

CANADA / JUDGMENT

Furtado v. Maasanen

2020 BCSC 1340

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1340 Furtado v. Maasanen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Furtado v. Maasanen,

2020 BCSC 1340

Date: 20200910

Docket: S201851

Registry: Victoria

Between:

Maico Furtado, also known as Mike Furtado, and Antonio Furtado

Petitioners

And

Ronald Walter Maasanen and Debra Lynn Tattersall, also known as

Debra Lynn Tattersall-Maasanen

Respondents

Before: The Honourable Madam Justice Murray

On judicial review from: The decision of J. Edwards, Arbitrator,

Residential Tenancy Branch, dated March 26, 2020 (Ronald Walter Maasanen,

Debra Lynn Tattersall, Tenants (Applicants) and Maico Furtado,

Antonio Furtado, Landlords (Respondents))

Reasons for Judgment

Counsel for Petitioners:

D. Redman

Counsel for Respondents:

S. Maroney

Place and Date of Hearing:

Victoria, B.C.

August 18, 2020

Place and Date of Judgment:

Victoria, B.C.

September 10, 2020

Introduction

- [1] The petitioners apply to set aside the decision of Arbitrator J. Edwards of the Residential Tenancy Branch (RTB) dated March 26, 2020, on two bases:
- a) First, that the arbitrator failed to consider or misapprehended evidence at the hearing; and
 - b) Second, that the arbitrator failed to consider extenuating circumstances.
- [2] For clarity and ease of reference and not out of disrespect, I will refer to Maiko (Mike) Furtado as Mike throughout these reasons.
- [3] By way of brief background, the respondents were tenants of a rental suite located at 1345 Mount Douglas Cross Road, Victoria, British Columbia, a house owned by the petitioners, the landlords.
- [4] On or about February 4, 2019, the petitioners served the respondents with a two month Notice to End Tenancy for Landlord's Use of Property (the Notice) pursuant to s. 49(3) of the Residential Tenancy Act, [SBC 2002] c. 78 (RTA). Under the Notice the respondents were to vacate the suite by May 31, 2019. The Notice specified that the tenancy was being terminated so Mike and his family could move into the suite. Mike's wife (Mrs. Furtado) had been diagnosed with a terminal illness and they wanted to move into the suite to be close to family.
- [5] As the respondents were able to find new living accommodations, they vacated the suite on April 30, 2019.

- [6] The suite had to be renovated before Mike and his family could move in. Mike expected that the renovations could be completed within a reasonable time. It was decided that Mrs. Furtado would not move into the suite until the work was completed as dust could exacerbate her health difficulties.
- [7] As often happens in construction, there were unforeseen delays in completing the project. Most significant of these involved the District of Saanich serving Mike with a stop work order on May 27, 2019, which directed Mike to obtain a number of permits and architectural drawings and have asbestos testing done.
- [8] On August 17, 2019, Mike moved into the suite so he could continue to work on it himself in an effort to finish the construction more quickly.
- [9] Renovations were completed by November 9, 2019 and Mike's family was able to move into the suite on that date.
- [10] On November 5, 2019, the respondents filed a dispute with the RTB pursuant to s. 51 of the RTA seeking compensation of \$22,001.04 (the equivalent of 12 months' rent) on the basis that the petitioners failed to occupy the suite within a reasonable time after the effective date of the Notice.
- [11] The hearing was held via conference call on March 23, 2020. Both the petitioners and the respondents attended. In the decision released March 26, 2020, the arbitrator found that the petitioners failed to take steps to accomplish their move-in within a reasonable time after the effective vacancy date of May 31, 2019. The arbitrator ordered the petitioners to pay to the respondents compensation in the amount of \$22,001.04 pursuant to s. 51(2) of the RTA, plus the \$100 filing fee pursuant to s. 72 of the RTA.

Issue

- [12] The issue to be determined is whether the arbitrator's decision was patently unreasonable as the arbitrator:
- a) Failed to consider or misapprehended the evidence that the suite was occupied as of August 17, 2019; and/or
 - b) Failed to consider extenuating circumstances.

Standard of Review

- [13] It is common ground that, for decisions of the Director of the RTB, the standard of review pursuant to s. 5.1 of the RTA and s. 58 of the Administrative Tribunals Act (ATA) is patent unreasonableness.
- [14] In *Yee v. Montie*, 2016 BCCA 256, our Court of Appeal discussed this standard in the context of a judicial review of a RTB decision:

- [21] The ATA does not define patent unreasonableness as the term applies to questions of fact or law. In *Manz v. Sundher*, 2009 BCCA 92 at para. 39, Saunders J.A. adopted the meaning of the phrase in relation to factual matters from *Speckling v. British Columbia (Workers' Compensation Board)*, 2005 BCCA 80:
- [37] As the chambers judge noted, a decision is not patently unreasonable because the evidence is insufficient. It is not for the court on judicial review, or for this Court on appeal, to second guess the conclusions drawn from the evidence considered by the Appeal Division and substitute different findings of fact or inferences drawn from those facts. A court on review or appeal cannot reweigh the evidence. Only if there is no evidence to support the findings, or the decision is "openly, clearly, evidently unreasonable", can it be said to be patently unreasonable. That is not the case here.
- [22] In *Pacific Newspaper Group Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, 2014 BCCA 496 at paras. 39-44, this Court affirmed that the standard of patent unreasonableness is at the high end of the deference spectrum, and endorsed this description of the phrase from *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at para. 52:

a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason". A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand. [Citations omitted.]

[Emphasis added]

Analysis

- [15] The petitioner argues that the arbitrator made the following errors in the decision:
- a) The arbitrator failed to consider or misapprehended the evidence that Mike moved into the suite on August 17, 2019 and lived there while renovations were being completed;
 - b) The arbitrator failed to consider the "extenuating circumstances" that led to the delay in moving into the suite.
- [16] The respondents respond that Mike did not testify at the hearing that he moved into the suite on August 17, 2019, nor did he submit any evidence showing same. The respondents further submit that the arbitrator did not fail to consider whether there were extenuating circumstances. Overall, they contend that there is no palpable, overriding error in the decision of the arbitrator and that the arbitrator's decision "was on a matter in respect of which the director has exclusive jurisdiction" and pursuant to the RTA is "final, conclusive and not open to question or review in any court."

- [17] It is unclear what evidence was before the arbitrator regarding when Mike moved into the suite.
- [18] In an affidavit sworn for this judicial review, Mike states that he "believes" that he testified during the hearing that he moved into the suite in August 2019. While the respondents in their response to petition deny that he so testified, that is a submission only. There is no evidence from them before me. The arbitrator found that Mike had moved some of his belongings into the suite on August 17, 2019 and that he and his family moved in on November 9, 2019.
- [19] The arbitrator had two receipts that Mike submitted as exhibits: one from a moving company dated August 17, 2019, and the other a receipt from the same moving company dated November 9, 2019.
- [20] Ultimately, the invoice and receipt are proof that there were two moving days -- one in the midst of renovations and the other at the end. But they are not proof that the arbitrator was made aware that Mike had moved into the suite in August 2019.
- [21] Accordingly, I am unable to conclude that the arbitrator was made aware that Mike moved into the suite in August 2019.
- [22] That Mike occupied the suite in August 2019 was critical to the arbitrator's conclusion at page 9 of the decision as evidenced by this passage:

I accept that neither the landlords nor their close family member occupied the rental unit for at least six months beginning with a reasonable period after the effective date of May 31, 2019 as indicated on the Two Month Notice. Instead, as stated by the landlord, they performed renovation extensive enough to require permits. I find that the landlord did not follow through on the intended purpose of the Notice until November 9, 2019 which is over 6 months after gaining vacant possession of the rental property I find that this far exceeds what could be considered as a reasonable period of time to follow through on the intended purpose of the Two Month Notice.

[Emphasis added]

- [23] In reaching this conclusion the arbitrator referenced s. 51(2) and paraphrased it in this way:
Section 51(2) of the Act states:

In addition to the amount payable under subsection one, if steps have not been taken to accomplish the stated purpose for ending the tenancy under section 49 within a reasonable time after the effective date of the notice, or the rental unit is not used for that stated purpose for at least six months beginning within a reasonable period after the effective date of the notice, the landlord,, or the purchaser, as applicable under section 49, must pay the tenant an amount that is the equivalent to 12 times the monthly rent payable under the tenancy agreement.

[Emphasis added]

[24] In assessing what constituted a "reasonable time" the arbitrator referred to the Residential Tenancy Policy Guideline 50, and reproduced passages of it as follows:

The Residential Tenancy Policy Guideline 50 (the "Policy Guideline") further explains:

A reasonable time is an amount of time that is fairly required for the landlord to start doing what they planned. Generally, this means taking steps to accomplish the purpose for ending the tenancy or using it for that purpose as soon as possible, or as soon as the circumstances permit.

It will usually be a short amount of time. For example, if a landlord ends a tenancy on the 31st of the month because the landlord's close family member intends to move in on the 15th of the next month, then a reasonable period to start using the rental unit would be about 15 days.

Accomplishing the Purpose/Using the Rental Unit

Section 51(2) of the RTA is clear that a landlord must pay compensation to a tenant (except in extenuating circumstances) if they end a tenancy under section 49 and do not take steps to accomplish that stated purpose or use the rental unit for that purpose for at least 6 months.

This means if a landlord gives a notice to end tenancy under section 49, and the reason for giving the notice is to occupy the rental unit or have a close family member occupy the rental unit, the landlord or their close family member must occupy the rental unit at the end of the tenancy. A landlord cannot renovate or repair the rental unit instead. The purpose that must be accomplished is the purpose on the notice to end tenancy.

[25] The arbitrator then rendered this decision:

I accept that neither the landlords nor their close family member occupied the rental unit for at least six months beginning with a reasonable period after the effective date of May 31, 2019 as indicated on the Two Month Notice. Instead, as stated by the landlord, they performed renovation extensive enough to require permits. I find that the landlord did not follow through on the intended purpose of the Notice until November 9, 2019 which is over 6 months after gaining vacant possession of the rental property I find that this far exceeds what could be considered as a reasonable period of time to follow through on the intended purpose of the Two Month Notice.

[Emphasis added]

[26] I am satisfied that the arbitrator made several errors in reaching this conclusion.

[27] First, instead of directly inserting the language of the section at the heart of the application, the arbitrator summarised it but in doing so, omitted a crucial aspect of it - the consideration of extenuating circumstances.

[28] Sections 51(2) and (3) of the RTA read as follows:

51 (2) Subject to subsection (3), the landlord or, if applicable, the purchaser who asked the landlord to give the notice must pay the tenant, in addition to the amount payable under subsection (1), an amount that is the equivalent of 12 times the monthly rent payable under the tenancy agreement if

- (a) steps have not been taken, within a reasonable period after the effective date of the notice, to accomplish the stated purpose for ending the tenancy, or
 - (b) the rental unit is not used for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.
- (3) The director may excuse the landlord or, if applicable, the purchaser who asked the landlord to give the notice from paying the tenant the amount required under subsection (2) if, in the director's opinion, extenuating circumstances prevented the landlord or the purchaser, as the case may be, from
- (a) accomplishing, within a reasonable period after the effective date of the notice, the stated purpose for ending the tenancy, or
 - (b) using the rental unit for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

[Emphasis added]

[29] The petitioners and the director of the RTB disagree as to whether it is incumbent on the arbitrator to consider extenuating circumstances. The petitioners take the position that if there is evidence of extenuating circumstances the adjudicator must consider it. The director disagrees, arguing that that there is nothing in the RTA that mandates that the director must or shall consider extenuating circumstances, stating that "such an interpretation would require the director to consider extenuating circumstances even in cases where the landlord does not attend the dispute resolution hearing." The director further submits that s. 51(3) "grants a discretionary authority to excuse a landlord from paying where extenuating circumstances are established. The director is not required to address arguments that are not made."

[30] The respondents made no submission regarding s. 51(3).

[31] While I agree with the director that s. 51(3) grants the director the discretion to excuse the landlord from paying a fine, I disagree with the director's other submissions. It is not a matter of the adjudicator taking into account evidence that is not before him/her.

[32] In my view, the plain reading of s. 51(2) is that if evidence of extenuating circumstances is presented, the adjudicator must consider it to determine whether those circumstances prevented the landlord from accomplishing, within a reasonable period after the effective date of the Notice, the stated purpose for ending the tenancy.

- [33] There was presented to the arbitrator evidence of circumstances which could be seen as extenuating, including the unforeseen scope of the renovations, the difficulties getting tradespeople to complete the work, the stop work order and resultant permits required by the municipality and that because of Mrs. Furtado's health issues she could not move in until the work was fully complete. Although the arbitrator recited these facts in the decision, the arbitrator failed to take them into consideration in determining whether the petitioners moved into the suite within a "reasonable time."
- [34] It was incumbent on the arbitrator to consider whether the evidence constituted extenuating circumstances that prevented the petitioners from occupying the suite earlier and if so, whether those circumstances would make it unreasonable and unjust to order the petitioners to pay compensation to the respondents.
- [35] The arbitrator not only failed to consider the evidence of extenuating circumstances as mandated by the RTA, the arbitrator completely removed the consideration of same out of the analysis by inaccurately paraphrasing the sections of the RTA.
- [36] As a result I am satisfied that the arbitrator erred and that the decision is unsupportable in both fact and law.

Conclusion

- [37] For the reasons above I am satisfied that the arbitrator's decision is patently unreasonable.
- [38] Given the uncontroverted evidence that Mike moved into the suite in August 2019 and what I find to be extenuating circumstances, I exercise my discretion not to remit the matter back to the director for reconsideration. Accordingly, I order that the decision and the monetary award to the respondents in the amount of \$22,001.04 plus \$100 costs be set aside.
- [39] That leaves the issue of costs. The tone of the emails and texts sent by the respondents to the petitioners following receipt of the Notice and continuing to the date of the hearing of this judicial review demonstrate that the respondents were unhappy with the way the tenancy ended. The evidence shows that the respondents filed this complaint with the RTB to get back at the petitioners for initially refusing to return their damage deposit and for disposing of some property the respondents left outside the suite when they moved. Their malice continues to today as reflected by their refusal to delay efforts to enforce the monetary order made by the arbitrator until after the decision of this judicial review. In all of the circumstances, I am satisfied that the petitioners are entitled to costs.

"C. A. Murray, J."

The Honourable Madam Justice Murray

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