393/2017), wherein he stated that the rent is €774.74 for one year. The plaintiff agrees that the rent is €774.74 per annum (vide the original application). The defendant deposited the sum of €3,873.70 for the period from **1st March 2013 to the 28th February 2018**. The court declared:

"On the other hand, the amount claimed by applicant is incorrect because since he acquired the premises on the 2nd October 2012 at most the amount due is €3,098.96 (as originally offered by defendant) and the amount of €387.49 (six month rent) which amounts to €3,486.45. Applicant is also asking for the rent payments due till November 2017. Defendant himself referred to them. Thus, adding up nine additional months (from February 2017) the arrears total to the amount of €4,077.67".

15. With regards to sum of €4,077.67 the appellant contends that the rent claimed in the original application is incorrect;

"In his demand the plaintiff is asking for the sum of €4,131.95 (covering arrears from October 2012 till end January 2017), at the rate of €477.74 per annum. First and foremost the defendant had paid up till end of February 2013, as can be seen from the receipt dated 15th April 2013, issued by the previous owner Cilia (Dok. RD1), covering half yearly payment, in the sum of €387.49, since the rent was payable every six (6) months. Which means that the rent due was actually that as indicated in the defendant's letter dated 1st December 2016, (4 years from 1st March 2013 till 28th February 2016 – (there is a mistake in the letter stating February 2016), at the rate of €774.74, totalling to €3098.96). By the time the plaintiff, filed this action, then another term fell due (that from 1st March 2017 till 28th February 2018), and this was included in the schedule of deposit filed on the 20th February 2017, in the total sum of €3873.70".

16. The defendant exhibited a receipt stating that on the 15th April, 2013 he paid the sum of €387.49 to the previous owners (fol. 61). However the document does not state the period of rent to which the payment refers. Plaintiff bought the premises on the 2nd October 2012. Therefore with effect from that date he had a legal right to the rent. The court does not agree that rent to the plaintiff was owed with effect from the 1st March 2013 (vide defendant's letter dated 1st December, 2016). In the original application the plaintiff requested payment up to January, 2017 (vide paragraph nine of the original application).

17. The contract states that the first payment of rent is due on the 1st March, and rent is paid every six months. Therefore, rent is due on the 1st March and 1st September of each year.

18. Payment due to plaintiff is:

- October 2012 to February 2013:- €322.81
- March 2013 to February 2016: €2,324.22

• March 2016 to January 2017:	€710.18
Total	**€3,357.21**.

19. It is a fact that in the original application the plaintiff declared *"u b'rizerva ghal hlas ta' ammonti ulterjuri) spettanti lir-rikorrent kontra l-intimat"*. However it was only in the note of submissions that plaintiff claimed additional rent (vide para 6 of the last page). This is certainly not the correct procedure to claim additional payment not featuring in the original application. The Board should have decided according to what the plaintiff requested in the application.

For these reasons the Court decides the appeal by:-

1. **Rejecting the first three grievances in the appeal application.**
2. **Partially upholds the fourth grievance and declares that the sum owed by the defendant is three thousand three hundred and fifty seven euro and twenty one cents (€3,357.21), and condemns the defendant to pay the said sum to the plaintiff. Including legal interest with effect from the date when each rent payment became due.**
3. **Condemning the defendant to pay 90% of the judicial costs of the first instance and appeal stage and the plaintiff is to pay 10% of the costs.**
4. **Declaring that the period for eviction established by the Rent Regulation Board commences from today.**
5. **Confirming the rest of the judgment.**

Anthony Ellul.