

CANADA / JUDGMENT

Khan v. Savino

2020 BCSC 82

COURT

Supreme Court of British Columbia

DECIDED

22 January 2020

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2020 BCSC 82 Khan v. Savino

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Khan v. Savino,

2020 BCSC 82

Date: 20200122

Docket: S1912668

Registry: Vancouver

In the Matter of the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241

and the Residential Tenancy Act, S.B.C. 2002, c. 78

Between:

Tyler Khan

Petitioner

And

Anthony Savino

Respondent

Before: The Honourable Chief Justice Hinkson

On judicial review from: An order of the Residential Tenancy Branch, dated May 9, 2019 (Khan v. Savino, Docket # 31035560).

Reasons for Judgment

Counsel for the Petitioner:

S. Hannigan

The Respondent, appearing in person:

A. Savino

Place and Date of Hearing:

Vancouver, B.C.

January 13, 2020

Place and Date of Judgment:

Vancouver, B.C.

January 22, 2020

- [1] The Residential Tenancy Branch ("RTB") dismissed an application by the petitioner on May 9, 2019. The petitioner seeks judicial review of that decision.
- [2] The petition in these proceedings was not filed until November 8, 2019, some six months after the decision by the RTB arbitrator.
- [3] On the application before me, the petitioner seeks an order to retroactively extend the time for the filing of his petition.

Background

- [4] The petitioner is the owner of a residential condominium unit at 506 - 488 Helmcken Street, in the City of Vancouver (the "unit"). He rented the unit to the respondent between August 2012 and December 2018.
- [5] The respondent vacated the unit on December 31, 2018. The petitioner contends that the respondent caused considerable damage to the unit during his residency in the unit. The respondent denies that he caused more than normal wear and tear to the unit during his residency.
- [6] In January of 2019, the petitioner filed and served the respondent with an application to the RTB seeking compensation of approximately \$17,000 for the damage that he said had been caused by the respondent, authorization to keep all or part of the security deposit paid by the respondent, and payment of the filing fee for his application.
- [7] The application was set for hearing on May 7, 2019. On April 23, 2019, the petitioner purported to amend his claim to increase the compensation he sought to approximately \$30,000, and filed an amended application and supporting material in support of that amended claim.

- [8] The hearing proceeded on May 7, 2019 before an arbitrator appointed pursuant to the Residential Tenancy Act, S.B.C. 2002, c. 78 ("RTA").
- [9] The arbitrator issued his decision on May 9, 2019, dismissing the petitioner's application, in its entirety, without leave to re-apply to the RTB. In dismissing the application, the arbitrator focused on the issue of the amendment and service of additional evidence, writing in part:

The arbitrator has the discretion to determine whether to accept documentary or digital evidence that does not meet the criteria established above provided that the acceptance of late evidence does not unreasonably prejudice one party or result in a breach of the principles of natural justice. Rule 3.11 provides that if the arbitrator determines that a party unreasonably delayed the service of evidence, the arbitrator may refuse to consider the evidence.

I find the landlord did not comply with section 59(2) of the Act and Rule 2.5 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 landlord also did not utilize form RTB-43 to provide details of the digital evidence.

I find the landlord unreasonably delayed the service of the complete evidence package including the monetary order worksheet and Amended application. The tenant was served with the landlord's original application on or about January 14, 2019. The tenancy ended on December 31, 2018. The landlord's amendment and evidence package was served to the tenant on April 23, 2019. The amendment sought to almost double the original claim from \$17,000 to \$35,000 and the evidence provided to support the claim was in the form of a very large digital evidence dump. I do not accept the landlord's explanation that the extent of the damage prevented him from submitting the evidence any sooner than 14 days prior to the hearing date. The bulk of the evidence submitted by the landlord is in the form of picture and video evidence to support the damage which clearly should have been available to the landlord soon after the end of the tenancy. The landlord also had over 4 months to perform repair work and submit any receipts or invoices for expenses incurred over this period or at the very least provide estimates of the work to be done. I find the landlord willfully delayed the service of the amendment and evidence on the tenant. This was evident as the landlord insisted he was within the requirements of the Branch to serve the evidence and amendment exactly 14 days prior to the hearing. The not less than 14 days before the hearing is a minimum requirement if the party can show why they were not able to meet the requirements of serving evidence at the time of filing or serving an amendment as soon as possible. I find that by filing an amendment to significantly increase the amount claimed and by dumping a large amount of digital evidence on the tenant exactly 14 days before the hearing date, the landlord attempted to ambush the tenant. I find that in doing so, the tenant's ability to provide any meaningful response to the landlord's claim has been severely prejudiced.

For the reasons provided above, I dismiss the landlord's application in its entirety without leave to reapply.

The Petitioner's Application for Judicial Review

[10] The petition was filed on November 8, 2019.

[11] In his petition, the petitioner seeks an order setting aside the decision of the arbitrator on the following grounds:

The Landlord applies for judicial review of the Decision on grounds that he was denied procedural fairness in respect of the Hearing. In particular, the Landlord was not afforded procedural fairness because:

- (a) the Arbitrator refused his amendment and additional evidence;
- (b) the Arbitrator failed to consider or grant an adjournment;
- (c) the Arbitrator required that the Landlord proceed with his original Application on testimony alone, i.e. without any of the documentary or digital evidence;
- (d) the Arbitrator abruptly ended the Hearing without evidence or submissions on the merits of the Application; and
- (e) the Arbitrator dismissed the Application in its entirety without leave to re-apply.

The Relevant Legislation

[12] The legislation that governs the petitioner's application is the Administrative Tribunals Act, S.B.C. 2004, c. 45 ("ATA"). The decision was made pursuant to the dispute resolution provisions in Part 5 of the RTA. Section 5.1 of the RTA makes certain provisions of the ATA, including s. 57, applicable to review of such decisions.

[13] Section 57 of the ATA provides:

57 (1) Unless this Act or the tribunal's enabling Act provides otherwise, an application for judicial review of a final decision of the tribunal must be commenced within 60 days of the date the decision is issued.

- (2) Despite subsection (1), either before or after expiration of the time, the court may extend the time for making the application on terms the court considers proper, if it is satisfied that there are serious grounds for relief, there is a reasonable explanation for the delay and no substantial prejudice or hardship will result to a person affected by the delay.

Discussion

[14] In order to grant the application, the petitioner must satisfy me that:

- a) there are serious grounds for relief;

- b) there is a reasonable explanation for the delay; and,
- c) no substantial prejudice or hardship will result to the respondent.

[15] The serious grounds for relief relied upon by the petitioner are set out in para. 11 above. The petitioner swore an affidavit in these proceedings in which he asserted, in part, that:

17. At the outset of the Hearing, the Arbitrator raised the issue of my amendment of the Application and my submission of additional evidence on April 23, 2019. He told me that I had not followed the relevant procedural rules in making the amendment and submitting evidence. After reviewing the evidence, the Arbitrator advised the parties that the Hearing would proceed without consideration of my evidence. I objected to this and attempted to explain to the Arbitrator why I had made the amendment and submitted the additional evidence when I did. The Arbitrator ultimately concluded the hearing without hearing me on the merits of the Application or allowing me to explain the evidence I had submitted. Neither party was asked if they wanted to adjourn the Hearing and the Tenant was not asked whether he needed additional time to prepare for the Hearing or respond to the amendment or evidence that I served on April 23, 2019.
- [16] The reason offered for the delay in the filing of the petition is error on the part of counsel for the petitioner. Counsel for the petitioner, who was not counsel on the application before me, swore an affidavit in which he deposed that the petitioner had instructed him to file an application for judicial review on June 3, 2019, well within the time required pursuant to the ATA. Counsel further deposed that he did not note, at the time, the 60-day deadline for the filing of the petition.
- [17] The petitioner asserts that the respondent will suffer no, let alone substantial prejudice or hardship if his application is granted.
- [18] While the respondent did not file a written response to the application before me, he did file an affidavit in response to the petition, and appeared before me and made submissions opposing the application. He says that delay in and of itself is prejudicial to him, as he obtained a remedy from the arbitrator that was to his considerable advantage.
- [19] The respondent also asserts that "as a single father, [the petitioner's efforts against him] has strongly affected [his] ability to earn income and [his] reputation has been negatively affected by [the petitioner's] repeated actions".

Are there serious grounds for relief?

- [20] Insofar as the merits of the petition are concerned, the test in s. 57(2) is included there for a reason. If there are serious grounds for the relief sought, (which I consider to relate to the relief sought in the petition), the second criterion in the section comes into play, but it cannot be conflated with the first criterion.

- [21] The petitioner contends that the arbitrator had discretion to accept the material that he filed 14 days before the hearing, but failed to exercise that discretion; instead saying that the petitioner could attempt to prove his claim by oral evidence. However, the arbitrator terminated the hearing before hearing submissions, and denied the petitioner leave to re-apply without hearing submissions with respect thereto.
- [22] In his decision, the arbitrator does not appear to have exercised any discretion upon which to permit the filing and reliance upon the material filed, and apparently served, by the petitioner 14 days before the hearing. While one might infer that he must have done so, more importantly, the arbitrator clearly gave no thought to adjourning the hearing in order to permit it to proceed on the full evidentiary record and to then determine it on its merits.
- [23] The arbitrator also does not appear to have followed through on his invitation that the petitioner proceed on oral evidence, nor to have considered the material that was filed by the petitioner in support of his original application of January 2019. Instead, he terminated the hearing and dismissed the application without permitting the petitioner to re-apply with notice to the respondent pursuant to the RTA.
- [24] I find that these failures on the part of the arbitrator, if proven, afford the petitioner serious grounds for the relief he wishes to pursue in his petition.

Is there a reasonable explanation for the delay?

- [25] In terms of delay, the petitioner himself is blameless. If his application is refused, he may well have a remedy against his counsel, but the second criterion does not require that there be no other remedy available to the petitioner. He has shown a reasonable explanation for the delay in the filing of his petition, and I am therefore satisfied that the second criterion of s. 57(2) of the ATA has been met.

Is there no substantial prejudice or hardship to the person affected by the delay?

- [26] In terms of prejudice or hardship, s. 57(2) of the ATA contemplates serious prejudice or hardship if an extension of the time for making the application is to be denied.
- [27] While the dismissal of the petitioner's application against him is of benefit to the respondent, the fact that s. 57 of the ATA exists, suggests that the loss of that benefit is, by itself, an insufficient ground upon which to refuse the extension of time sought by the petitioner.
- [28] In his oral submissions, the respondent said that he destroyed certain evidentiary records once he received the decision of the arbitrator. He was unable to describe just what evidence he destroyed, but did advise that he still has film records of the condition of the unit at the time he gained occupancy of it, and at the time he vacated it.
- [29] The fact that the arbitrator never determined the application on its merits further weakens the argument that the respondent should not be deprived of that dismissal.

- [30] The respondent provided no evidence of how his income earning ability has been affected nor how his reputation has been negatively affected by the delay in filing the petition. I am unable to rely upon such vague and general assertions as a basis for finding that he will suffer substantial prejudice or hardship if the extension sought by the petitioner is granted.
- [31] I accept the respondent's submission that he will face additional expense in once again defending the petitioner's claim against him, but his preparation was presumably well in hand and its repetition will lessen the burden upon him to advance his defence.
- [32] I find that he will not suffer substantial prejudice or hardship if the extension sought by the petitioner is granted.

Conclusion

- [33] I grant the petitioner's application for the extension of time to file his petition until November 10, 2019, two days after it was in fact filed.
- [34] Despite the disposition of the application before me, I award the respondent his costs of the application, as it could and should have been avoided had the petition been filed when the petitioner instructed his counsel.

"The Honourable Chief Justice Hinkson"

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Prepared on 25 October 2026 · Esheria