

CANADA / JUDGMENT

McCullough v. Kuo

2001 BCSC 554

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA IN THE MATTER OF THE JUDICIAL REVIEW
PROCEDURE ACT

AND IN THE MATTER OF THE RESIDENTIAL TENANCY ACT

BETWEEN: LOUISE MCCULLOUGH
PETITIONER

AND: ANICE KUO
RESPONDENT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE RALPH

Counsel for the Petitioner: A.A. Parker

Agent for the Respondent: B. Driedger

Date and Place of Hearing: April 10, 2001

New Westminster, BC

- [1] Ms. McCullough has rented premises in Langley from Ms. Kuo since June 2000. Over time a number of disputes arose about the payment of rent which culminated in a decision by Arbitrator C.A. Hart dated February 23, 2001. The February 23 decision was in response to an application by Ms. McCullough under section 59 of the Residential Tenancy Act to have a review hearing of a decision made by Arbitrator Hart dated February 19, 2001.
- [2] At the time of renting the premises Ms. McCullough provided the landlord with 12 postdated cheques for rent. At some point after the tenancy began, Mr. Driedger became the property manager and began to demand rent payments in cash. The reason for that is disputed and it is not necessary for me to determine that issue.
- [3] There had been earlier hearings in relation to this tenancy. On January 11, 2001, Arbitrator R.A. Morrison ordered that a Notice to End a Residential Tenancy dated December 27, 2000, be set aside and the tenancy continued. On January 23, 2001, Arbitrator L. Plenert ordered that a Notice to End a Residential Tenancy dated January 3, 2001 be set aside and the tenancy continued.
- [4] On February 16, 2001, Arbitrator Hart began a hearing to consider a Notice to End a Residential Tenancy dated February 2, 2001. The Notice claimed outstanding rent of \$1650 which the arbitrator reduced to \$1150 in light of a rent reduction agreement relating to an arrangement in which the tenants were to paint the premises. Ms. McCullough testified that she could pay the arrears of rent on Monday, February 19.
- [5] The arbitrator therefore extended the time to pay the arrears to 3:30 p.m. on February 19 at which time the hearing was to re-convene. In her decision dated February 19 the arbitrator stated at pp. 2-3:

I clearly explained to the parties that the file on the landlord's application would be left open, and the hearing would be reconvened by telephone conference at 3:30 p.m. on 19 February 2001 to ensure that the arrears were paid as ordered. I advised the parties that if they were unavailable at the telephone numbers they had provided for the telephone conference, the hearing would proceed, and orders could be made to resolve the matters in dispute.

- [6] Following the adjournment on February 16 it appears that some type of exchange took place between Ms. McCullough and Mr. Driedger outside the Residential Tenancy office. It resulted in Ms. McCullough calling the police and alleging that she had been threatened by Mr. Driedger. A member of the Surrey detachment of the RCMP attended at the Residential Tenancy office and spoke to Ms. McCullough. It is Ms. McCullough's evidence that she understood from the RCMP that she was to have no contact with Mr. Driedger.
- [7] A fax message dated February 25, 2001, from Cpl. Samagalski of the Langley detachment of the RCMP to the Director of the Residential Tenancy Office in Surrey confirmed that they had begun an investigation of the matter. The evidence before me does not disclose that the matter has gone further since then. Its relevance to the application before me is its effect

upon what transpired before Arbitrator Hart on February 19, 2001. My noting of this incident should not be taken to mean that I consider Mr. Driedger to have committed an offence.

[8] When the arbitrator telephoned Ms. McCullough on February 19 to continue the hearing, Ms. McCullough informed her that she would decline to participate in the hearing as there was a "no contact order" prohibiting Mr. Driedger from contacting her directly or indirectly. Ms. McCullough also advised the arbitrator that the rent had not been paid for the same reason.

[9] At p.3 of the February 19 decision the arbitrator stated:

I advised Ms. McCullough that I had made an order during the face-to face hearing on 16 February 2001, and that order granting her an extension of time to pay the rent could not be changed. She stated that she would contact an Information Officer for further information. As Ms. McCullough declined to continue to participate in the hearing, I telephoned Mr. Driedger for the telephone conference.

[10] The arbitrator then telephoned Mr. Driedger and subsequently ruled that Ms. McCullough had breached the order granting her an extension of time to pay the arrears of rent. As a result the arbitrator ruled that the tenancy should end, an order of possession should issue, and the landlord would be entitled to retain the security deposit.

[11] Ms. McCullough immediately filed an application for a review hearing as provided for in s. 59 of the Residential Tenancy Act. The application was reviewed by Arbitrator Hart without hearing from the parties. In a written decision dated February 23, 2001, leave to have a review hearing was denied.

[12] The application for a review hearing was made on two grounds provided for in s. 59(4) of the Act:

1. the party was unable to attend the original hearing due to circumstances that could not be anticipated and that were beyond his or her control;
2. the party has new and relevant evidence that was not available at the time of the original hearing.

[13] On the first ground Ms. McCullough stated that she was unable to attend "due to RCMP order and charges pending against Mr. Driedger of Quality Property Rentals. I needed legal advice and was not given opportunity to find a lawyer."

[14] The arbitrator stated at p.3 of her February 23 decision:

Ms. McCullough had personally participated in the hearing on 16 February 2001, and had chosen not to participate in the reconvening of the hearing by telephone conference on 19 February 2001. It was not established that Ms. McCullough had "new and relevant evidence that was not available at the time of the original hearing"....

[15] Also on p.3 of the review decision the arbitrator stated:

The order granting an extension of time to pay the rent was made verbally, and was clearly communicated and explained to the parties during the hearing on 16 February 2001. I explained that the order, once made, cannot be changed by the arbitrator (in the absence of the agreement of both parties). In addition, I stressed that should the payment not be made as promised by the tenant, and as ordered under the Residential Tenancy Act, the tenancy would end, and the orders requested by the landlord would be granted.

[16] In addition the arbitrator noted a number of ways that Ms. McCullough might have used to convey the rent payment to Mr. Driedger and that there "was no indication as to why" Ms. McCullough did not use any of them.

[17] Counsel for Ms. McCullough submits that the arbitrator's decision was unreasonable in a number of ways. In his submission the arbitrator's threshold decision on February 16 was to set aside the Notice to End a Residential Tenancy. He goes on to say that there is no evidence on the record to indicate the Petitioner was ever unable or unwilling to pay the rent while at the same time the conduct of Mr. Driedger was vexatious and had breached the terms of the tenancy agreement.

[18] In addition counsel submitted that the arbitrator acted unreasonably in failing to make an additional order under s. 54 of the Act for a method of payment of the rent. He further submitted that the February 23 decision unreasonably focussed on the strictness of proof required of the Petitioner in proving a "no contact order" when the Petitioner did not have a reasonable opportunity to submit evidence of this issue on February 19. Related to this submission was a further argument that the decision overlooks the efforts that the Petitioner made to contact the Residential Tenancy Office prior to the February 19 hearing.

[19] In my respectful view this is a case in which the arbitrator should be directed to reconsider her decision of February 23, 2001, denying a review hearing. The need for reconsideration arises out of the unusual circumstances that occurred following the adjournment of the hearing on February 16 and its continuation on February 19.

[20] At the time of the adjournment of the hearing on February 16 hearing a decision was made to extend the time for payment of the February rent based on the evidence known to that date. No events which might affect the rental payment extension were anticipated at that point. By the time of the resumption of the hearing on February 19, however, some type of incident had taken place which had a bearing on Ms. McCullough's capacity or willingness to attend the continuation of the hearing, even by telephone.

[21] Whether or not she misunderstood what might have been told to her by the police, the evidence suggests that Ms McCullough had a genuine belief that she should not be taking part in the continuation of the hearing involving Mr. Driedger. As a result, submissions that might have been made by her in the continued hearing could not be made. For example, it would have been open to the arbitrator to direct the manner in which the rent payment was

to be made. As noted in the arbitrator's decision of February 19, she had informed the parties on February 16 that it was possible that on February 19 "orders could be made to resolve the matters in dispute".

- [22] In her decisions of February 19 and 23, however, the arbitrator states that her order extending the payment date to February 19 could not be changed. No authority for this statement is identified. This view of the law appears to have substantially affected the arbitrator's decision to end the tenancy on February 19. In my view, if there were changed circumstances, it would have been open to the arbitrator in the continued hearing of February 19 to modify the extension of time to pay that had been granted on February 16.
- [23] It appears that the arbitrator's view that it was not open to her to alter the initial extension of time to pay had a substantial impact upon her decision to deny leave to hold a review hearing. Another substantial factor appears to be the absence of proof of the making of a "no contact order" against Mr. Driedger. The absence of such an order is not determinative of whether Ms. McCullough had a reasonable basis for believing that she was not to take part in the continued hearing on February 19. There was certainly some new and relevant evidence affecting the payment of rent that was not available to the arbitrator on February 16. Its import and weight do not appear to have been considered in the review application.
- [24] In summary, it appears to me that in her decision on the review hearing application the arbitrator did not fully consider the evidence of whether Ms. McCullough was unable to attend the continued hearing on February 19 due to circumstances which could not be anticipated. In addition there does not appear to have been a sufficient examination of whether there was new and relevant evidence which was not available on February 16 which would have a substantial effect on Ms. McCullough's failure to pay the February rent by February 19. Finally, the arbitrator appears to have erred in concluding that she could not modify her order of February 16 extending the time for payment of the rent to February 19.
- [25] It is my conclusion that, in light of these reasons, the arbitrator should be directed pursuant to section 5 of the Judicial Review Procedure Act to reconsider her decision of February 23, 2001. Pending the completion of the reconsideration the orders dated February 19, 2001, on File numbers 328129 and 328142 will be stayed.

"B.F. Ralph, J."

The Honourable Mr. Justice B.F. Ralph

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