
CANADA / JUDGMENT

Best G.I.S. Co. Ltd. et al. v. Wray

2004 BCSC 146

COURT

Supreme Court of British Columbia

DECIDED

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2004 BCSC 146 Best G.I.S. Co. Ltd. et al v. Wray

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Best G.I.S. Co. Ltd. et al. v. Wray,

2004 BCSC 146

Date: 20040205

Docket: L032789

Registry: Vancouver

Between:

Best G.I.S. Co. Ltd.,

Susan Wei Chun An Yeung,

and Gary Hing Chan

Appellants

And:

Shannon Wray

Respondent

Before: The Honourable Mr. Justice Masuhara

Reasons for Judgment

Counsel for the Appellant:

J.D. Whyte

Counsel for the Respondent:

H. Wiebach

Date and Place of Hearing:

January 7, 2004

Vancouver, B.C.

Facts:

- [1] This is an appeal of a decision of a Provincial Court judge who granted judgment in favour of the respondent, Ms. Wray, in a fraudulent misrepresentation action regarding a residential tenancy agreement she entered into in April 2002 with the appellant, Best G.I.S. Co. Ltd. ("Best"). Ms. Wray was unsuccessful about a year earlier on the facts arising from the same circumstances before an arbitrator appointed under the Residential Tenancy Act, R.S.B.C. 1996, c. 406 (the "Act").
- [2] The appellant is in the business of leasing residential premises and then sub-leasing them to renters. The principal agent with whom Ms. Wray communicated was Susan Wei Chun An Yeung.
- [3] Ms. Wray is a mother of two and was living in Toronto in April 2002. She accepted a job offer that month to start up a television station in Vancouver commencing May 15, 2002. This required her to find a home in Vancouver, and after a short search she and Best entered into what she thought was an 11-month rental agreement for a house, effective May 1, 2002. The agreement was in writing. At the request of Ms. Yeung she paid a damage deposit and one month's rent in advance in cash to Best.
- [4] Unfortunately, Best did not have the right to sub-let the premises. Ms. Wray discovered this when she contacted the electric utility to have the account placed in her name. The utility customer representative advised her that Best was not the landlord and that Oak West Realty Ltd. ("Oak West") was on record as the agent for the landlord. She contacted Oak West and was advised that Best was neither the landlord nor the agent for the landlord. Moreover, she was told that she would not be permitted to move into the premises as Best was the tenant. She retained counsel, who delivered a letter to Best, dated May 14, 2002, noting that she was unable to occupy the premises and demanding the return of the monies Ms. Wray had paid. An action in Small Claims Court was filed on May 24, 2002.
- [5] Notwithstanding an explicit term in the head lease requiring the consent of the landlord to sub-let, Best argued with the landlord that such consent was not required. Best stopped payment for the June rent, and Oak West gave notice to terminate the head lease effective the end of June. Oak West was successful before an arbitrator appointed under the Act. By that time, Ms. Wray had moved to Vancouver with her children, was staying in a hotel, and had been unable to find other accommodations. She was rapidly accumulating expenses.

Given her pleas to be allowed occupancy of the premises, Oak West permitted Ms. Wray to occupy the premises in June. Ultimately, she was accepted as a tenant in July.

- [6] Best then applied under sections 46 and 84 of the Act, for an order for possession of the premises and an order for payment from Ms. Wray of June rent. Arbitrator Morrow, who heard the application, dismissed the Best's application for possession. Regarding the June rent, the issue before the arbitrator was whether:
- (a) the respondent owed Best rent for June 2002, and, if so;
 - (b) the respondent could set off rent she had paid Best for May 2002, against her liability for the June rent, on the basis that her tenancy with Best was not effective because Best could not lawfully rent the property to her on the basis of its own lease with the property owner.

The arbitrator ruled that Ms. Wray was required to pay the appellant rent for the month of June. Further, the arbitrator did not permit Ms. Wray to set off her liability, on the basis that Ms. Wray had the keys to the premises in May, could have moved into the premises at any point, and did not take any steps to repudiate her tenancy with Best. It is notable that counsel for Ms. Wray advised me that he did refer the arbitrator to the May 14th letter, which was a repudiation by Ms. Wray. This point was brought to the attention to the arbitrator after the initial ruling. In a supplementary decision, the arbitrator declined to vary or amend the order, and ruled that on a review of notes and documents no such letter was before the arbitrator at the time of determination.

- [7] On June 13, 2003, the action in Provincial Court was heard. Judgment was issued on August 26, 2003, granting relief to Ms. Wray which effectively returned to her the damage deposit and May rent, as well as special damages for expenses she incurred as a result of not having occupancy of the premises. In the reasons for judgment, the Honourable Provincial Court Judge found that the tenancy agreement between the parties was void and unenforceable.

Issues

- [8] The central questions to this appeal are:
- (a) whether the Provincial Court judge erred in law in hearing and accepting jurisdiction in this matter and,
 - (b) whether the doctrine of res judicata estopped the respondent from bringing the action in the Provincial Court.

Analysis

- [9] I find myself with considerable sympathy for the respondent, Ms. Wray. As mentioned earlier, she is a single mother who transferred from Toronto to Vancouver as a result of finding employment here. She was in need of finding accommodations and thought she had done so when she contracted with the appellant Best through their representative Ms. Susan Yeung. She duly paid a damage deposit and a month's rent in advance. Unfortunately, she

was denied possession. As we know she was ultimately successful in gaining occupancy through the acquiescence of the owner starting in June 2002.

- [10] What is at issue is whether the decision of the arbitrator and the operation of the Act barred the Provincial Court action, which I note was commenced well before the commencement of the arbitration with the Residential Tenancy Branch, but decided after the arbitration decision. Unfortunately, I conclude that it does.
- [11] Section 84 of the Act prohibits the bringing of an action in Provincial Court for debt or damages which arises out of a right or obligation under the Act or a tenancy agreement. That section is dependent on a preliminary finding that a valid tenancy agreement was formed between the parties. There is no question that an arbitrator under the Act has the authority to make that preliminary finding.
- [12] In this case, the arbitrator expressly found Ms. Wray to be a sub-tenant of Best in June, and did not allow Ms. Wray to set off her liability for June's rent with her previous payment of May's rent to Best. In my view, the only interpretation of that ruling is that the arbitrator found that there was a valid tenancy agreement between Ms. Wray and Best in May. While I question that finding, the fact is that the arbitrator had the jurisdiction to make the determination. Therefore, section 84 of the Act precluded the action in Provincial Court. It is a matter that is within the purview of the arbitrator under the Act. The correct path for Ms. Wray is to pursue the avenues for review under the Act, or judicial review, as noted by counsel for the appellant.
- [13] In my view, while the arbitrator may have found an agreement applicable for the month of June given the possession by Ms. Wray of the premises, the finding of a tenancy for the month of May is questionable for several reasons.
- [14] First, counsel for the appellant advised that the issue of the formation of a valid tenancy agreement in May was argued before the arbitrator. However, the decision does not reflect much in the way of reasoning on this critical point, particularly in light of the finding of an earlier arbitrator that Best had sublet the premises without the consent of the landlord contrary to the head tenancy agreement.
- [15] Further, I am told by Ms. Wray's counsel that the May 14th letter, which would eliminate the critical deficiency identified in the arbitrator's decision - that is, that she had not taken steps to repudiate the tenancy agreement - was identified and pointed out to the arbitrator by counsel for Ms. Wray, but was not noted by the arbitrator.
- [16] Finally, while the Honourable Provincial Court Judge found the tenancy agreement void and unenforceable based on fraudulent misrepresentation, my view as I indicated at the hearing was that the contract was likely void ab initio on the basis of mutual mistake. Ms. Wray thought she was dealing with a person who had the capacity to lease the subject premises for 11 months; Best thought that it had the capacity to lease the premises. It was clear that Best did not have the capacity to lease without the consent of the Owner, which it did not

seek or receive. It was also clear that Best did not at any relevant time tell Ms. Wray that it required the consent of the Owner to sublet. The outcome was that Ms. Wray received nothing in terms of her part of the bargain with Best. As the Honourable Provincial Court Judge aptly stated, "Her part of bargain was completely frustrated through no fault of her own, and as a result of the actions of Best."

- [17] Notwithstanding my reservations, the jurisdiction issue remains; further, section 57(2) of the Act states that the decision of the arbitrator in this case is final and binding. The substantive issues were addressed by the arbitrator which in essence precluded the matter from being brought in Provincial Court. I find that the judge was precluded from considering the matter where an arbitrator has found that a valid tenancy agreement is in force. The judge's stated basis for permitting the action to continue was that the arbitrator did not have certain correspondence available at the time; namely, the May 14, 2002 letter. This may be the case; however, it is clear that this letter was known and in the possession of Ms. Wray and her counsel at the time of the arbitration. If Ms. Wray's counsel failed to make it available to the arbitrator, the fact remains that the letter was not fresh evidence that would warrant a relitigation of the issues. The proper course for Ms. Wray is to seek redress through the review process mentioned earlier.

Conclusion

- [18] In conclusion, the order of the Honourable Provincial Court Judge and the Small Claims Court payment order dated September 26, 2003 is set aside.

"D. Masuhara, J."

The Honourable Mr. Justice D. Masuhara

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