

CANADA / JUDGMENT

Hughes v. Pavlovic

2011 BCSC 990

COURT

Supreme Court of British Columbia

DECIDED

22 July 2011

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2011 BCSC 990 Hughes v. Pavlovic IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Hughes v. Pavlovic, 2011 BCSC 990 Date: 20110722 Docket: 45916 Registry: Kamloops Re: The Section 2 and 5 of the Judicial Review Procedure Act and the Decision of Dispute Resolution Officer J. Yuen of the Residential Tenancy Branch, pronounced June 20, 2011, in File No. 776651, whose decision is sought to be reviewed. Between: David Hughes Petitioner And Vito Pavlovic, J. Yuen and Residential Tenancy Branch Respondents Before: The Honourable Mr. Justice Harris On judicial review from: the Residential Tenancy Branch, June 20, 2011, on file number 776651 Reasons for Judgment David Hughes appeared on his own behalf Counsel for Vito Pavlovic: G.A. Kay No one appeared on behalf of J. Yuen or the Residential Tenancy Branch Place and Date of Hearing: Kamloops, B.C. July 18, 2011 Place and Date of Judgment: Kamloops, B.C. July 22, 2011

- [1] This is an application for judicial review of the decision of a Dispute Resolution Officer of the Residential Tenancy Branch made on June 20, 2011. In that decision, the Officer concluded that the landlord was entitled to an Order of Possession and a monetary order for rental arrears. The orders were made as a result of the landlord pursuing a Direct Request Proceeding under s. 55(4) of the Residential Tenancy Act, SBC 2002, c.78, (the "Act") as amended.
- [2] The application before me arises because the tenant, Mr. Hughes, did not receive notice, in fact, of the Direct Request Proceeding. The landlord sent notice of that proceeding to Mr. Hughes by registered mail. This method of giving notice is permitted under the Act. When notice is given by registered mail, it is deemed to have been delivered within five days of the registration of the notice. The difficulty is that the day after the notice was registered a postal strike started and Mr. Hughes was not notified of the registered mail. The matter proceeded without Mr. Hughes knowledge. He says that is not right and the orders should be set aside.
- [3] The matter is, however, rather more complicated than this summary would suggest. It is necessary to delve into the facts in more detail to decide whether Mr. Hughes is on solid ground.

- [4] The evidence before the Officer was that on June 3, 2011 at 11:45 a.m. the landlord served on Mr. Hughes a Notice to End Tenancy for Unpaid Rent. The Notice was served by posting it on the tenant's door. There was a witness to this event. This method of serving a notice is contemplated by the Act. Section 90 of the Act says that the notice is deemed to have been received on the third day after it is attached.
- [5] The Act provides that when a landlord gives this notice, a tenant has a choice to pay the overdue rent, in which case the notice has no effect, or the tenant may dispute the notice by making an application for dispute resolution: see, s.46(4). If the tenant does neither of these things within 5 days of receiving the notice, the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and must vacate the rental unit by that date: see, s.46(5).
- [6] In this case, Mr. Hughes did not pay the overdue rent and he did not dispute the notice.
- [7] These were the circumstances before the Officer on June 20, 2011 when the landlord proceeded to seek the orders for possession and a monetary order for rental arrears. It is clear from the decision that the Officer considered the case on the basis that the tenant had been properly served by registered mail. The Officer had evidence that the mail had been registered. Under the Act service is deemed to have occurred within a certain time.
- [8] The Officer went on to decide that the landlord was entitled to an Order of Possession and a monetary order for unpaid rent because the tenant was conclusively presumed to have accepted the ending of the tenancy as he had not either paid the rent owing or disputed the notice.
- [9] At some stage, Mr. Hughes learned of these orders. He requested the Officer to correct the decision because of three errors. These were that the landlord did not serve the tenants with the Notice to End Tenancy, that the registered mail was not received, and that a new hearing should be held to permit the tenants to attend.
- [10] The Officer refused this request. He reiterated that he had found that the Notice to End Tenancy had been served by posting it on the door of the rental unit in front of a witness and that the tenant had neither paid the arrears, nor disputed the notice within five days. The Officer said that as a result there was a conclusive presumption that the tenant accepted that the tenancy ended. The Officer went on to say: On this basis, the landlord made an application under the Direct Request process, which does not involve a participatory hearing and is based only on documentary evidence. No appearance of the landlord nor the tenant was required. The fact that the Notice of Direct Request Proceeding was held up in the mail, would not have affected the outcome in any case.
- [11] As a practical matter, this is the decision which properly is the subject of a judicial review application.

- [12] Judicial review is based on the record before the administrative tribunal. There is nothing to suggest that the Officer had evidence from Mr. Hughes that the Notice to End Tenancy had not been served. Rather, that allegation had been made as one ground to correct the original decision. It may reasonably be inferred that Mr. Hughes says the notice was not served because he did not receive it.
- [13] The Officer went on to conclude that the fact that notice of the Direct Request Proceeding was held up in the mail would not have affected the outcome. It is not apparent to me that this conclusion is correct. If Mr. Hughes had received notice of the hearing he would have had an opportunity to present evidence in at least documentary form to support his position that he had not received the Notice to End Tenancy. The Officer would have been required to consider that evidence and weigh it against the evidence provided by the landlord. In my view, it would not have been open to the Officer to ignore Mr. Hughes' evidence on this point. The fact that a notice is deemed to be received on the third day after posting it is not a conclusive presumption. In my view, it is a rebuttable presumption. Fairness requires that evidence said to rebut it be considered. It is, of course, for the Officer to make the findings of fact.
- [14] The finding of fact that the tenants had been served with and received the Notice to End Tenancy triggered the application of the conclusive presumption that led to the orders being granted. If the Officer had had the evidence from Mr. Hughes that he had not received that notice, then, depending on the facts found, the conclusive presumption may not have been triggered and the orders may not have been made. Mr. Hughes did not get the opportunity to present that evidence at the original hearing because he had not in fact received notice of it. The presumption that deems registered mail to have been delivered is rebutted on the evidence.
- [15] The question then is whether the refusal of the Officer to "correct" the decision and to allow a new hearing is a basis to set the decision aside on judicial review. In my view, it is. The standard of review applicable to this case is found in s. 58 (2)(b) of the Administrative Tribunals Act, SBC 2004, c. 45. That section stipulates that questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all the circumstances, the tribunal acted fairly.
- [16] This matter involves issues of natural justice and procedural fairness. The issue is whether Mr. Hughes, who did not in fact have notice of the hearing that led to the orders, should have been given an opportunity to present his case that he did not receive the Notice to End Tenancy. In my view the tribunal did not act fairly, according to the principles of natural justice and procedural fairness, in denying him that opportunity. The orders made are serious and affect his rights and those of his co-tenant. Natural justice requires that he have the opportunity to present his case that he would have had under the Act had he been served with notice of the hearing.

[17] Accordingly, the decisions of June 20, 2011, corrected June 27, 2011 and July 5, 2011 are set aside and the matter is remitted to the tribunal for a new hearing in accordance with the provisions of the Act. Mr. Hughes is entitled to his costs in accordance with Schedule B. "D.C. Harris J." HARRIS J.

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