

CANADA / JUDGMENT

Khan v. Savino

2020 BCSC 555

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 555 Khan v. Savino

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Khan v. Savino,

2020 BCSC 555

Date: 20200408

Docket: S1912668

Registry: Vancouver

Between:

Tyler Khan

Petitioner

And

Anthony Savino

Respondent

Before: The Honourable Madam Justice W.A. Baker

On judicial review from: A decision of the Residential Tenancy Branch dated May 9, 2019 (RTB File No. 31035560)

Reasons for Judgment

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J. Patrick

Place and Date of Hearing:

Vancouver, B.C.

February 25, 2020

Place and Date of Judgment:

Vancouver, B.C.

April 8, 2020

I. INTRODUCTION

- [1] This is an application for judicial review of a decision of the Residential Tenancy Branch ("RTB") dated May 9, 2019, which was issued pursuant to the Residential Tenancy Act, S.B.C. 2002, c. 78 (the "Act").
- [2] The applicant Mr. Khan is a landlord who seeks to set aside the decision of the arbitrator on the basis that the RTB hearing was procedurally unfair.
- [3] There is a long history between Mr. Khan and his tenant Mr. Savino. The tenancy lasted from 2012 to 2018, during which time the parties engaged in a number of residential tenancy hearings. However, I do not need to engage in a review of that history for the purposes of this decision.
- [4] The facts relevant to the application before me are the following:
 - a) On October 16, 2018 the parties reached an agreement that Mr. Savino would vacate the rental unit at the end of 2018.
 - b) On December 31, 2018 Mr. Savino moved out and Mr. Khan conducted a post-tenancy inspection.
 - c) Mr. Khan was not satisfied with the state of the rental unit and took the position that Mr. Savino had left the unit in a state of considerable disrepair.
 - d) On January 14, 2019 Mr. Khan filed an application with the RTB claiming \$17,000 in compensation for the damage caused to the unit. Mr. Khan filed various documents and several photographs. At that time Mr. Khan had not begun doing the repairs to the unit.
 - e) The RTB hearing was set for May 7, 2019.

- f) On April 23, 2019 Mr. Khan amended his application to increase the claim to \$30,000, and submitted, in electronic form, a great number of additional documents, including photographs, video, evidence of his restoration, and evidence of further expenses incurred.
- [5] The hearing began on May 7, 2019 before Arbitrator Kaila. It was conducted over the telephone, as is usual. I received affidavits from Mr. Khan and Mr. Savino regarding what happened at the hearing. On the material points there is very little dispute between the affidavits.
- [6] In his affidavit, Mr. Savino makes a number of statements about why the arbitrator did what he did. However, I am not satisfied that I am entitled to take into account any of these assumptions as to the arbitrator's motivation. The arbitrator provided a written decision. That is what governs, supplemented by the statements in the affidavits of both Mr. Savino and Mr. Khan as to the procedural steps taken which, when the gloss of speculation about why the arbitrator did what he did is removed, are quite consistent.
- [7] The hearing began with the arbitrator stating that the amended material of Mr. Khan had been filed late. This caused some confusion for Mr. Khan because he thought he had filed the material 14 days before the hearing. Rule 3.14 of the RTB Rules of Procedure (the "RTB Rules") required all materials to be filed "not less than" 14 days before the hearing. Mr. Khan did not understand that this wording actually required the first and last days to be excluded from the calculation of time, although this is clearly set out in the definitions in the RTB Rules. As a result, Mr. Khan should have filed his amended application and materials on April 22, 2019, not April 23, 2019.
- [8] The arbitrator took a few minutes to consider the new material, and then advised the parties that he would not refer to the new evidence but would proceed with the hearing. He advised that he would provide written reasons explaining his decision later. The arbitrator swore in Mr. Khan to receive his evidence. It is clear from both affidavits that Mr. Khan still did not understand or accept the arbitrator's ruling on the evidence and asked for clarification. The arbitrator confirmed that he would not refer to any of the submitted evidence but that Mr. Khan could proceed with oral testimony. Mr. Khan asked for a short break to consider what he should do, and again asked the arbitrator to confirm the date the documentation had been received as he understood he had delivered the new evidence within the applicable time limit. The arbitrator then ended the hearing without hearing any oral testimony from Mr. Khan.
- [9] The arbitrator rendered his decision in writing on May 9, 2019. He considered what he described as a preliminary issue - the submitting and exchanging of evidence. The arbitrator noted that the original application was filed on January 14, 2019, and then on April 23, 2019 Mr. Khan filed the amended application with a large amount of information on a USB stick. While Mr. Savino agreed that some documents and photographs were served with the initial application, the arbitrator stated that neither party could confirm exactly what was delivered on the initial application and what was delivered later. Mr. Khan did not provide a monetary

order worksheet with his original application, but did provide one with the amended application on April 23, 2019. Mr. Khan did not submit a "Digital Evidence Details" form (RTB-43) along with his USB delivered on April 23, 2019.

- [10] The arbitrator found that Mr. Khan did not comply with s. 59(2) of the Act and Rule 2.5 of the RTB Rules "as the tenant was not provided with the full particulars of the landlord's claim, specifically a monetary order worksheet providing a detailed calculation of the monetary claim, nor was he served with all the documentary and digital evidence the landlord intended to rely on in the proceeding, at the time of service of the original application". The arbitrator also found Mr. Khan did not use the proper form (RTB-43) to provide details of the digital evidence.
- [11] The arbitrator found that Mr. Khan deliberately and unreasonably delayed service of the amended application and documents in an attempt to ambush Mr. Savino, and that Mr. Savino's ability to provide any meaningful response to Mr. Khan's claim was severely prejudiced.
- [12] The arbitrator found that Mr. Khan's amended materials were filed and served one day late, as they should have been served on April 22, 2019.
- [13] The arbitrator decided to dismiss the whole of the landlord's application without leave to reapply, based on the following findings:
- a) At the time of service of the original application, Mr. Khan did not provide Mr. Savino with:
 - i. the full particulars of the landlord's claim, specifically a monetary order worksheet providing a detailed calculation of the monetary claim,
 - ii. all documentary evidence and digital evidence the landlord intended to rely on in the proceeding, and
 - iii. a form RTB-43 to provide details of the digital evidence.
 - b) Mr. Khan unreasonably delayed service of the complete evidence package,
 - c) Mr. Khan's explanation that the extent of the damage prevented him from delivering the evidence any sooner than April 23, 2019 was rejected,
 - d) Mr. Khan had over four months to perform repair work and submit any receipts or invoices for expenses incurred or provide estimates of the work to be done,
 - e) Mr. Khan willfully delayed service of the amendment and evidence,
 - f) Mr. Khan attempted to ambush Mr. Savino,
 - g) Mr. Savino was not able to provide any meaningful response to the landlord's claim and was severely prejudiced, and

- h) Mr. Khan was required to serve the materials by April 22, 2019 to be in compliance with the RTB Rules, and he served the materials one day late on April 23, 2019.

II. ISSUES ON REVIEW

[14] This application raises the following issues:

- a) What is the appropriate standard of review?
- b) Did the arbitrator breach Mr. Khan's right to procedural fairness?
- c) Was the arbitrator's decision patently unreasonable?
- d) What is the appropriate remedy?

A. What is the appropriate standard of review?

- [15] Mr. Khan brings this application relying solely on procedural fairness grounds. Mr. Savino argues that the procedure before the arbitrator was fair, and also argues that the relevant test to review the arbitrator's decision is on the standard of patent unreasonableness and the decision was reasonable.
- [16] The appropriate standard of review of an arbitrator's decision under the Act has been determined many times by this court, and is grounded in sections 5.1 and 84.1 of the Act and s. 58 of the Administrative Tribunals Act, S.B.C. 2004, c. 45 (the "ATA"). Questions of fact, law and discretion are only open to review if such decisions are patently unreasonable: *Campbell v. McInnes*, 2017 BCSC 1134 [Campbell] at para 8. Questions of procedural fairness, however, must be decided "having regard to whether, in all of the circumstances, the tribunal acted fairly": *Campbell* at para. 10.
- [17] Many cases have considered what level of procedural fairness is to be applied in RTB hearings, and have concluded that such hearings require the adjudicator to observe a high degree of procedural fairness, following the analysis in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 [Baker]; *Fernandez v. Sakr*, 2012 BCSC 1024 at paras. 25-30; *Ganitano v. Metro Vancouver Housing Corp.*, 2009 BCSC 787 at para. 40; *Fulber v. Doll*, 2001 BCSC 891 at para. 30; *Ndachena v. Nguyen*, 2018 BCSC 1468 at para 58.
- [18] For questions of fact or law, a decision is patently unreasonable if it is "openly, clearly, and evidently unreasonable" or it is "so flawed that no amount of curial deference can justify letting it stand": *Campbell* at para. 9. For challenges to an exercise of discretion, a discretionary decision is only patently unreasonable if it meets the criteria set out in s. 58(3) of the ATA.
- [19] A review of an arbitrator's decision is always founded in the written reasons. The reasons must set out the legal test to be met and, importantly, the findings of fact and the principal evidence upon which those findings were made. The reasons must disclose how and why the decision was made: *Christiansen v. Harwood*, 2015 BCSC 1440 at para. 20.

B. Did the arbitrator breach Mr. Khan's right to procedural fairness?

[20] Mr. Khan says that his right to procedural fairness was breached because he was not given the opportunity to present his case. Mr. Khan says the breach occurred in two ways: the arbitrator wrongly excluded the evidence that was filed one day late, and the arbitrator erred in excluding all evidence and testimony that related to the application which was filed on time.

1. Evidence and application filed one day late

[21] There is no dispute that Mr. Khan did not comply with the technical requirements for provision of his amended application and additional evidence. Mr. Khan submits that, notwithstanding his technical non-compliance, in the whole of the circumstances it was unfair for the arbitrator not to, at a minimum, adjourn the hearing or give Mr. Khan leave to reapply. He says his non-compliance arose from the fact he is a lay person and did not understand the 14-day rule. He honestly thought he had complied with the RTB Rules.

[22] Further, Mr. Khan points to Rule 3.17 of the RTB Rules which states that "Both parties must have the opportunity to be heard on the question of accepting late evidence". He says that at no time did the arbitrator seek submissions from the parties on the question of accepting the late evidence. He says the arbitrator reviewed the evidence and made his decision in the absence of any submissions, other than Mr. Khan's insistence that he did file the materials on time. Importantly, the arbitrator did not seek submissions from Mr. Savino on any prejudice he might have suffered, nor did he seek submissions on how that prejudice could be addressed.

[23] Mr. Khan says that the duty of procedural fairness required the arbitrator to safeguard not only the RTB procedures, but also the substantive fairness of the proceeding. The arbitrator failed to fairly receive submissions on the receipt of the new evidence, any prejudice arising, and any means to alleviate the prejudice. Mr. Khan says the arbitrator had to consider these issues before deciding to disallow any of the new evidence or the whole of Mr. Khan's application.

[24] Mr. Savino argues that the RTB Rules and the Act set out the content of procedural fairness which the arbitrator must follow. He argues that Mr. Khan failed to comply with the Rules in several material ways, and these failures justify the arbitrator's exercise of discretion. Section 59 of the Act required Mr. Khan, in commencing his application, to make the application in the approved form, and include the full particulars of the dispute. Rule 2.5 sets out the documents to be included in an application and states that "to the extent possible" the applicant must include a detailed calculation of any monetary claim being made and copies of all documentary and digital evidence to be relied on, subject to Rule 3.17. Rule 3.10.3 requires parties who submit digital evidence to provide a description of the information using form RTB-43. Mr. Savino argues that not only did Mr. Khan fail to deliver the new material on time, but he also failed to comply with Rules 2.5 and 3.10.3.

- [25] Mr. Savino says that the RTB Rules provide the parties with a reasonable opportunity to be heard, and the parties had a reasonable expectation that the Rules would be followed. In the circumstances of the detailed RTB Rules, a more relaxed requirement for procedural fairness applies than in the judicial model referred to in Baker. He argues that had Mr. Khan followed the RTB Rules, he would have been given a full opportunity to be heard, but he chose not to follow the RTB Rules. He says the arbitrator properly balanced Mr. Khan's rights against the right of Mr. Savino to know the particulars of the case against him at least 14 days before the hearing.
- [26] I find that the RTB Rules do set out a process which provides a reasonable opportunity to be heard. However, the arbitrator did not comply with an important provision of the RTB Rules. Rule 3.17 expressly requires the arbitrator to give both parties an opportunity to be heard on the question of accepting late evidence. The arbitrator did not receive submissions from Mr. Savino on whether he would be prejudiced by the delivery of the late material, nor did he receive submissions on whether there was any way to cure any prejudice to Mr. Savino.
- [27] In his affidavit on this hearing, Mr. Savino commented on the prejudice he would have suffered had the material been allowed. However, it is clear from the affidavits of the parties as to the process which unfolded before the arbitrator that no such submissions were sought from or given by Mr. Savino at the hearing.
- [28] I find that the arbitrator's failure to seek submissions from both parties, including giving Mr. Khan an opportunity to respond to any submissions on prejudice, was a breach of procedural fairness.

2. Refusal to hear original application

- [29] The next issue raised by Mr. Khan is the fact that, having decided he would not receive the late material, the arbitrator dismissed the whole of Mr. Khan's application. Mr. Khan's initial application was filed within the time set out in the RTB Rules. The arbitrator told Mr. Khan that he would hear the original application, but then he abruptly shut down the hearing without explanation, without hearing from Mr. Khan or Mr. Khan's witness, and without hearing any submissions on the original application. In terms of what transpired before the arbitrator, the parties' affidavits are consistent on this point.
- [30] Mr. Khan says that after the arbitrator swore him in to give evidence, he was confused and didn't understand what evidence he would be able to rely on. He again tried to clarify with the arbitrator the question of the evidence. Mr. Savino says Mr. Khan argued with the arbitrator. What is clear from the affidavits of both parties is that Mr. Khan did not understand the arbitrator's ruling on the evidence, no complete explanation was provided by the arbitrator who told the parties he would explain it later in his reasons, and the arbitrator simply ended the hearing without hearing from either party on the substance of the original application.

- [31] Mr. Savino submits that rather than present his case, Mr. Khan simply decided to waive his right to make his case and instead argued with the arbitrator about his ruling on the evidence. In those circumstances, he submits the arbitrator was entitled to dismiss the entirety of the application.
- [32] I do not agree with Mr. Savino. There is no dispute that the arbitrator told Mr. Khan that he would hear his original application. There is also no dispute that the arbitrator did not in fact receive or consider any oral testimony or submissions on the original application. The arbitrator's decision does not disclose that Mr. Khan declined to participate in a hearing of the original application. Rather, the decision does not consider the original application at all.
- [33] Mr. Savino submits that Mr. Khan was argumentative and this entitled the arbitrator to dismiss the case. However, the decision does not support Mr. Savino's submissions. There is no finding by the arbitrator that Mr. Khan was argumentative or behaved improperly at the hearing, and no finding that Mr. Khan's behaviour justified the dismissal of his case.
- [34] It is clear that Mr. Khan did not understand how his service of his amended application was not compliant with the RTB Rules. He sought clarification from the arbitrator as he did not understand the decision. It is clear that during the hearing the arbitrator did not take the time to explain his decision to Mr. Khan, and this only created further confusion for Mr. Khan. Mr. Khan was not represented by counsel on the hearing. The RTB Rules are extensive and, frankly, confusing. It is completely understandable that a lay person may not appreciate all the many components of the filing requirements. It was incumbent upon the arbitrator to take the time to explain to Mr. Khan why he reached the conclusion he did, ensure that Mr. Khan understood the scope of the continued hearing, and allow Mr. Khan to present his case.
- [35] Even if the arbitrator had fairly concluded that the new material could not be relied on, Mr. Khan did file his original application within time, was told by the arbitrator that he would hear the original application, and he ought to have been given an opportunity to have that original application heard.
- [36] I find that the arbitrator's abrupt conclusion of the hearing before Mr. Khan had an opportunity to present his case was a breach of natural justice and procedural fairness.

C. Was the arbitrator's decision patently unreasonable?

- [37] Mr. Savino argues that the arbitrator's decision is in fact a decision properly taken within the exercise of his discretion and, therefore, only reviewable on a standard of patent unreasonableness. Mr. Savino argues that the arbitrator's decision was not patently unreasonable and should be upheld.
- [38] In addition to my finding in relation to the fairness of the hearing before the arbitrator, I also find that the arbitrator's decision is patently unreasonable in a number of respects.

[39] The arbitrator made two significant findings based on no evidence before him: Mr. Khan willfully delayed service of his materials in order to ambush Mr. Savino, and Mr. Savino was prejudiced by the introduction of the new material.

1. Wilful delay of service

[40] The arbitrator found that Mr. Khan did not provide all the materials required under s. 59(2) of the Act and Rule 2.5 because no monetary worksheet or full documentary and digital evidence were provided at the time of the initial filing. However, Rule 2.5 requires provision of such material "to the extent possible". For the arbitrator to find that Mr. Khan was in breach of Rule 2.5, he would have to have found that Mr. Khan had all the evidence he eventually filed in April at the time he filed the initial application in January.

[41] At the hearing, Mr. Khan submitted that the new materials were filed in April because he did not know the extent of the damage to the property until he began taking the drywall off the walls, he was doing the repairs himself, and it was taking a long time. The arbitrator rejected Mr. Khan's explanation and found that Mr. Khan should have been able to provide the material earlier, that he had over 4 months to get the material together, and that he was attempting to ambush Mr. Savino.

[42] The difficulty with the conclusion of the arbitrator is that the arbitrator set out no evidence upon which this finding is based. For example, the arbitrator does not point to evidence establishing what material Mr. Khan actually had at the time of the initial application, what material he received later, or when he received such material. He does not identify evidence which established that Mr. Khan completed the repair work earlier than April, or had the new material earlier than April and deliberately withheld it.

[43] The arbitrator's reason for finding Mr. Khan willfully delayed service of the evidence was that Mr. Khan "insisted he was within the requirements of the Branch to serve the evidence and amendment exactly 14 days prior to the hearing". Mr. Khan's understanding of the filing deadline is not evidence which can support a conclusion that the material was available earlier than the filing deadline but was deliberately withheld to "ambush" Mr. Savino. I find this finding of fact to be clearly unreasonable, arbitrary and unsupportable on the evidence before the arbitrator as set out in his reasons. As such, I conclude this finding of the arbitrator is patently unreasonable.

2. Prejudice to Mr. Savino

[44] The arbitrator found that service of an increased claim and a large amount of digital data exactly 14 days before the hearing severely prejudiced Mr. Savino. Again, this finding is based on no evidence. There is no evidence of prejudice to Mr. Savino referenced in the decision. This is to be expected because no evidence was sought from Mr. Savino on this point. Prejudice cannot be assumed, particularly where the relevant RTB Rule requires the arbitrator to give both parties an opportunity to be heard on this very point. As such, I conclude that the arbitrator's finding on prejudice is unsupportable on the evidence before

him, unreasonable and arbitrary. I conclude that this finding of the arbitrator is patently unreasonable.

[45] These patently unreasonable findings of fact by the arbitrator are fundamental to the decision itself.

D. What is the appropriate remedy?

[46] I have found that the arbitrator breached the duty of procedural fairness owed to Mr. Khan, and that the arbitrator made two fundamental findings of fact which were patently unreasonable and tainted the whole of the decision. As such, I order that the decision of the arbitrator is void, and I remit Mr. Khan's application to the RTB for re-determination.

[47] While submissions were made as to the merits of the underlying dispute, given my conclusion that the arbitrator's decision is void and my order for a re-determination of the dispute, I will not address these submissions.

[48] Costs are awarded to Mr. Khan.

"Baker J."

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