
CANADA / JUDGMENT

Powell River v. Sliwinski

2013 BCSC 737

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Supreme Court of British Columbia

DECIDED

16 April 2013

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2013 BCSC 737 Powell River v. Sliwinski

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Powell River v. Sliwinski,

2013 BCSC 737

Date: 20130416

Docket: S110981

Registry: Vancouver

Between:

City of Powell River

Plaintiff

And

Martin Ernest Sliwinski

Defendant

Before: The Honourable Madam Justice Maisonville

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

M.R. Voell

Counsel for the Defendant:

L.A. Berezan

Place and Date of Trial/Hearing:

Vancouver, B.C.

April 16, 2013

Place and Date of Judgment:

Vancouver, B.C.

April 16, 2013

- [1] The plaintiff, the City of Powell River (the "City"), brings an application by way of summary trial for declaratory relief and for injunctive relief as against the defendant, Martin Ernest Sliwinski.
- [2] The application stems from a breach of the City's Zoning Bylaw and more specifically the use of a trailer as a residence on Mr. Sliwinski's property, located in the City of Powell River on the Pan-American Highway, Marine Avenue, which runs through the City of Powell River. The property was purchased by Mr. Sliwinski in 2008, with a view to development. He then moved to Alberta but ultimately returned in 2008 with his family. In 2009, he bought another property.

I. Applicable Bylaws

- [3] The property on which the trailer is located is zoned MX (Mixed Use) and the City claims that the trailer which Mr. Sliwinski has placed on the property is in violation of the Waterworks Bylaw, the Building Occupancy Bylaw and the Zoning Bylaw.
- [4] In terms of an occupancy permit, the applicable Bylaw is s. 19.1 of the Building Bylaw 2141, 2007, as amended ("Building Bylaw"), which states:

19.1 No person shall occupy a building or structure or part of a building or structure, or permit all or part of a building or structure to be occupied until an Occupancy Permit has been issued in the form as provided by the City.

It is not in dispute that no occupancy permit has been issued for the trailer.

- [5] In terms of the recreational vehicle which is located on the property, the applicable Bylaw is s. 20.1 of the Building Bylaw, which states:

20.1 Where a permit has been issued for a dwelling, construction has commenced, and upon payment of a permit fee and security deposit in accordance with Schedule "A" to this Bylaw, a permit may be issued for the placement of a temporary accommodation in the form of a recreational vehicle or holiday trailer but not a modular home or manufactured home, on the same parcel providing the unit is equipped with a holding tank or connected to the City sanitary sewer. The permit shall expire upon occupancy of the dwelling or six months from the date of its

issuance, whichever comes first.

[6] The applicable bylaw respecting water is s. 8 of the Waterworks Rates and Regulations Bylaw, 2316, 2012 ("Waterworks Bylaw"), which states as follows:

8. (a) Any person being the owner of real property within the Waterworks upon which no building or structure is situated, or any owner, or his authorized agent of any Premises desiring the Premises to be served with water, shall make application to the Engineer for water service.

[7] Section 12 of the Waterworks Bylaw states:

12. No person shall install, place or maintain in any Premises any water connection, pipe, fixture, or other apparatus which does not comply with the requirements of this Bylaw.

II. Background Facts

[8] As noted, there is no dispute that there has been no occupational permit obtained. There is at present a water hookup to the trailer. There was argument that the actions of Mr. Sliwinski did not entail actually turning on the water. However, it was explained in the materials before the Court that in order to have the continuing use of the water, certain physical actions had to be taken. It was not simply a matter of continuing using the water. I accept that fact.

[9] The background of this matter is that the defendant is the owner of the parcel of land in Powell River, which is subject to the City Zoning Bylaw, Waterworks Bylaw and Building Bylaw. The property does not have a street address and has never been developed. It is zoned mixed use under the Zoning Bylaw. It has only the recreational vehicle on the property that is being used as a residence.

[10] The occupant of the trailer is Mr. Jersey Staszewski. Mr. Staszewski is 81 years of age and I am advised has metastatic prostate cancer. The City of Powell River does not quarrel with that fact that he is 81 years of age and has advanced prostate cancer. He has not provided an affidavit in these materials. He entered into a lease arrangement with the defendant, Mr. Sliwinski, on March 1, 2010, and that agreement was put before the Court. The agreement is a residential tenancy and rent-to-own agreement which commenced on March 1, 2010, for a period of five years. It stated that at the end of this fixed length of time the tenancy may continue on a month-to-month basis, or another fixed length of time.

[11] By the terms of the agreement, Mr. Staszewski was to pay the landlord \$305 on the first day of each month. There was, as well, a separate part of this agreement, a rent-to-own agreement, in respect to the trailer. The purchaser, Mr. Staszewski, was to pay \$400 each month for 60 months, commencing March 1, 2010, for a total of \$24,000 for the trailer, which was moved to be located as noted on the property. Mr. Sliwinski has resided in the trailer from that time to date.

[12] It is not in issue that the trailer hooks up to the water which goes to the property. The water hookup had been at that location before the trailer was there. It is not alleged that the defendants had somehow wrongly piped the water to the property. However, I accept the ongoing use is in contravention of the Bylaw. There is no separate water bill which identifies the water usage. The defendant, Mr. Sliwinski, has always paid his taxes.

[13] Very shortly after Mr. Staszewski began to live in the trailer on the property the City sent a letter dated April 22, 2010, to the owner, Mr. Sliwinski, stating as follows:

This letter is further to a site visit of the above-described land by City Bylaw Enforcement on 19 April 2010. City staff noted that a recreational vehicle is located thereupon and individuals are residing within. Please be notified this activity is a non conforming use and does not meet Zoning Bylaw provisions for the MX zone nor does the residence meet the definition of "dwelling" as per the following excerpt from Zoning Bylaw 2100:

DWELLING means any building occupied as a home, residence or boarding house by one or more persons, but does not include any hotel, motel, auto court, motor hotel, institution or any manufactured home less than 6 metres (20 ft) wide, exclusive of carports, verandas, cabanas, porches, stairways or any other extension whatever to the original pre-fabricated, modular, or factory made unit.

I have also included a copy of the MX Zone requirements. Additionally, further to discussion with staff at the Development Services counter, you are aware that the land is in Development Permit Area 3 (DPA): Marine and Willingdon Avenues Mixed Use Area. Application for Development Permit is required prior to any proposed construction, development or placement of structures upon the land.

The City requires compliance with Zoning Bylaw 2100 via removal of the vehicle and cessation of the prohibited use or application for land use change by 07 May 2010, at which time we will re-inspect the property.

[14] It is not in dispute that nothing occurred in response to this letter.

[15] Accordingly, because no action was taken in response to this letter, the City wrote a further letter on May 14, 2010, to Mr. Sliwinski, which stated:

This letter is further to my previous letter of 22 April 2010 and our discussion in my office yesterday regarding a recreational vehicle located on the above land and individuals residing therein. The non-conforming use has not been removed from the land by May the 7th as requested in the previous letter.

You have asked us to confirm what would be required to permit or enable this use upon the land. I have reviewed the Local Government Act (the Act) and our Bylaws. Consideration by Council of a 'temporary use permit' is not possible as the Official Community Plan Bylaw has no designation for that permit in the MX zone; moreover, the proposed use is not covered by Act provisions.

This leaves rezoning and revising the permitted land uses under the Zoning Bylaw to include residential/recreational vehicle as the only option. While City staff cannot confirm that this would be recommended, the final decision in land use Bylaw amendments rests with Council. [being the City of Powell River].

Attached, please find a rezoning application form.

Again, the City requires compliance with Zoning Bylaw 2100, 2006 via removal of the recreational vehicle and cessation of the prohibited use or application for land use change: we await your response. If there is no action in either preceding option by 28 May 2010, staff will forward the matter to Council and recommend Bylaw enforcement.

[16] Finally, on January 24, 2013, a letter enclosing a notice was forwarded to Mr. Sliwinski stating inter alia:

The City requires compliance with Zoning Bylaw 2100, 2006 and Building Bylaw 2141, 2007 by cessation of the occupancy and prohibited use of the recreational vehicle for residential purposes.

Please find enclosed a copy of the order requiring said suspension of the occupation of the recreational vehicle, dated today, January 24, 2013.

[17] I would emphasize that last portion of the City's letter insofar it makes it absolutely clear to Mr. Sliwinski that that is an order of the City. A signed copy was sent to the defendant, Mr. Sliwinski.

III. Issue - Should the Injunction issue?

[18] The issue is whether the City should be granted the relief it seeks to enforce its Bylaw. The submission of the plaintiff is that the City is entitled to an injunction where there is a breach of a municipal bylaw: see the Community Charter, S.B.C. 2003, c. 23, s. 274, which reads:

A municipality may, by a proceeding brought in Supreme Court, enforce, or prevent or restrain the contravention of,

- (a) a Bylaw or resolution of the council under this Act or any other Act, or
- (b) a provision of this Act or the Local Government Act or a regulation under those Acts.
- (2) For a civil proceeding referred to in subsection (1), or relating to any damage to or interference with a highway in the municipality,
 - (a) the proceeding may be brought by the municipality in its own name,
 - (b) it is not necessary that the Provincial government, the Attorney General or an officer of the Provincial government be a plaintiff in the proceeding, and
 - (c) the municipality must serve a copy of the originating documents on the Attorney General

- (i) before the end of the period prescribed by the Supreme Court Civil Rules for filing a response to civil claim by the defendant, or
- (ii) within a further time that may be allowed by the court.
- (3) The authority under subsection (1) is in addition to any other remedy or penalty provided under this Act or the Local Government Act and may be exercised whether or not a penalty has been imposed for the contravention.

[19] Additionally here, the plaintiff City relies upon the decision *Langley (Township) v. Wood*, 1999 BCCA 260.

[20] In *North Pender Island Local Trust Community v. Conkoni*, 2009 BCSC 328, which was later affirmed at 2010 BCCA 494, Brown J. stated, at para. 56:

[56] The injunction sought is a statutory injunction pursuant to s. 274 of the Community Charter. It is a purely statutory remedy, not based in equity. It is no objection to the granting of the injunction that there has been a failure to enforce the bylaw for many years or that officials have permitted or approved of the breach. The court's role is to determine whether there has been a breach: *Langley (Township) v. Wood*, 1999 BCCA 260, 173 D.L.R. (4th) 695. Although the court has a very narrow jurisdiction to refuse an injunction where the injunction does not remedy the mischief of the bylaw (*Burnaby (City) v. Pocrnic*, 1999 BCCA 652, 71 B.C.L.R. (3d) 211; *Coquitlam (City) v. Aweryn*, 2001 BCCA 373, 156 B.C.A.C. 218), that does not apply in this case, where an injunction would remedy the mischief.

[21] It is not disputed that the property has the recreational vehicle and that the City has not issued an occupancy permit and the defendant is in violation of the Zoning Bylaw. No land or building structures on a property can be used or occupied or erected, moved, or enlarged, except in conformance with Zoning Bylaw 4.1, which states as follows:

Subject to 4.2 below, no land, water surface, buildings or structures within the City shall be used or occupied, and no buildings, structures or parts thereof shall be erected, moved, altered or enlarged except in conformance with this Bylaw.

The Zoning Bylaw prohibiting the residential use of the recreational vehicle on the property is 10.7.2. I will not outline the entirety of those uses but this use does not fall within the exceptions noted in the Bylaw.

[22] This recreational vehicle is, at present, connected to the City's water source. It separately is connected to a source of electricity.

[23] The City states that, as a statutory authority, it is entitled to decide whether to proceed to enforce a Bylaw and relies upon the decision of *Toronto (City) v. Polai*, [1973] S.C.R. 38, as well as *Burnaby (City) v. Oh*, 2010 BCSC 1970 at 26, which was affirmed at the Court of Appeal, 2011 BCCA 222, at para. 42, in which the Court of Appeal held:

In this case, Justice Greyell concluded that the appellant, in asserting discrimination as a defence, could not rely on the City's alleged non-enforcement of the Bylaws against others in order to defeat the application the City had brought against her. The correctness of the judge's conclusion on this point is well-supported by the decision in *Polai v. Toronto (City)*, [1970] 1 O.R. 483 (Ont. C.A.), *aff'd* [1973] S.C.R. 38. In that case, Mrs. Polai was convicted of breaching a zoning bylaw but nevertheless continued to contravene the bylaw by using the premises as a multiple family dwelling-house. The City issued a writ for an injunction but the trial judge, [1968] O.J. No. 1343, dismissed the City's action because he found that it maintained a secret "deferred list" of infringers against whom no action, either by prosecution or application for an injunction, had been or would be taken. In the Court of Appeal, there was a difference of opinion about whether to accept the judge's characterization of the list but all three judges on the appeal held that the public had a direct and substantial interest in the enforcement of the bylaw and that the public interest must prevail over the private interest of Mrs. Polai. The Supreme Court agreed with that conclusion at 40-41:

I do not think that lax enforcement of zoning by-law - and I am by no means sure that it can be called "lax enforcement" in this case - can afford any defence against an application for an injunction under s. 486 of The Municipal Act, which provides:

486. Where any by-law of a municipality or of a local board thereof, passed under the authority of this or any other general or special Act, is contravened, in addition to any other remedy and to any other penalty imposed by the by-law, such contravention may be restrained by action at the instance of a ratepayer or the corporation or local board.

This is a case of persistent and defiant infringement. The defence really amounts to a claim for immunity until the list is disregarded and everybody else prosecuted. ... The City, in this action, is seeking to protect and enforce a public right, and should not be denied the remedy of injunction merely because others, in addition to the defendant, are guilty of similar violations and have not been restrained.

[Emphasis added.]

[24] Before the Court, the defendant argued there has been some lack of diligence or quick movement by the City, and that consequently this matter should be looked at through a different lens. However, as noted in those cases, the fact that the City may choose to proceed with enforcement, given the statutory nature of the injunction being sought, does not amount to there being a lack of diligence such that equitable remedies arise. The fact is, however, that the City seeks to protect and enforce the public right as set out in the Bylaw. The Bylaw enables the City to choose when to do so, and that action has, in fact, been commenced.

[25] Mr. Sliwinski, through counsel, argues that if the injunction is allowed, he will be in violation of the contract with Mr. Staszewski in that the agreement of five years would be unable to carry on for the entire duration of the agreement envisioned between the defendant and Mr. Staszewski. In response, the City states that the Residential Tenancy Act, S.B.C. 2002, c. 78, provides that a landlord may end a residential tenancy in order to comply with an order. Specifically, s. 47(1)(k) provides:

47 (1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:

...

(k) the rental unit must be vacated to comply with an order of a federal, British Columbia, regional or municipal government authority;

[26] While it is argued by the City that the first two letters were orders of the City, I find in the particular circumstances here, notably the use of the word "order" in the third letter, that until January 2013 the earlier letters did not, in fact, amount to orders of the City within the meaning of s. 47(1)(k).

[27] There is very limited discretion by the Court, once it has been demonstrated that there has been a breach of the City's Bylaw, to deny the statutory injunction to enforce the public right. I refer to the cases Oh and Pocrnic, noted above.

[28] In the submissions before the Court, it was argued by the City that this order goes exactly to remedying the mischief set out in the Bylaw.

[29] In the circumstances of Pocrnic, there was a crawlspace permitted, but the owner went beyond the permitted use and excavated below the house to complete entire basement. Esson J.A., for the unanimous court, held:

[15] Finally, Mr. Azevedo submitted that the trial judge may have been misled by judicial pronouncements in some cases of this kind to the effect that, once a breach is established, there is no discretion to refuse the order. The better view I think is that there is a discretion but, because the right to an injunction is created by statute and because the public interest must be weighed against any hardship which the order may impose on the defendants, the scope of the discretion is narrow. That the discretion exists is illustrated by a recent decision of this Court: Capital (Regional District) v. Smith (1998), 168 D.L.R. (4th) 52; 115 B.C.A.C. 76; 49 M.P.L.R. (2d) 159. In that case, the District sought a mandatory injunction requiring the defendants to demolish a partially completed cottage. While the relief sought was essentially the same as that sought by the municipality in this case, the factual circumstances were radically different.

[30] Referring again to the discretion, after reviewing that case, Esson J. continued:

- [18] This court took a different view of the effect of the provisions of s. 911 and held that its language must be interpreted as applying to each individual cottage and not to the group. However, Hall J.A. for the court went on to hold that it would not be appropriate to order the demolition of the partly completed replacement cottage. He noted that to permit the cottage to be completed would not offend against the mischief at which s. 911 was aimed. At para. 23, he observed that, while the discretion of the court is limited, it would be "highly inequitable" to order the removal of the building and that, because the new building was exactly the same as the one which had burned down and that its completion would restore the group of 17 to the situation before the fire, there would be no utility in granting an order.
- [19] In this case, the factual circumstances bring the case directly within the scope of the mischief which the legislation seeks to prevent. Reduced to its essentials, it is a case of owners deliberately flouting the bylaw for their own benefit and in the hope of not being detected.
- [20] Clearly, the trial judge did not approach the matter on the premise that he had no discretion. His final conclusion was stated thus:

It is unfortunate that the defendants may have to spend a considerable sum of money to comply with the bylaw; however, there is no equity in their position. They wilfully ignored the bylaw and rendered themselves subject to prosecution and the risk of the very problem they now face.

I find no reason equitable or otherwise to deny the relief sought.

[21] I find no error in that conclusion. I would dismiss the appeal.

[31] The exercise of discretion was reviewed additionally by Rowles J.A. for the Court of Appeal in *Oh, supra*. In that regard, she stated:

[41] Once the municipality applying for the injunction has demonstrated that there has been a breach of a bylaw, the court has limited discretion to deny a statutory injunction to enforce a public right: *Maple Ridge (District) v. Thornhill Aggregates Ltd.* (1998), 54 B.C.L.R. (3d) 155, 162 D.L.R. (4th) 203 (C.A.) at para. 9:

Where an injunction is sought to enforce a public right, the courts will be reluctant to refuse it on discretionary grounds. To the extent that the appellants may suffer hardship from the imposition and enforcement of an injunction, that will not outweigh the public interest in having the law obeyed. ...

[32] I am mindful of those statements. And while I accept that this Court has the discretion, it is a very narrow one and, in the particular circumstances before the Court, the issue is not the hardship of the defendant, Mr. Sliwinski, it is rather the hardship of the tenant on the property.

[33] In the circumstances, it is appropriate that the injunction follow. However, the Court is mindful and the City of Powell River does not quarrel with the fact that Mr. Staszewski is an 81-year-old with metastatic prostate cancer who has been living on the property for some

time and that there is the importance of ensuring that he has the fulsome opportunity to move either his premises or locate a place to live. The Court is mindful of that, as is the City which, during argument, had in fact offered alternatives for Mr. Staszewski to locate his trailer. The City could provide an alternative place for the trailer to be situated were the injunction to be given immediate effect. In this case, the parties took the opportunity to make further telephone calls to determine and ascertain the ultimate living arrangements that can be made for Mr. Staszewski on that property.

[34] In all of the circumstances, this Court grants the declaratory relief as follows:

1. the Defendant, Martin Ernest Sliwinski, is using or allowing the use of the property legally described as Lot 4 Block 15 District Lot 5307 Plan 6875, PID# 010-784-918 ... contrary to the City of Powell River Zoning Bylaw 2100, 2006 by using, or allowing the use of one recreational vehicle on the Property for residential purposes;
2. the Defendant, Martin Ernest Sliwinski, is contravening the City of Powell River Waterworks Regulations and Rates Bylaw 2266, 2010 by connecting or allowing the connection of the recreational vehicle on the Property to the City water service without first obtaining permission from the City Engineer;
3. the Defendant, Martin Ernest Sliwinski, cease using or allowing the residential use of the recreational vehicle on the Property within six months of this Order;
4. this Court shall remain seized of this matter; and
5. the City shall be notified of the steps taken by Mr. Sliwinski to comply with this order at the end of each month; and
6. the parties shall have leave to make further submission on the costs of this action if costs cannot be agreed to.

[35] The Court is mindful of Ms. Berezan's submissions relating to Mr. Staszewski, and accordingly that order was made. However, the City is entitled to the statutory declaration in the terms set forward in detail by Mr. Voell, with the alterations that I have just pronounced, and I will stay seized of the matter.

[36] I want to thank counsel again for their submissions. Are there any questions?

[37] MR. VOELL: My Lady, I just have one question with respect to keeping the City notified.

[38] THE COURT: Yes, I thought it would be prudent - your submission was very mindful of the fact that Mr. Staszewski is on the property still and needs to have water, and so the City was not going to cut off his water. So I think the onus falls to the defendant to ensure that the steps are being taken. The Court is also concerned that he is living in a trailer in his condition, in any event, and so that if he can find alternative living, that would seem preferable, although there is no evidence before the Court. The City's offer to assist in this regard is appropriate.

[39] MR. VOELL: My Lady, perhaps I can ask that the defendant contact or keep Carlos Felip, who is the manager of Development Services with the City, up to date with respect to that monthly information.

[40] THE COURT: All right, and that that occur at the last business day of every month?

[41] MR. VOELL: That would be fine.

[42] THE COURT: All right.

____ "Maisonville J." ____

Maisonville J.

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