
CANADA / JUDGMENT

Ingram v. Wilkinson

2012 BCCA 507

COURT

British Columbia Court of Appeal

DECIDED

7 December 2012

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2012 BCCA 507 Ingram v. Wilkinson

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Ingram v. Wilkinson,

2012 BCCA 507

Date: 201201207

Docket: CA039898; CA039897

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Between:

Gordon Brent Ingram, Tenant

Appellant

(Petitioner)

And

Bryan Wilkinson, Dispute Resolution Officer under the
Residential Tenancy Act and Rossmore Enterprises Ltd.

Respondents

(Respondents)

- and -

Docket: CA039897

Between:

Rossmore Enterprises Ltd.

Respondent

(Claimant)

And

Gordon Brent Ingram

Appellant

(Respondent)

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Hall

The Honourable Madam Justice Garson

On appeal from Supreme Court of British Columbia, April 5, 2012

(Ingram v. Wilkinson, Vancouver Registry S114448)

Oral Reasons for Judgment

Counsel for the Appellant:

D.J. O'Donnell

Counsel for the Respondent, Rossmore Enterprises Ltd.:

C.N. Mangan

Place and Date of Hearing:

Vancouver, British Columbia

December 7, 2012

Place and Date of Judgment:

Vancouver, British Columbia

December 7, 2012

[1] HALL J.A.: The appellant, Mr. Ingram, has occupied rental premises in Vancouver since 1998. The premises are described as, and zoned for, artists' live-work studios. This is a special type of premises created by the City in the 1990s to address a perceived demand. The premises, before their conversion, were formerly warehouse premises.

- [2] The respondent Rossmore Enterprises Ltd. ("Rossmore") is the landlord. In May of 2011, Rossmore considered the appellant was not performing as a proper tenant and served an eviction notice, purporting to proceed under the Residential Tenancy Act, R.S.B.C. 2002, c. 78 [the RTA]. The appellant disputed the eviction notice and the matter came on for adjudication before a Dispute Resolution Officer. The officer determined on June 5, 2011 that the RTA did not apply to the dispute. His reasoning was said to be based on a judgment of this Court, *Gardiner v. 857 Beatty Street Project*, 2008 BCCA 82. In that decision, this Court, dealing with premises with a general similarity to the premises here, found the RTA was inapplicable to a tenancy.
- [3] What happened thereafter is set forth in the reasons of Hinkson J.A. dated May 11, 2012:
- [7] The applicant sought judicial review of the decision of the Officer (the "Petition Action"). It is his position that the Officer erred in finding that the RTA did not apply to his tenancy. The matter came before Mr. Justice Wong on June 30, 2011. Wong J. granted indigency status to the applicant and stayed his eviction until the Petition Action could be heard ("Injunction").
- [8] On June 30, 2011 Rossmore served the applicant with a 1 month's Clear Notice of Termination of Lease under the Commercial Tenancy Act, R.S.B.C. 1996, c. 57 ("CTA"), terminating the lease effective July 31, 2011.
- [9] The applicant supplied Rossmore with a cheque in the total amount of \$1,108.00 for his July rent. Thereafter Rossmore refused to accept rental payments but proposed that the applicant pay \$1108.00 per month as payment in lieu of potential damages until his petition was heard and resolved. Mr. Ingram refused to pay any amount for damages. On October 1, 2011 Mr. Ingram supplied Rossmore with a cheque in the amount of \$1,108.00, which was successfully deposited by Rossmore. Since then, he has made no payments of any sort to Rossmore.
- [10] On January 5, 2012 Mr. Justice Burnyeat heard an application by Rossmore to vary the terms of the Injunction. He gave leave to Rossmore to commence a Writ of Possession Action and take all steps up to the hearing of the Writ of Possession, which was to be heard at the same time as the Petition Action.
- [11] On February 15, 2012 Mr. Justice McEwan heard a further application by Rossmore and ordered that amounts in damages equivalent to rent due be paid into court on a defined schedule. The applicant did not make any of those payments.
- [12] Rossmore then brought an application in the Petition Action seeking to have it dismissed because the applicant had, at that point, made no payment into court. Rossmore also brought an application in the Writ of Possession Action seeking certain procedural relief including a determination under s. 18 of the CTA and setting the date for the hearing regarding the Writ of Possession for April 5, 2012.

[13] Mr. Justice Barrow heard the applications on March 22, 2012 and made two orders. The first order, dealing with the Petition action provided, among other things, that the applicant pay the sum of \$750 into Court the following day, and that the further sum of \$1,100 be paid into Court by the applicant on or before 4:00 p.m. Friday, March 30, 2012. Counsel agreed to the form of the first order, and submitted a copy of that form of order signed by both of them to the Registry for signature by Barrow J. and then entry of the order. On April 5, 2012, the Registry declined to accept the order as it contained two references to what counsel before me referred to as administrative provisions purporting to dismiss the applicant's petition if the payment terms of the order were not complied with.

[14] Barrow J. provided a hand written note to the Registry which stated:

I agree with these comments [respecting the two references to "administrative terms"]. 2(b) and 4(b) should not be in the order. What I intended was an application by requisition that I would hear, all can appear by telephone.

[15] In his second order of March 22, 2012, regarding the Writ of Possession Action, he allowed the application for the Writ of Possession to proceed. That order stated:

Without prejudice to the argument of the Defendant that this is a matter to which the Commercial Tenancy Act, RSBC 1996 c. 57 ("CTA") does not have application:

- (a) the notice requirement per s. 20 of the CTA is deemed to have been met today; and
- (b) the threshold questions in s. 19 and the substantive question in s. 21 of the CTA will be dealt with together on April 5, 2012 or such other date as is ordered or agreed upon at that time.

[16] On March 23, 2012 the applicant deposited \$500 of the \$750 which was to be deposited and filed an affidavit detailing his financial situation and a second in support of his indigency so he could file a Reply and Counter Claim in the Writ of Possession Action. He paid no part of the \$1,100 into court as ordered by Barrow J.

[17] On April 5, 2012 Mr. Justice Meyers heard both Rossmore's application to dismiss the applicant's Petition Action and Rossmore's application for a Writ of Possession.

[18] In oral reasons pronounced that day granting the application for the Writ of Possession, Myers J. also referred to his dismissal of the Petition Action the same day. Counsel did not produce a transcription of the reasons for judgment dismissing the Petition Action. In the reasons for judgement with respect to the Writ of Possession, Myers J. explained at paras 3 - 5:

[3] In a separate proceeding, Mr. Ingram sought judicial review of that decision [of the Residential Tenancy Board]. I dismissed the petition for judicial review because Mr. Ingram did not comply with an order made by Mr. Justice Barrow requiring the disputed rents to be paid into court.

- [4] In the current proceeding [the Writ of Possession Action], Mr. Ingram seeks to raise as a defence to the writ of possession the decision of the Board with respect to its jurisdiction. In other words, Mr. Ingram wants to raise the identical issues that were the subject of his judicial review application [the Petition Action].
- [5] I do not agree that that is open to Mr. Ingram. The proper way to challenge the decision of the Board was in the judicial review petition. The petition having been dismissed, the Board's decision stands. The application for the writ of possession must be determined on that basis. I also note that Barrow J.'s order specifically contemplated that the petition would be dismissed if his order was not complied with. To allow Mr. Ingram to raise the identical matters in this proceeding would allow him to circumvent that order.
- [19] On May 2, 2012 the applicant filed Notices of Appeal of the orders of Meyers J. in relation to the Petition Action and the Writ of Possession Action and accompanying motions.
- [4] One thing that may be observed about the proceedings in the trial court is that several judges were involved. That is often going to be the situation, but in this case it has not worked advantageously for anyone.
- [5] It seems that the appellant did not adhere in any timely way to making payments required under the February 2012 order of McEwan J. The respondent landlord then in late March sought an order dismissing the petition and as well applied for an order for possession of the premises. The date for hearing the application for a writ of possession was on March 22 set by Barrow J. for April 5, 2012. Concurrently he ordered payments into Court totalling \$1,850 by March 30, 2012. An order was submitted but on April 5, the Registry declined the order. Barrow J. agreed the order was inappropriate in including automatic provisions for dismissal of the petition for judicial review if the payments were not made as he had ordered. The only amount paid by the appellant was \$500. He claimed he was indigent. On April 5, the matter came before Myers J. and what occurred is referred to in the reasons of Hinkson J.A.:
- [17] On April 5, 2012 Mr. Justice Myers heard both Rossmore's application to dismiss the applicant's Petition Action and Rossmore's application for a Writ of Possession.
- [18] In oral reasons pronounced that day granting the application for the Writ of Possession, Myers J. also referred to his dismissal of the Petition Action the same day. Counsel did not produce a transcription of the reasons for judgment dismissing the Petition Action. In the reasons for judgement with respect to the Writ of Possession, Myers J. explained at paras 3 - 5:
- [3] In a separate proceeding, Mr. Ingram sought judicial review of that decision [of the Residential Tenancy Board]. I dismissed the petition for judicial review because Mr. Ingram did not comply with an order made by Mr. Justice Barrow requiring the disputed rents to be paid into court.

- [4] In the current proceeding [the Writ of Possession Action], Mr. Ingram seeks to raise as a defence to the writ of possession the decision of the Board with respect to its jurisdiction. In other words, Mr. Ingram wants to raise the identical issues that were the subject of his judicial review application [the Petition Action].
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- [6] Hinkson J.A. on May 11, 2012 granted the appellant a stay of the eviction notice pending a hearing in this Court. In para. 28 of his reasons, Hinkson J.A. observed:
- ... Myers J. may have felt constrained by what he was advised to have been the form of order of Barrow J., and in the result, have failed to exercise his discretion to entertain evidence and submissions from the applicant as to why he should have been given a further accommodation. At this juncture I do not consider that I should consider what might have occurred if that further evidence and submissions had been made. If Myers J. felt constrained in the exercise of his discretion by what he understood to be the order of Barrow J., the applicant has a reasonable basis for his appeal.
- [7] I am of the opinion that these comments of Hinkson J.A. reflect what I perceive as the difficulty in sustaining the orders of Myers J. It seems clear to me that the learned judge was on April 5, 2012 operating under a misapprehension of the actual state of events. As Hinkson J.A. observed in an earlier portion of his reasons, this unsatisfactory situation might well have been avoided if counsel had been able to put before the judge a transcript of what had occurred before Barrow J. but this was not done.
- [8] As matters stand, the petition questioning the issue of what statute ought to govern the proceedings has never been adjudicated. Whether it should be adjudicated upon, having regard to the circumstance of continuing non-compliance with court orders by the appellant is of course another question. This Court is however not able to satisfactorily address questions raised by the petition since there has been no adjudication of issues in Supreme Court. Myers J. dismissed the petition because of non-compliance with orders on the part of the appellant. He also decided to grant a writ of possession having regard to his perception of the non-compliant conduct of the appellant. As I noted above, Myers J. was not fully informed about all that had occurred in the earlier proceedings presided over by Barrow J.

- [9] Given the circumstances, I consider there must be some uncertainty as to whether Myers J. would have granted the orders he did on April 5, 2012, had he been fully apprised of all relevant facts. In such a situation, I consider that the only appropriate course open to this Court is to allow an appeal from the orders granted by Myers J. The case should be remitted to Supreme Court for hearing.
- [10] While I am reluctant to intrude on the decision-making function of the Supreme Court, having regard to the unfortunate history of this matter, I venture to suggest that this case should in a timely way be brought to the attention of the Associate Chief Justice for him to consider assigning a single judge to hear all matters in controversy between the parties. Such a decision is of course entirely within the purview of the Associate Chief Justice but perhaps such a direction could forestall any further delay or confusion in this case.
- [11] Concerning the issue of costs, I would direct that costs in this appeal proceeding ought to be in the cause of the decision of the case in Supreme Court.
- [12] It occurs to me, as well, that in light of the disposition given by Hinkson J.A., about staying the matter pending the hearing of this appeal, and I am saying that is staying the execution of the writ of possession, one might say the eviction of the appellant, that it would be appropriate for this Court to make some relatively short term order in view of the fact that the matter is going to have to be dealt with in Supreme Court. The order that I propose to make in that regard is that the stay order that was granted by Hinkson J.A. pending a hearing in this Court should be extended for some relatively short period of time. I propose to extend the stay order that was granted by Hinkson J.A. to January 15, 2013. That will allow the Supreme Court to take jurisdiction again in the matter. If there is any necessity for any further applications for a stay, such an application would be made in the court in which the proceedings are extant.
- [13] The net result of all that is that the matter is remitted for hearing to the Supreme Court and the stay ordered by Hinkson J.A. in May will continue until January 15, 2013. I think that disposes of all matters that I would consider need adjudication in the matter.
- [14] NEWBURY J.A.: I agree.
- [15] GARSON J.A.: I agree.
- [16] NEWBURY J.A.: The appeal is allowed and the stay is extended until January 15, 2013.

"The Honourable Mr. Justice Hall"

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