

CANADA / JUDGMENT

Belmont Properties v. Swan

2020 BCSC 1716

COURT

Supreme Court of British Columbia

DECIDED

13 November 2020

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2020 BCSC 1716 Belmont Properties v. Swan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Belmont Properties v. Swan,

2020 BCSC 1716

Date: 20201113

Docket: S200553

Registry: Victoria

Between:

Belmont Properties

Petitioner

And

Carly Swan

Respondent

Before: The Honourable Madam Justice B.J. Brown

On Judicial Review from: Decisions of the Residential Tenancy Branch dated December 10, 2019
and December 18, 2019

Reasons for Judgment

In Chambers

Counsel for the Petitioner:

A.E. Fammartino

Counsel for the Respondent:

D.C. Jackson

A. McGee, Articled Student

Place and Date of Hearing:

Victoria, B.C.

September 17, 2020

Place and Date of Judgment:

Victoria, B.C.

November 13, 2020

- [1] This is a petition to set aside to decisions made by the Residential Tenancy Branch, the first by Arbitrator Trotter on December 10, 2019 and the second by Arbitrator Yee on December 18, 2019.

Background

- [2] By way of background, the petitioner Belmont Properties is the landlord (the "Landlord") of Carly Swan (the "Tenant"). Ms. Swan has lived in the property since approximately April 2013. At issue in the residential tenancy dispute is the proper interpretation of a clause in the lease:

Any other person (as) taking up residence with tenant (as) at a later date must be approved by management in writing. Such a person (as) will then be included in the tenancy agreement. This will increase the rental payment by twenty-five (25) per month. Any other person (is/are) guests, and may stay with the tenant(s) for a period of up to two (2) weeks during the calendar year. Any longer period of stay must be permitted in writing by management, only. (Addendum Para. 4)

- [3] There is no dispute between the parties that Ms. Swan's mother stays in her apartment for more than two weeks per calendar year. The issue is whether this is a breach of the agreement. Ms. Swan takes the position that the proper interpretation is that she is not in breach of the laws unless someone stays with her for more than two weeks at a time. The Landlord says that the proper interpretation is that she can have someone stay with her for a total of 14 days in the calendar year without seeking the required permission from the Landlord.
- [4] The Landlord gave notice to the Tenant to end the tenancy. Ms. Swan commenced an application for dispute resolution with the residential tenancy branch seeking to set aside the one-month notice to end tenancy for cause.

- [5] The hearing was held before Arbitrator Trotter. Arbitrator Trotter set aside the notice to end tenancy. The Landlord sought review on the ground of fraud. The Landlord asserted that during the hearing the tenant had given false testimony with respect to her former landlord and manager. The Landlord had obtained evidence following the initial hearing from the former landlord and manager disputing the tenant's claims.
- [6] Section 79(2) of the Residential Tenancy Act, SBC 2002, c 78 [RTA] sets out three grounds on which a party may request that a decision or order be reviewed:
- (2) A decision or an order of the director may be reviewed only on one or more of the following grounds:
- (a) a party was unable to attend the original hearing because of circumstances that could not be anticipated and were beyond the party's control;
 - (b) a party has new and relevant evidence that was not available at the time of the original hearing;
 - (c) a party has evidence that the director's decision or order was obtained by fraud.
- [7] The review application was made pursuant to s. 79(2)(c) that the party has evidence that the Directors decision or order was obtained by fraud.
- [8] On that basis, Arbitrator Yee conducted their limited review of Arbitrator Trotter's reasons, which unquestionably accepted Arbitrator Trotter's legal analysis, and refused to allow a new hearing

Position of the Petitioner

- [9] The Landlord argues that Arbitrator Trotter made the following errors:
1. That Arbitrator Trotter refused to permit the Landlord to introduce additional complaint letters because these had been submitted less than seven days prior to the hearing. The Landlord argues that Arbitrator Trotter did not provide the Landlord the opportunity to make argument as to why the late evidence should be considered or why it was relevant. The Landlord says that the arbitrator has discretion to determine whether to accept late evidence but must provide an opportunity to each of the parties to be heard on the question of accepting late evidence (Rule 3.17 Residential Tenancy Branch Rules of Procedure).
 2. Arbitrator Trotter failed to consider that the occupants of the rental property is a material term of the tenancy agreement. The Landlord argues that this failure was patently unreasonable.
 3. That Arbitrator Trotter's failure to find that clause 4 was a material term was patently unreasonable.
 4. That Arbitrator Trotter's finding that clause 4 was vague and unclear was patently unreasonable.

5. That Arbitrator Trotter's finding that the warning letters were unclear was patently unreasonable.

[10] With respect to the decision of Arbitrator Yee, the Landlord asserts the following errors:

1. That Arbitrator Yee's finding that clause 4 was vague and unclear was patently unreasonable, and exceeded the task before her which was to determine whether there was fraud before Arbitrator Trotter.
2. Arbitrator Yee's finding that the Tenant's testimony did not amount to fraud was patently unreasonable.

Position of the Respondent

- [11] Ms. Swan argues that Arbitrator Trotter's failure to admit two letters as late evidence was not patently unreasonable. The evidence related to a fact that it is not in dispute: i.e., that Ms. Swan's mother had been seen in and around the premises at various times. Their exclusion did not affect the fairness of the process in any way.
- [12] With respect to the interpretation of the guest addendum, Ms. Swan argues that the decision was not patently unreasonable. It was based on available evidence. There was ample evidence before the arbitrator regarding Ms. Swan's interpretation of the clause.
- [13] With respect to the warning letters, Ms. Swan argues that these letters amount to nothing more than the assertion of the Landlord's interpretation of clause 4.
- [14] With respect to the review consideration decision of Arbitrator Yee, Ms. Swan argues that Arbitrator Yee dismissed the application for review on the basis that the application discloses no basis on which even if the submissions and the application were accepted the decision or order of the Director should be set aside or varied (s. 81(1)(a)(iii) of the RTA).

The Standard of Review

- [15] Section 84.1 of the RTA contains a privative clause:

84.1 (1) The director has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in a dispute resolution proceeding or in a review under Division 2 of this Part and to make any order permitted to be made.

- (2) A decision or order of the director on a matter in respect of which the director has exclusive jurisdiction is final and conclusive and is not open to question or review in any court.

- [16] Section 5.1 of the RTA provides that s. 58 of the Administrative Tribunals Act, SBC 2004, c 45 [ATA] applies to dispute resolution proceeding.

5.1 Sections 1, 44, 46.3, 48, 56 to 58 and 61 of the Administrative Tribunals Act apply to the director as if the director were a tribunal and to dispute resolution proceedings under Division 1 of Part 5, reviews under Division 2 of Part 5 and the imposition and review of administrative penalties under Part 5.1.

[17] Section 58 of the ATA sets out the standard of review to be applied where the tribunal statute includes a privative clause:

58 (1) If the Act under which the application arises contains or incorporates a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.

- (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
 - (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
 - (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
 - (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
- (3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion
 - (a) is exercised arbitrarily or in bad faith,
 - (b) is exercised for an improper purpose,
 - (c) is based entirely or predominantly on irrelevant factors, or
 - (d) fails to take statutory requirements into account.

Discussion

[18] I have decided that the decision of Arbitrator Trotter must be set aside and the matter remitted to the Residential Tenancy Branch for a new hearing. I have concluded that the decision of the arbitrator was patently unreasonable.

[19] The heart of the decision turned on the proper interpretation of the guest addendum. Arbitrator Trotter concluded that the clause at addendum 4 in the tenancy agreement was vague and unclear, saying:

Therefore, due to the disagreement between the parties as to the meaning of the term of the tenancy agreement addendum, and the tenants understanding which may have been clarified upon originally signing the agreement, I am not satisfied that a guest staying more than two weeks total in a year is a material term of the tenancy.

As I understand her decision, the arbitrator is saying that the parties do not agree on the meaning of the term, it is vague, therefore it is not material.

[20] Arbitrator Trotter did not undertake an analysis of the proper interpretation of the contract. A lease is, of course, a contract. As Iacobucci J said in *Eli Lilly & Co. v Novopharm Ltd.*, [1998] 2 SCR 129, 1998 CanLII 791 at para. 54:

The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. Evidence of one party's subjective intention has no independent place in this determination.

Rather, she concluded that the parties had different interpretations of the clause, so it was vague and uncertain. She does not, for example, consider as a circumstance, the implication of the Tenant's interpretation of the clause which would permit someone to live with the Tenant in the suite for 13 days, leave for a day and then stay for another 13 days. By my calculation this would permit a person to stay some 312 days per year in the suite without running afoul of the guest addendum.

[21] Without determining the proper interpretation of the clause, Arbitrator Trotter found it vague and uncertain and concluded that it could not be material.

[22] As the court of appeal said in *Ahmad v Merriman*, 2019 BCCA 82:

[37] Section 58(2)(a) of the ATA requires that a decision of an expert tribunal, such as the RTB, may not be interfered with unless it is patently unreasonable. The standard of patent unreasonableness requires the decision under review be accorded "curial deference, absent a finding of fact or law that is patently unreasonable": *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25 at para. 29. Stated otherwise, it must be "clearly irrational" or "evidently not in accordance with reason": *Canada (Attorney General) v. Public Service Alliance of Canada*, 1993 CanLII 125 (SCC), [1993] 1 S.C.R. 941 at 963–64. A patently unreasonable decision is one that is "so flawed that no amount of curial defence can justify letting it stand": *Ryan v. Law Society (New Brunswick)*, 2003 SCC 20 at paras. 52–53.

[23] In my view, failing to determine the proper interpretation of the clause, and without a proper interpretation, concluding that it is not material, is a patently unreasonable conclusion. The contract term must be interpreted and then, having determined the meaning of the clause, the arbitrator must determine whether it is material. The analysis was simply not undertaken.

[24] In remitting this matter for a new hearing, I anticipate that the parties will lead new evidence and argument, and the Landlord will have an opportunity to lead evidence to address the Tenant's evidence of her discussions with the former landlord and building manager. Given that there will be a new hearing, I do not need to address the other arguments raised.

"B.J. Brown J."

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Prepared on 26 October 2026 · Esheria