

CANADA / JUDGMENT

Allen v. Khinda

2022 BCCA 322

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 322 Allen v. Khinda COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Allen v. Khinda, 2022 BCCA 322 Date: 20220907 Docket: CA47960 Between: Felicia Allen Appellant (Plaintiff) And Meor Singh Khinda Respondent (Defendant) Before: The Honourable Mr. Justice Abrioux The Honourable Mr. Justice Marchand The Honourable Madam Justice Horsman On appeal from: An order of the Supreme Court of British Columbia, dated December 3, 2021 (Allen v. Khinda, New Westminster Docket S241816). Oral Reasons for Judgment The Appellant, appearing in person: F. Allen No one appearing on behalf of the Respondent Place and Date of Hearing: Vancouver, British Columbia September 7, 2022 Place and Date of Judgment: Vancouver, British Columbia September 7, 2022 Summary: The appellant tenant seeks to set aside an order that she vacate commercial premises within 30 days. Held: Appeal allowed. The order went beyond the subject matter of the application before the court. The chambers judge granted relief that the respondent landlord was not seeking and without any consideration of the requirements of the Commercial Tenancy Act. MARCHAND J.A.:

Introduction

- [1] This appeal arises from an order pronounced in chambers on December 3, 2021 in the context of a commercial tenancy dispute (the "chambers order") in which the respondent landlord, Meor Singh Khinda, attempted to terminate a handwritten lease for portions of a farm property (the "property") on which the appellant tenant, Felicia Allen, intended to run a business.
- [2] The chambers order required Ms. Allen to vacate the property within 30 days. Ms. Allen promptly appealed. On December 23, 2021, Justice Groberman stayed the chambers order on the basis that the order went beyond the subject matter of the application before the court. I would allow the appeal for the same reason.

Background

- [3] In these reasons, I will summarize the background only so far as necessary to dispose of the appeal.

- [4] In June 2021, Ms. Allen and Mr. Khinda, drew up a handwritten lease. The lease provided that Ms. Allen would rent a portion of a farm property owned by Mr. Khinda in Surrey starting on July 1, 2021. Ms. Allen intended to operate a horse stable business, stable her own horses and keep rescue animals on the property.
- [5] Shortly after Ms. Allen took possession of the property, relations between the parties deteriorated, with each making various allegations against the other.
- [6] On September 18, 2021, Mr. Khinda informed Ms. Allen that he was terminating the lease effective October 31, 2021. He alleged several defaults under the lease, including interference with other occupants of the land, engaging in illegal activity, failure to repair damage, and assigning or subletting the premises without his consent.
- [7] The parties commenced proceedings under Residential Tenancy Act, S.B.C. 2002, c. 78 [RTA]. Ms. Allen applied for several forms of relief, including compensation for damage or loss, rent reduction, and cancellation of the notice to end tenancy. Mr. Khinda sought a writ of possession based on alleged breaches of the lease. On November 19, 2021, a Residential Tenancy Branch arbitrator found the Branch did not have jurisdiction over the dispute because the tenancy was commercial not residential.
- [8] Despite the proceedings under the RTA, Ms. Allen paid and Mr. Khinda accepted rent for October 2021. By November 27, 2021, Ms. Allen had not paid the November rent. On that day, Mr. Khinda served Ms. Allen with a notice terminating the lease based on non-payment of rent. The notice ordered Ms. Allen to vacate the property in five days and outlined consequences for non-compliance.
- [9] On November 29, 2021, Ms. Allen filed a notice of civil claim. She alleged fraud, breach of contract, and breach of privacy. She sought return of overpaid rent and damages.
- [10] On December 1, 2021, Ms. Allen brought an ex parte application for an order to prevent bailiffs from enforcing the notice to vacate until after the adjudication of her claim and for police assistance to ensure her access to the property. The chambers judge granted short leave for the application, but required Ms. Allen to serve Mr. Khinda with the notice of application.
- [11] Ms. Allen did not provide a transcript of the reasons for judgment of the chambers judge, however, the Court accessed the digital audio recording of the proceedings.
- [12] In brief, at the hearing on December 3, 2021, Ms. Allen informed the judge that she was asking for an order that Mr. Khinda's bailiff not remove any of her personal property from Mr. Khinda's property until the court had considered her claim. Counsel for Mr. Khinda replied that the lease was governed by the Commercial Tenancy Act, R.S.B.C. 1996, c. 57 [CTA], Mr. Khinda was in a position to apply under the CTA for a writ of possession and Mr. Khinda's bailiff would not be taking any action against Ms. Allen until Mr. Khinda's application for a writ of possession had been heard and determined.

- [13] Although, no application was before the judge, under the CTA or otherwise, to require Ms. Allen to vacate the property, he concluded that something had to be done to resolve the apparent "standoff" between the parties. Over Ms. Allen's objections, he ordered her to vacate the property within 30 days. In recognition of Ms. Allen's complaints about the state of the property, he also waived the payment of any further rent.
- [14] On December 8, 2021, Mr. Khinda filed a response to Ms. Allen's notice of civil claim and a counterclaim. He denied all of her claims and sought unpaid rent, damages, and a writ of possession.
- [15] On December 14, 2021, Ms. Allen filed her notice of appeal from the chambers order.
- [16] On December 22, 2021, Mr. Khinda filed a notice of application seeking an order that it appeared Ms. Allen was wrongfully holding the property and Mr. Khinda was entitled to possession of it, as well as an inquiry under s. 19 of the CTA to determine whether that was so.
- [17] On January 7, 2022, a master granted, in large part, the order Mr. Khinda sought in his December 22, 2021 application. However, instead of granting a "show-cause" hearing under s. 19 of the CTA, as sought, at Mr. Khinda's request, the master ordered the hearing under s. 25.
- [18] The show-cause hearing proceeded in January and February 2022. On May 18, 2022, Justice Armstrong dismissed Mr. Khinda's application. In his view, Mr. Khinda's application was fatally flawed due to noncompliance with the CTA. Justice Armstrong's comprehensive reasons for judgment are indexed at 2022 BCSC 815.
- [19] It appears that the trial of Ms. Allen's notice of civil claim is scheduled to proceed on October 19, 2022. Discussion and Disposition
- [20] In my respectful view, not much needs to be said regarding the merits of the appeal.
- [21] The judge unilaterally made an order to resolve the apparent "standoff" between the parties. However well-intentioned the order may have been, there was no jurisdiction to make it.
- [22] As noted by Justice Groberman, the chambers order went beyond the subject matter of the application before the court. The judge granted relief that Mr. Khinda was not seeking and without any consideration of the requirements of the CTA.
- [23] It is telling that counsel for Mr. Khinda did not appear for the hearing of Ms. Allen's appeal and has indicated Mr. Khinda takes no position on the appeal.
- [24] For these reasons, I would allow the appeal and set aside the order of the chambers judge.
- [25] ABRIOUX J.A.: I agree.
- [26] HORSMAN J.A.: I agree.

[27] ABRIOUX J.A.: The appeal is allowed and the order of the chambers judge is set aside. "The Honourable Mr. Justice Marchand"

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