

CANADA / JUDGMENT

Burnaby (City) v. Chiodo

2008 BCSC 491

COURT

Supreme Court of British Columbia

DECIDED

23 April 2008

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2008 BCSC 491 Burnaby (City) v. Chiodo IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Burnaby (City) v. Chiodo, 2008 BCSC 491 Date: 20080423 Docket: S070780 Registry:

Vancouver Between: City of Burnaby Plaintiff And Vincent Chiodo Defendant Before: The

Honourable Mr. Justice Rogers Reasons for Judgment Counsel for the Plaintiff: D.C. Russell

Appearing on his own behalf: V. Chiodo Date and Place of Trial: April 11, 2008 Vancouver, B.C.

Introduction

- [1] In this summary trial, the City of Burnaby has applied for a declaration that certain aspects of Mr. Chiodo's house contravene various municipal bylaws and other code requirements. The City seeks an order requiring Mr. Chiodo to bring the house into compliance. Finally, the City asks the court to dismiss Mr. Chiodo's counterclaim. In that counterclaim, Mr. Chiodo seeks damages arising out of the City's effort to enforce its bylaws.
- [2] Mr. Chiodo opposes the application, saying first that the matter is not suitable for summary disposition, and second, if a summary trial does proceed, then the matter should be decided in his favour because his house complied with whatever bylaws or codes were in effect when it was built and as it was altered in years past. He says that the City cannot require him to bring old renovations that were good when they were done into compliance with current codes.
- [3] The City's case against Mr. Chiodo's house centers on a basement suite it says contravenes the City's bylaws, and on the fact that at times unknown the house has been renovated without permit or inspection. Without knowing when the renovations were done, the City cannot know whether the work done then, and which still exists, complies with the bylaws and codes then in effect. The Facts
- [4] The City says that these aspects of the house must be brought into compliance with current bylaws and building codes:
1. remove stove and range hood in basement;

2. install smoke detectors on both floors; the detectors to be connected to the electrical service and be interconnected;
 3. bring access to the furnace and hot water tank into compliance with current building code requirements;
 4. remove three-piece bathroom on south side of basement and seal associated remnant plumbing in an approved manner;
 5. obtain permit to document removal of interior staircase between the two floors;
 6. obtain permit for:
 - (a) basement kitchen sink;
 - (b) basement bar sink;
 - (c) removal of one set of laundry facilities;
 - (d) installation of furnace, hot water tank, basement gas fireplace, upstairs gas fireplace and supply manufacturer's manual for each.
 7. Expose upstairs tub diverter for inspection;
 8. Provide ground electrode for electrical service;
 9. Bond water, gas and waste pipes;
 10. Complete electrical panel directory;
 11. Install missing panel fillers in sub-panel;
 12. Remove electrical wiring for basement stove and range hood;
 13. Remove branch circuit wiring from main area of electrical panel;
 14. Bring furnace switch into compliance with current Code;
 15. Replace garage electrical service with approved wiring method;
 16. Confirm circuit loading for each electrical breaker;
 17. Check and correct non-conforming electrical wiring and provide written confirmation from an individual the City is satisfied is competent to say that the electrical service and wiring complies with the current Code.
- [5] The City's inspectors have filed affidavits establishing that the house requires the work noted.

- [6] The house in question is at 4469 Percival Avenue, in Burnaby, B.C. The house was built in 1953. During construction, the City issued a temporary occupancy permit to the original owners. The temporary permit allowed the original owners to live in the basement while their upstairs living quarters were being completed. That temporary permit has long since expired.
- [7] Mr. Chiodo presented an affidavit from Mrs. Roemer in support of his defence. In 1959 Mrs. Roemer moved in next door. She deposes that she has been familiar with the house since 1959. She says that to her knowledge there was a kitchen with an electrical stove in the basement in 1959. Curiously, despite her avowed familiarity with the house, Mrs. Roemer does not say whether there was or was not an interior staircase connecting the basement and the main living quarters upstairs. The City presented an affidavit from Mr. Jacoe. Mr. Jacoe is one of the City's senior building inspectors. He is familiar with the design and construction of houses of Mr. Chiodo's vintage. According to Mr. Jacoe, the house in issue here would most likely have had an interior staircase because that is how houses of that era were usually built. The house does not now have an interior staircase, and there is no permit or other documentation relating to its removal.
- [8] In 1968 the City issued a permit to the then homeowner to construct a bathroom in the basement. The permit specified that the existing basement bathroom had to be removed. The new basement bath was built, but the old bathroom was either never removed or it was removed and someone put it back in later. There is no question that the house currently has two basement bathrooms, one of which was built under permit, the other of which was not.
- [9] In the 1960s the City adopted bylaws which had the effect of making it illegal for houses zoned as Mr. Chiodo's house to have two or more separate kitchens. There is no question but that Mr. Chiodo's house does have two kitchens: one is upstairs and the other is downstairs.
- [10] In 1989 the City received a complaint that there was an illegal suite in the house's basement. The City inspected the premises, found the basement suite, determined that it contravened the City's bylaws, and issued an order that the suite be removed. The then homeowner did not comply with that order, or the owner did comply and then reconstructed the suite. Either way, the suite continued to exist inside the house.
- [11] Mr. Chiodo bought the house in 2005. He made some cosmetic changes to the house which did not require city permits. He also installed a new furnace and hot water tank. That work involved the house's gas service and did require a City permit. Mr. Chiodo never obtained it. The doorway giving access to the furnace room is too small to comply with the building code, and the master switch for the new furnace was improperly located.
- [12] In the summer of 2006 Mr. Chiodo decided to sell the house. He listed the house as having two suites in the basement. Somebody reported to the City that the house appeared to have illegal basement suites and that the interior staircase had been removed without proper permit. One of the City's building inspectors, Ms. Lupia, acted on the complaint. She contacted Mr. Chiodo's real estate agent to advise that there was a potential problem with the

house's compliance with City ordinances. She made that call because she was concerned that potential purchasers should be fully informed about the house and any potential problems it might present to them. Ms. Lupia also arranged for the house to be inspected. Upon inspection, the City's officials identified numerous problems with the house. Ms. Lupia put Mr. Chiodo on notice that he was required to rectify those problems. The itemized list above recites those problems that remain with the house.

- [13] Mr. Chiodo's reaction to the City's notice was generally negative. He took the view that the City had unfairly targeted him and had acted on a bogus complaint. He implied that the City had made up the complaint ex post facto so as to justify the inspectors' jackboot tactics. Mr. Chiodo complained that the City was discriminating against him on the basis of his sexual orientation. Mr. Chiodo said that the City's advice to the real estate agent prevented him from selling the house. It was this latter complaint that Mr. Chiodo formalized as a claim for damages in the counterclaim he filed in response to the City's lawsuit.
- [14] As to the merits of the City's case, Mr. Chiodo takes the position that the downstairs suite had been continuously present since the house was built in 1953 and so it was a non-conforming use and ought not now to be declared illegal. He admits that for a while he had a tenant in the basement but that he evicted the tenant and so it cannot be said that the suite is now illegally used. Mr. Chiodo also argues that the various plumbing, gas and electrical attributes of the house about which the City now complains were all installed in accord with the bylaws and codes in effect at the time and so they should be "grandfathered" and he should not be ordered to bring them into compliance with current regulations. Discussion Summary Disposition
- [15] Mr. Chiodo attended the summary trial saying that he wished to cross-examine the City's deponents and that he wanted the court to retain a handwriting expert to determine whether the original illegal suite complaint had been forged. There was simply no merit in either of those positions. Mr. Chiodo did not demonstrate that cross-examining the City's inspectors could produce anything other than confirmation that his house did not comply with the City's bylaws and the Building Code. The City's Rule 18A application was filed in the fall of 2007 and was not heard until April 2008. During that time the City's outside counsel treated Mr. Chiodo to a series of mini-lessons about civil practice and procedure. The City gave Mr. Chiodo every opportunity to prepare his case. Mr. Chiodo simply failed to attend at trial with evidence that would support his position (more about that follows). Cross-examination of the City's inspectors would not have materially advanced Mr. Chiodo's position.

- [16] As for the handwriting expert, Mr. Chiodo's "need" to examine the original complaint arose from Mr. Chiodo's assertion that the City had targeted his house unfairly. There was, quite simply, no suggestion in any of the evidence in the summary trial that the City had acted in bad faith with respect to Mr. Chiodo's house or that the original complaint was manufactured. There is, therefore, no need to engage a handwriting expert. Non-Conforming Use
- [17] Mr. Chiodo's position with respect to the suite in the basement, or more particularly the second kitchen there, is that it has been extant since 1953. He says that in 1953 there was no regulation against secondary suites in Burnaby houses. Mr. Chiodo argues that the second kitchen and the suite attached to it are, therefore, non-conforming uses that subsequent bylaws cannot forbid.
- [18] The flaw in Mr. Chiodo's argument is that in 1953 the second kitchen was authorized by a temporary occupancy permit only. When the temporary permit expired, so did the authorization for a second kitchen. Mr. Chiodo cannot, therefore, say that the basement kitchen was ever installed in accord with a proper building permit. If the kitchen was used after the temporary occupancy permit expired, its use was not something that the City approved. In short: the basement kitchen was never permanently authorized, and so its use was illegal after the temporary occupancy permit expired. Non-conforming use is a principle that can save a use that was legal at one time from being outlawed at a later time. The problem for Mr. Chiodo is that the basement kitchen was, except during the currency of the temporary occupancy permit, never legal. Never having been legal, Mr. Chiodo cannot claim protection for the kitchen as a non-conforming use. Compliance with Previous Building Codes
- [19] Mr. Chiodo's next argument is that certain aspects of the house, the wiring to the garage for example, complied with the building codes in effect when they were installed. He says that the City cannot now make him bring those old improvements up to the current Code.
- [20] Mr. Chiodo's position here might possibly have succeeded if he had attended at trial with some evidence as to when those improvements were made and that they did, in fact, conform to the building code or other regulations then in effect. Unfortunately for Mr. Chiodo, whoever did those improvements in the past did not get the necessary building permits for that work. Mr. Chiodo cannot, therefore, look to the City's records for proof of when the improvements in question were completed. Mr. Chiodo did not present evidence from, say, an expert to establish when the improvements were done. Such an opinion would, one would think, be based upon the expert's examination of the work itself. However, not having any evidence of when the works were carried out, Mr. Chiodo was not able to adduce any evidence that the work itself complied with the codes and regulations in effect when that work was done. Absent such evidence, the court had no basis upon which to accept Mr. Chiodo's assertion (and that was all it amounted to) that the improvements about which the City complains were not problematic when they were completed. Declaration

- [21] The evidence adduced in this matter satisfied me that Mr. Chiodo's house does not comply with certain of the City's bylaws or with the Building Code. More specifically:
1. The house has two kitchens. The kitchen in the upstairs was built in compliance with the original building permit. The kitchen in the downstairs area was built pursuant to a temporary permit which has long since expired. The downstairs kitchen is not a non-conforming use of the property because its construction was never authorized by a proper permanent building permit. The stove and range hood and their associated wiring must be removed.
 2. The Building Code requires smoke detectors on both floors. Mr. Chiodo's house does not have these. Mr. Chiodo is in violation of the Code. The house is equipped with electrical service, and so the detectors, when they are installed, must be connected to the electrical system and the detectors must be interconnected.
 3. The doorway giving access to the room containing the furnace and hot water tank is too small and does not comply with current Building Code requirements. That access must be brought into conformity with the Code.
 4. The bathroom on the south side of the basement should have been removed in 1968 but it never was. Having been ordered removed 30 years ago, it cannot be a non-conforming use now. That bathroom is not authorized by a building permit and it must be removed. The plumbing associated with that bathroom must be sealed in an approved manner.
 5. I accept the evidence of Mr. Jacoe, who said that it is more likely than not that this house originally had an interior staircase and that it has been removed. There is no permit on record relating to that alteration. The City does not require that the staircase be rebuilt, but Mr. Chiodo is required to obtain a permit to document its removal.
 6. Mr. Chiodo does not have a permit for these items:
 - (a) basement kitchen sink;
 - (b) basement bar sink;
 - (c) Installation of furnace, hot water tank, basement gas fireplace, upstairs gas fireplace. Mr. Chiodo must obtain a permit for the installation of these items, and he must supply a copy of the original manufacturer's manuals for the gas fixtures.
 7. The house may have only one set of laundry facilities. It currently has two. One set must be removed.
 8. The upstairs tub diverter is concealed and cannot be inspected. Mr. Chiodo must expose that diverter for inspection.
 9. Mr. Chiodo maintains that he has complied with the City's demands concerning:
 - (a) grounding the electrical service;

- (b) bonding the water, gas and waste pipes;
 - (c) completing the electrical panel directory;
 - (d) installing missing panel fillers in the sub-panel; and
 - (e) bringing the furnace switch into compliance with current Code. He must facilitate inspection of the pipes to establish assertion, and correct any failings in that work.
10. The branch circuit wiring from main area of electrical panel must be removed.
 11. The garage electrical service must be replaced with an approved wiring method.
 12. The circuit loading for each electrical breaker must be confirmed and certified.
 13. Mr. Chiodo or his qualified contractor must check and correct non-conforming electrical wiring and provide written confirmation in a form satisfactory to the City that the electrical service and wiring complies with the current Code.

Conclusion

[22] There will be a declaration that Mr. Chiodo's house is in breach of the City's zoning, building, electrical, gas and plumbing bylaws. There will be an order requiring Mr. Chiodo to bring the house into compliance with those bylaws within 60 days of the service of the order upon Mr. Chiodo. Mr. Chiodo's counterclaim is dismissed. The City will have its costs of this action on Scale B. "P.J. Rogers, J." The Honourable Mr. Justice Rogers

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Prepared on 29 October 2026 · Esheria