

CANADA / JUDGMENT

Jay v. The Owners Strata Plan NW 3353

2018 BCSC 780

COURT

Supreme Court of British Columbia

DECIDED

11 May 2018

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2018 BCSC 780 Jay v. The Owners Strata Plan NW 3353

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jay v. The Owners Strata Plan NW 3353,

2018 BCSC 780

Date: 20180511

Docket: S1611707

Registry: Vancouver

Between:

Douglas Jay

Petitioner

And

The Owners Strata Plan NW 3353

Respondent

Before: The Honourable Madam Justice D.C. MacDonald

Reasons for Judgment

Counsel for the Petitioner:

M.D. Carter

Counsel for the Respondent:

L.N. Mackie

Place and Dates of Hearing:

Vancouver, B.C.

March 1, 2018

Place and Date of Judgment:

Vancouver, B.C.

May 11, 2018

Background

- [1] This is a dispute between Douglas Jay, the petitioner, and a strata council (the "Strata Council") of which he is a former member. In his original petition, Mr. Jay disputed the Strata Council's position that he had resigned in anger from his position on the Strata Council in March 2016.
- [2] One of the Strata Council's responses to Mr. Jay's petition was that he was not eligible to be a member of the Strata Council because he is neither an owner nor a tenant of a strata unit.
- [3] Mr. Jay has brought an application to seek a determination of whether he is a tenant or is otherwise eligible to be an elected member of the Strata Council. Consequently, I need to address the preliminary issue of whether he is a tenant under the Strata Property Act, S.B.C. 1998, c. 43 [SPA] or whether there is another basis for allowing him to be a member of the Strata Council.

Issues

- [4] Three issues are before me:
 - i) Is the petitioner a tenant under the SPA?
 - ii) If so, has the petitioner been assigned the right to stand for Strata Council of the Strata Corporation under either s. 147 or s. 148 of the SPA?
 - iii) In the alternative, should the respondent be estopped from denying that the petitioner is eligible to be a member of the Strata Council?
- [5] The dispute regarding the petitioner's alleged resignation from the Strata Council is not before me.

Facts

- [6] Mr. Jay is the occupant of Strata Lot 35 in Strata Plan NW 3353 (the "Strata Corporation"). This is a condominium in the City of Burnaby. Strata Lot 35 is owned in joint tenancy by the petitioner's father and stepmother, Timothy and Susan Jay. The Jays reside in Nelson, BC.

- [7] The respondent is a residential strata corporation governed by the SPA and the Strata Corporation's bylaws. The Strata Corporation consists of 127 strata lots in a condominium building situated at 4825 Hazel Street in Burnaby.
- [8] The petitioner has been residing in Strata Lot 35 since 2009. The petitioner deposed that from 2009 to 2011, he paid to his parents amounts that were roughly equal to the monthly maintenance fees in exchange for living in Strata Lot 35. The petitioner deposed that from 2011 forward, he paid certain expenses related to Strata Lot 35, such as special levies, in exchange for residing in Strata Lot 35. The petitioner provided no documentary evidence regarding these payments.
- [9] In April 2009, the petitioner provided the respondent with a letter from Timothy Jay appointing the petitioner as his representative with respect to all matters pertaining to Strata Lot 35 (the "letter of appointment"). This included attending meetings, voting, and standing for election to the Strata Council. The letter does not state that the petitioner is a tenant and it does not refer to a lease.
- [10] The other registered owner of Strata Lot 35, Susan Jay, has not been involved in any discussions pertaining to the petitioner's occupation of the property. The petitioner gave evidence that Susan Jay delegated her responsibilities to his father, Timothy Jay. However, the petitioner acknowledged in cross-examination that because Ms. Jay's English is not very good, he does not know to what extent she is aware of his living situation in Strata Lot 35. The letter of appointment was executed only by Mr. Timothy Jay.
- [11] In February 2011, the petitioner attended the Annual General Meeting ("AGM") of the Strata Corporation. Prior to the meeting, the petitioner confirmed with the respondent's property manager, Ms. Barbara Fisher, that she had received the letter of appointment and that it was on file. During the actual meeting, Ms. Fisher confirmed that the petitioner was eligible to vote.
- [12] At the 2012 AGM, the petitioner stood for election to the Strata Council. The petitioner was elected, and he was subsequently re-elected each year through to and including at the February 29, 2016 AGM. During those years, the petitioner served as president of the Strata Council.
- [13] Vony Kam was a member of the Strata Council in both 2014 and 2015. The petitioner invited Ms. Kam to join the Strata Council. Prior to joining, Ms. Kam questioned her eligibility to serve. The petitioner advised Ms. Kam that because she was the child of a property owner, she was permitted to participate.
- [14] During a Strata Council meeting on March 30, 2016, the petitioner became frustrated and left the meeting. According to members of the Strata Council, the petitioner resigned at that time. The petitioner denies that he resigned from the Strata Council.

- [15] On December 19, 2016, the petitioner brought a petition for a declaration that he did not resign from the Strata Council and an order that the minutes be corrected. In response to his petition, the respondent claimed that the petitioner was not eligible to be a member of the Strata Council because the petitioner was not an owner or tenant of Strata Lot 35.
- [16] On February 2, 2017, the petitioner was cross-examined on his affidavits. He refused to answer some questions respecting his tenancy.
- [17] The petitioner stated during this cross-examination that his occupation of Strata Lot 35 is a family arrangement with his father and that there is no specific rental amount. He deposed that there are no payment deadlines or requirements with respect to this family arrangement.
- [18] During cross-examination, the petitioner stated that all payments made to his father were in person or deposited to a joint line of credit or bank account that he shared with his father. The petitioner conceded that since 2011, he had not made any regular payments for occupying Strata Lot 35. Instead, he took care of the special levies and paid "little bits here and there". He has not provided documentary evidence of these periodic payments made to his father.
- [19] Mr. Josip Jurilj is a member of the Strata Council. He deposed that during 2016, the petitioner criticized the Strata Council and worked against its efforts. He deposed that the petitioner tore down Strata Council notices posted in the building and tried to bully Strata Council members. In response, the petitioner deposed that "I have not torn down notices posted in the building, nor bullied the respondent or Strata Council."
- [20] In cross-examination, the respondent referred the petitioner to screenshots of videotape evidence showing a person tearing down notices from the common areas of the property. The petitioner agreed that he was in the screenshots. He further agreed that he did remove various notices of a trivial nature from the property.
- [21] The petitioner objected to the screenshot evidence on the basis that it was not properly authenticated. I allowed the evidence in, subject to determining whether it was admissible and, if so, what weight to give the evidence.

Legal Issues

Eligibility to be a Member of a Strata Council

- [22] This dispute is governed by the SPA and the Residential Tenancy Act, S.B.C. 2002, c. 78 [RTA]. The SPA distinguishes between tenants and occupants. As defined in s. 1 of the SPA, an occupant is "a person, other than an owner or tenant, who occupies a strata lot". A tenant is "a person who rents all or part of a strata lot, and includes a subtenant but does not include a leasehold tenant in a leasehold strata plan as defined in section 199 or a tenant for life under a registered life estate".

[23] According to s. 28 of the SPA, subject to the strata corporation's bylaws, the only individuals permitted to act as strata council members are owners, individuals representing corporate owners, or tenants who have been assigned a landlord's right to stand for strata council. Section 28 does not list occupants as a class of persons eligible to be members of a strata council.

[24] Section 28 of the SPA reads as follows:

(1) The only persons who may be council members are the following:

- (a) owners;
 - (b) individuals representing corporate owners;
 - (c) tenants who, under section 147 or 148, have been assigned a landlord's right to stand for council.
- (2) Despite subsection (1), the strata corporation may, by a bylaw passed at an annual or special general meeting held after the first annual general meeting, allow classes of persons, other than those referred to in subsection (1), to be council members.
- (3) Despite this section, a strata corporation may, by bylaw, provide that no person may stand for council or continue to be on council with respect to a strata lot if the strata corporation is entitled to register a lien against that strata lot under section 116 (1).

[25] Since the petitioner is not an owner or an individual representing a corporate owner, he must be a tenant in order to be permitted to act as a Strata Council member. The bylaws do not allow a class of persons other than those provided for under the SPA to be members of the Strata Council.

[26] The SPA does not define the term "rent". The RTA defines rent in s. 1 as:

money paid or agreed to be paid, or value or a right given or agreed to be given, by or on behalf of a tenant to a landlord in return for the right to possess a rental unit, for the use of common areas and for services or facilities, but does not include any of the following:

- (a) a security deposit;
- (b) a pet damage deposit;
- (c) a fee prescribed under section 97 (2) (k) ...

Assignment of Right to Stand for Strata Council

[27] Section 28 of the SPA provides that a tenant may be a strata council member if he or she has been assigned the landlord's right to stand for strata council under s. 147 or s. 148 of the SPA.

[28] Section 147 of the SPA states:

- (1) A landlord may assign to a tenant some or all of the powers and duties of the landlord that arise under this Act, the bylaws or the rules, but may not assign to a tenant the landlord's responsibility under section 131 for fines or the costs of remedying a contravention of the bylaws or rules.
- (2) The assignment is not effective until the landlord gives the strata corporation a written notice stating all of the following:
 - (a) the name of the tenant to whom the assignment is made;
 - (b) the powers and duties that have been assigned;
 - (c) the time period during which the assignment is effective.
- [29] Section 147 of the SPA provides that a landlord may assign a tenant some or all of the landlord's powers and duties under the SPA, the bylaws or the rules, subject to certain exceptions. The assignment is not effective until the landlord provides the strata corporation with a written notice stating the name of the tenant to whom the assignment is made, the powers and duties that are assigned to the tenant, and the time period during which the assignment is effective.
- [30] Section 148 of the SPA provides:
 - (1) In this section, "long term lease" means a lease to the same person for a set term of 3 years or more.
 - (2) If a residential strata lot is leased under a long term lease, the tenant is assigned the powers and duties of the landlord under this Act, the bylaws and the rules for the term of the lease.
 - (3) Before exercising any powers of the landlord, the tenant must have given to the strata corporation written notice of the assignment referred to in subsection (2), stating the name of the tenant and the time period during which the lease is effective.
 - (4) The strata corporation must give a copy of the notice referred to in subsection (3) to the landlord and to the owner.
 - (5) The assignment does not include an assignment of the landlord's responsibility under section 131 for fines or the costs of remedying a contravention of the bylaws or rules.
 - (6) The tenant must not, without the owner's consent, exercise any power or right of an owner
 - (a) to acquire or dispose of land,
 - (b) to cancel or amend the strata plan, or
 - (c) to do anything that would affect the owner's interest in the strata lot, common property or land that is a common asset.

- (7) The landlord must not deal with his or her interest in the strata lot, common property or land that is a common asset in a way that unreasonably interferes with the rights of the tenant under the lease or assignment.
- [31] Section 148 of the SPA governs long-term leases. Prior to exercising any powers, the tenant must provide to the strata corporation written notice of the assignment stating their name and the time period during which the lease is effective.
- [32] When the landlord rents all or part of their property, s. 146 of the SPA requires the landlord to provide the strata corporation with a notice of tenant's responsibilities, signed by the tenants. Section 146 of the SPA provides:
- (1) Before a landlord rents all or part of a residential strata lot, the landlord must give the prospective tenant
 - (a) the current bylaws and rules, and
 - (b) a Notice of Tenant's Responsibilities in the prescribed form.
 - (2) Within 2 weeks of renting all or part of a residential strata lot, the landlord must give the strata corporation a copy of the notice signed by the tenant.
 - (3) If a landlord fails to comply with subsection (1) or (2), the tenant
 - (a) is still bound by the bylaws and rules, but
 - (b) may, within 90 days of learning of the landlord's failure to comply, end the tenancy agreement without penalty by giving notice to the landlord.
 - (4) If a tenant ends a tenancy agreement under subsection (3), the landlord must pay the tenant's reasonable moving expenses to a maximum of one month's rent.

Estoppel by Convention

- [33] The petitioner argues in the alternative that this Court should apply the doctrine of estoppel by convention to prevent the respondent from denying that he is a tenant and therefore ineligible to be a member of the Strata Council. The petitioner argues that because the Strata Corporation assumed he was a tenant between 2012 and 2016, it is now prevented from asserting its legal position that the petitioner is not a tenant.
- [34] The doctrine of estoppel by convention prevents a party from denying the truth of mutually agreed-upon facts if the result would be unjust or unconscionable: *Christensen v. The Owners, Strata Plan KAS468*, 2013 BCSC 1714 [Christensen] at paras. 41-42.
- [35] The doctrine of estoppel by convention has two requirements. First, it is founded on an agreed statement of facts, the truth of which has been assumed as the basis of a transaction into which the parties have entered. Where the parties have acted upon such an assumption, each will be estopped against the other from questioning the truth of the statement of fact that was assumed. Second, it must be unjust or unconscionable to allow one party to resile

from this common assumption. The party asserting the estoppel must establish that "it would suffer detriment if the other party is permitted to resile from the common assumption": Christensen at para. 42; Vancouver City Savings Credit Union v. Norenger Development (Canada) Inc., 2002 BCSC 934 at para. 76.

- [36] Estoppel by convention does not apply if it is contrary to public policy. Parties are not able to opt out of statutory protections or to confer a status to which a party is not legally entitled: see Halsbury's Laws of Canada - Estoppel (2016 Reissue, online ed.) at HES-92. A statutory right cannot be removed by estoppel: Blygh v. Wallace, [1950] B.C.J. No. 88 (C.A.) at paras. 8-9.

Costs

- [37] The court may award special costs against a person whose conduct is found to be reprehensible. However, a party seeking special costs must demonstrate exceptional circumstances to justify such an order. A court must exercise restraint in awarding special costs.

Law Applied to the Facts

Dispute about Screenshot Evidence

- [38] The respondent referred to screenshots of videotape evidence to establish that the petitioner discredited and undermined the Strata Council by tearing down notices and bullying members of the Strata Council. In addition, the respondent argued that these screenshots demonstrated that the petitioner's evidence was inconsistent and disingenuous. The petitioner objected to the screenshot evidence on the basis that it was not properly authenticated.
- [39] In his second affidavit, the petitioner deposed that "I have not torn down notices posted in the building, nor bullied the respondent or Strata Council." However, under cross-examination the screenshots were put to the petitioner and he agreed that it was he in the photos. His lengthy explanation regarding his earlier evidence was that he assumed that he was being questioned in another context. This explanation lacked credibility. Ultimately he conceded in cross-examination that he did remove notices from the common areas. His evidence under cross-examination contradicted his earlier affidavit evidence.
- [40] The petitioner has conceded that he did in fact tear down notices. Since that is not in issue, the screenshots are irrelevant and inadmissible.

Tenancy

- [41] The petitioner argues that he is a tenant. He relies on periodic payments he made to his father and the letter of appointment from his father assigning all matters pertaining to the strata unit and the Strata Council to him.

- [42] The respondent argues that the petitioner is not a tenant since the letter of appointment did not refer to a tenancy arrangement or to a lease. The respondent further argues that the petitioner has provided no concrete evidence that he has paid rent of any sort to his father since 2011. The respondent urges me to conclude that the petitioner does not meet the definition of a tenant under the legislation.
- [43] I agree with the respondent that the petitioner is not a tenant.
- [44] First, there is no written evidence of a tenancy relationship as is necessary under s. 28 of the SPA. There was no evidence from the owners of Strata Lot 35 that the petitioner is in a tenancy relationship with them as required under s. 28 and ss. 147 and 148 of the SPA.
- [45] The April 2009 letter of appointment naming the petitioner as his father's representative did not fulfil all of the requirements under s. 147 of the SPA. An assignment under s. 147 requires that the landlord provide the name of the tenant to whom the assignment is made, the powers and duties that are assigned to the tenant, and the time period during which the assignment is effective. These requirements were not met here because the letter provides no evidence that the petitioner was a tenant. Moreover, the letter regarding the assignment of rights was not executed by both registered owners of Strata Lot 35. There is no evidence that Susan Jay is even aware that the petitioner is residing in the strata unit.
- [46] Second, there was no notification from the owners of the strata unit to the Strata Corporation that they had rented all or part of their unit pursuant to s. 146 of the SPA. Subsequent to the petition, neither the petitioner nor the registered owners provided the Strata Corporation with a Form K Notice of Tenant's Responsibilities. Pursuant to s. 146 of the SPA, the landlord must provide the strata corporation with a copy of such notice signed by the tenant within two weeks of the rental.
- [47] With respect to s. 148, the petitioner did not provide the Strata Corporation with written notice of the assignment indicating for how long it would be effective, and confirming that the petitioner was a tenant.
- [48] Third, the petitioner has not asserted that he paid the strata unit owners any form of regular rent since 2011. Although the petitioner deposed that he made periodic payments to the registered owners in the past and irregular payments since 2011, he tendered no written evidence of any payments. Such evidence would be easily obtainable.
- [49] The petitioner stated that the respondent's argument is based on an overly technical application of the SPA. He further argued that tenancy agreements can be implied. If the petitioner had provided proof of payment of rent, or affidavit evidence from one of the registered owners, I might well have been satisfied that there was a tenancy arrangement in place. The petitioner had the opportunity to remedy these issues since commencing the litigation. Because he did not do so, I cannot imply a tenancy.

- [50] With respect to the lack of affidavit evidence from the petitioner's father to establish a tenancy relationship, the petitioner argued that since the respondent raised the issue of the tenancy, the respondent had the onus to call the witness. I do not accept this argument. The petitioner is the party applying for a declaration that he is a tenant, and as a result the onus is on him to establish the tenancy. Further, since it is his father, common sense dictates that the petitioner was in the best position to produce the affidavit. There was some evidence that his father promised to do so but ultimately he did not. The reason given by the petitioner regarding why his father did not provide an affidavit was unsatisfactory.
- [51] Although the respondent did not go so far as to ask me to draw an adverse inference due to the lack of this evidence, there is certainly a suggestion that the evidence from the father would not have helped the petitioner. I do not need to go as far as to draw an adverse inference in the circumstances. It is sufficient to say that the petitioner has not established that he is renting Strata Lot 35.
- [52] Without affidavit evidence from the registered strata unit owners, and without evidence of payments, I am unable to conclude that the petitioner is a tenant. The petitioner has not established that he is a tenant giving him a right to stand for election to Strata Council.

Assignment of Rights

- [53] For the reasons provided above, the April 2009 letter of appointment naming the petitioner as his father's representative did not fulfil all the requirements under the SPA. There was nothing in the letter asserting that the petitioner was in a tenancy relationship as is required by the SPA.

Estoppel

- [54] In terms of the estoppel argument, the respondent pointed out that the matter was not pleaded. I am not persuaded that a legal argument must be pleaded but in any event, the parties require an answer and I intend to address this issue.
- [55] Although the parties did operate on an assumed statement of facts for a number of years, the petitioner has not met the second requirement to establish an estoppel. The petitioner has not proven that it would be unjust or unconscionable for the respondent to resile from its common assumption. The petitioner had an easy remedy. He simply needed to provide the Strata Corporation with concrete evidence of payment or other compensation to establish a tenancy. Alternatively, the petitioner's father could have deposed that he is renting Strata Lot 35 to the petitioner.
- [56] Consequently, I do not have to determine the issue of whether this estoppel would be contrary to public policy.

Conclusion

[57] The petitioner's application for an order that he be declared a tenant is dismissed. I also dismiss his request for a declaration that he has been assigned the right to stand for election to the Strata Council under s. 147 or s. 148 of the SPA. Lastly, I dismiss the petitioner's request for a declaration that the respondent be estopped from denying that he is eligible to be a member of the Strata Council.

Costs

[58] The respondent requested special costs on the basis that: the petitioner refused to answer questions on his cross-examination which was ordered by this Court; the petitioner failed to provide sufficient evidence to establish his tenancy; the petitioner knowingly misrepresented Ms. Kam's participation on the previous Strata Council and his role in allowing her to participate; and the petitioner actively discredited and undermined the Strata Council.

[59] This is not a case where an award of special costs is appropriate. The petitioner has not engaged in what I consider to be reprehensible conduct: see *Garcia v. Crestbrook Forest Industries Ltd.*, [1994] B.C.J. No. 2486 (Q.L.) (C.A.).

[60] The respondent is entitled to costs at Scale B.

"The Honourable Madam Justice D.C. MacDonald"

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