CANADA / JUDGMENT

Johal v. Damiano

2019 BCSC 1747

COURT
Supreme Court of British Columbia

DECIDED
11 October 2019

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2019 BCSC 1747 Johal v. Damiano

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Johal v. Damiano,

2019 BCSC 1747

Date: 20191011

Docket: 215931

Registry: New Westminster

Between:

Amarjit Johal and Kamaljit Johal

Petitioners

And

John Henry Damiano

Respondent

Before: The Honourable Madam Justice E. McDonald

On judicial review from: A Decision of the Residential Tenancy Branch,

dated May 24, 2019

Reasons for Judgment

Representative for the Petitioners:

H. Durna

Counsel for the Respondent:

S. You

Place and Date of Hearing:

New Westminster, B.C.

September 24, 2019

Place and Date of Judgment:

New Westminster, B.C.

October 11, 2019

APPLICATION

[1] The petitioners are the former landlords of Mr. Damiano, the respondent. Mr. Damiano rented a basement suite in the petitioner's house located in Surrey, B.C. until the end of October 2018. On December 20, 2018, Mr. Damiano submitted an Application for Dispute Resolution to the Residential Tenancy Branch (RTB) for compensation for monetary loss (the "Application").

[2] In the Application, Mr. Damiano submitted that the petitioners served him with a two month notice to end his tenancy on the basis that the petitioners needed the suite for family use. Mr. Damiano submitted that the petitioners failed to compensate him for the two month notice, and the petitioners had begun renting the suite to someone who was not a "close family member" as defined under the Residential Tenancy Act, S.B.C. 2002, c. 78 [RTA].

[3] After hearing the Application, Arbitrator J. Edwards rendered a decision awarding Mr. Damiano a monetary order on April 17, 2019 (the "First Decision"). The petitioners did not attend the hearing before Arbitrator J. Edwards.

[4] The petitioners applied to the RTB for a review of the First Decision. Arbitrator A. Martin dismissed the petitioners' application for review consideration on May 24, 2019 (the "Review Decision").

[5] On June 17, 2019, the petitioners filed a petition seeking to set aside the Review Decision under the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241.

[6] On September 24, 2019, the petition came on for hearing before me. While the petition appeared to argue that the Review Decision should be set aside because it was patently unreasonable, at the hearing the petitioners' submissions focused on the issue of procedural fairness.

ISSUE

[7] Should the Review Decision and order be set aside?

BACKGROUND

[8] On April 11, 2019, the Application was heard by way of a teleconference hearing. Mr. Damiano attended the teleconference hearing, but no one appeared for the petitioners.

[9] The First Decision noted as follows concerning service on the petitioners:

The Tenant testified the Application and documentary evidence package were served to the Landlords by registered mail on December 22, 2018. The Tenant stated that he sent the Landlords more evidence by registered mail on March 19, 2019. Copies of the Canada Post registered mail receipts were submitted in support. Based on the oral and written submissions of the Tenant, and in accordance with sections 89 and 90 of the Act, I find that the Landlords are deemed to have been served with the Application and documentary evidence on December 27, 2018, as well as March 24, 2019, the fifth day after their registered mailings. The Landlords did not submit documentary evidence in response to the Application.

[10] The petitioners submit that they did not attend the teleconference hearing because they did not receive the material that Mr. Damiano served. The First Decision notes that Mr. Damiano provided the arbitrator with copies of Canada Post registered mail receipts. Those receipts show the items were returned to Mr. Damiano "unclaimed". Notwithstanding the evidence that the deliveries were returned unclaimed, the arbitrator concluded that the petitioners were "deemed to have been served" under the RTA.

[11] On May 24, 2019, the petitioners applied to the RTB for a review consideration of the First Decision on the grounds that (1) they were unable to attend the original hearing due to circumstances beyond their control that could not be anticipated, and (2) they had new and relevant evidence that was not available at the time of the original hearing.

[12] The Review Decision confirmed the arbitrator's finding in the First Decision that the petitioners were deemed to have been served by registered mail on December 27, 2018. In the Review Decision, Arbitrator A. Martin dismissed the petitioners' application for review consideration, as the petitioners failed to disclose sufficient evidence of a ground for review on the basis that the petitioners were unable to attend the original hearing because of circumstances beyond their control.

[13] The application was also dismissed because the "new and relevant" evidence the petitioners tendered was available, or could have been made available, at the original hearing. Both of these decisions were tied to the arbitrator's finding that the petitioners could have attended and provided evidence and submissions at the original hearing.

ANALYSIS

[14] At the hearing, the petitioners' submissions focused on whether the Review Decision was procedurally unfair. Section 58(2) of the Administrative Tribunals Act, S.B.C. 2004, c. 45, which applies to RTB decisions pursuant to s. 5.1 of the RTA, sets out the standard of review for procedural fairness:

(2) In a judicial review proceeding relating to expert tribunals under subsection (1)

(b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly,

[15] The petitioners argue that the RTB hearing was procedurally unfair because they did not have an opportunity to present their case. The petitioners rely on Ndachena v. Nguyen, 2018 BCSC 1468 in support of this argument. In that case, the court considered the evidence relied on at the original hearing and whether that evidence had been provided to the tenants prior to the original hearing. There was also an issue related to the failure of the tenants to attend the original hearing.

[16] In Ndachena, the tenants filed a dispute resolution application to the RTB regarding their landlord's failure to return the safety deposit. A few months later, the landlord also filed a dispute resolution application seeking compensation from the tenants for damage done to the rental unit.

[17] Both disputes were set for hearing together. At the appointed date and time for the hearing, only the landlord called into the hearing and the applications proceeded without the tenants in attendance. The arbitrator granted remedies to both parties pursuant to their respective applications, including an award to the landlord for damage to the unit.

[18] On judicial review, the tenants sought to set aside the arbitrator's monetary order in favour of the landlord. Justice Sewell set the decision aside on the grounds that the evidence clearly showed that the landlord had introduced new documents at the hearing that had not been provided to the tenants. At para. 66, Justice Sewell concluded that the failure to provide the tenants with the documents relied on before a hearing, coupled with the arbitrator's reliance on them, breached the duty of fairness.

[19] Justice Sewell also considered the potential injustice to a party who is honestly mistaken as to the time and format of their dispute resolution hearing, stating (at para. 71):

It may well be that in the future a court will find that the absence of some mechanism for redress for a person who honestly misapprehended their procedural responsibilities but otherwise had a meritorious case amounted to substantial unfairness.

[20] In Atchison v. British Columbia (Residential Tenancy Act, Dispute Resolution Officers), 2008 BCSC 1015, Justice Ehrcke considered the deemed service provision in s. 90(a) of the RTA. He concluded (at para. 17) that the presumption of deemed service in s. 90(a) was "rebuttable on proper evidence".

[21] In Atchison, there was evidence that the party failed to pick up the registered mail due to specific advice from the police where the landlord's son had threatened the party with violence. The police had advised the party not to respond to the landlord and not to pick up any unknown mail. Regarding that evidence, Ehrcke J. stated (at para. 26):

This is an unusual explanation, to be sure, but it is uncontradicted by any evidence before me. If the explanation is true, it is difficult to find fault with the petitioners for following the advice of the police. Although it will generally be the case that a person cannot evade service by refusing to pick up registered mail properly addressed to them, some allowance must be made for the exceedingly rare situation in which one is acting on the advice of a police officer.

[22] Turning to the facts of service relevant to the present case, it must be reiterated that s. 89 of the RTA contains specific rules for serving documents by registered mail. Section 90(a) of the RTA provides that a document served in accordance with s. 89 is deemed to be received "if given or served by mail, on the 5th day after it is mailed".

[23] The petitioners submitted to the RTB that they did not attend the original hearing because the notices sent to them by registered mail were not received. The evidence shows that the mail was returned as unclaimed. The petitioners have not through "proper evidence" provided an adequate explanation of why the mail was left unclaimed. The evidence falls well short of the evidence presented in Atchison.

[24] The petitioners have also failed to demonstrate an "honest misapprehension" of procedural responsibilities that was mentioned by Justice Sewell in Ndachena. Accordingly, it was not procedurally unfair for the arbitrator to conclude, on the record before the tribunal, that the petitioners had been properly served and to dismiss the application for review consideration on that basis.

[25] The petitioners also rely on Pacific Aviation Academy of British Columbia v. Hassan, 2017 BCSC 1259 in support of their application. Pacific Aviation arose from an unsuccessful application to set aside a default judgment in Provincial Court. The unsuccessful parties then applied for judicial review of the Provincial Court decision that denied their application to set aside the default judgment.

[26] In considering the application, Justice Jenkins concluded, amongst other things, that there was evidence to show that the parties did not wilfully or deliberately fail to enter an appearance or file a defence. Justice Jenkins concluded in the alternative that the default judgment was given without notice and as such it was a nullity liable to be set aside on the following basis:

"If the petitioners were never served with the Notice of Trial as required by the Rules until after the trial date, default judgment should not have been entered against them." (at para. 43)

[27] The decision in Pacific Aviation does not assist the petitioners in the present case. In Pacific Aviation, Justice Jenkins determined that the Notice of Trial had not been served in accordance with the applicable Small Claims Act and Rules. In the present case, the documents were served in accordance with the RTA.

[28] The petitioners also submit that once the registered mail was returned unclaimed, Mr. Damiano should have sought an order authorizing substitutional service. However, sections 89 and 90 of the RTA provide for deemed service if served by registered mail. Therefore, substitutional service is not required.

ORDER

[29] On the evidence before the tribunal, Arbitrator A. Martin found in the Review Decision that the petitioners had been properly served under the RTA. Having found no basis upon which the arbitrator could have rebutted the presumption of deemed service, I conclude that the tribunal acted fairly. Accordingly, the application to set aside the Review Decision and order is dismissed with costs.

"E. McDonald J."

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