

CANADA / JUDGMENT

Rogers v. Director Residential Tenancy Branch

2024 BCSC 2590

COURT

Supreme Court of British Columbia

DECIDED

26 July 2024

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2024 BCSC 2590 Rogers v. Director Residential Tenancy Branch

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rogers v. Director Residential Tenancy Branch,

2024 BCSC 2590

Date: 20240726

Docket: S235134

Registry: Vancouver

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

Between:

Mary Isobel Rogers

Petitioner

And

Director Residential Tenancy Branch

Jason Farrell, Property Manager, The BLOOM Group, Landlord(s)

Sam Curtis, Residential Manager, The BLOOM Group, Landlord(s)

Respondents

Before: The Honourable Justice Laurie

On judicial review from: Residential Tenancy Branch Dispute Resolution Services, Decision of Arbitrator, July 12, 2023 (RTB File 910105064)

Oral Reasons for Judgment

In Chambers

The Petitioner, appearing in person:

M. Rogers

Appearing with the Petitioner:

E. Rogers

The Respondent Sam Curtis, appearing on his own behalf:

S. Curtis

No other appearances

Place and Date of Trial/Hearing:

Vancouver, B.C.

July 19, 2024

Place and Date of Judgment:

Vancouver, B.C.

July 26, 2024

- [1] THE COURT: These are oral reasons for judgment. If a transcript is subsequently ordered, I reserve the right to make minor edits and corrections. The substance of the reasons will not change.

I. introduction

- [2] This is an application by the petitioner, Mary Isobel Rogers, for judicial review pursuant to the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241, seeking to set aside a decision of the Residential Tenancy Branch ("RTB"). At the hearing of this application, Ms. Rogers was assisted by her sister, Elisabeth Rogers, who provided oral and written submissions on behalf of the petitioner. The petitioner also relies on her own affidavit in support of her application.
- [3] The respondent Director for the RTB filed written submissions on the applicable law, as well as an affidavit attaching the record of dispute resolution proceedings in this matter. In its written submissions, the Director advised that it did not intend to be present at the hearing and that it took no position on the application, except on the issue of costs, which was opposed.

- [4] The respondents Jason Farrell and Sam Curtis did not file a response. Mr. Curtis was present at the hearing but did not make submissions with respect to the application.

II. Factual background

- [5] This matter involves a dispute between a tenant, Ms. Rogers, and her landlord, the Bloom Group. Ms. Rogers began renting Unit 712 at 1115 Nelson Street in Vancouver in December 2020. This building offers affordable housing. Ms. Rogers is 60 years of age. She has a long history of physical and mental health challenges. She is an amputee and requires a wheelchair to get around. She relies on disability insurance payments to support herself.
- [6] In February and March of 2023, Ms. Rogers's mental health declined. In late February 2023, while experiencing delusions that led her to believe that she was in harm's way, Ms. Rogers pulled the building's fire alarm in an attempt to seek help. This prompted the landlord to issue a one month's notice to end the tenancy ("the notice"), which it served on Ms. Rogers by leaving it in her mailbox on March 2, 2023.
- [7] The notice contained the language in subsections 47(4) and 90(d) of the Residential Tenancy Act, S.B.C. 2002, c.78 (RTA), which provide that the tenant was deemed to have received the notice three days after it was left in the mailbox, and that the tenant had 10 days after receipt to dispute the notice by filing an application for dispute resolution with the RTB.
- [8] In light of these provisions, the deadline for Ms. Rogers to have filed an application to dispute the notice was March 15, 2023. Ms. Rogers filed an application on March 24, 2023, nine days past the deadline.

III. Procedural background

A. The dispute resolution hearing

- [9] On June 30, 2023, a dispute resolution hearing was held via conference call before RTB Arbitrator S. Kaila. The hearing was in respect of Ms. Rogers's request to extend the time limit for her application, as well as the application to cancel the notice. During the hearing, Ms. Rogers testified about the decline in her mental health during the months of February and March 2023. She testified that she was admitted to the hospital on March 2 in a psychotic delusional state. She testified that after that date, she was AWOL from the hospital until March 18. She stated that she was very ill and confused, and she did not return to her unit during this period. She said that she did not receive the notice until March 15, at which time she sought help from her support workers with respect to filing an application to dispute the notice.
- [10] Ms. Rogers provided letters from her support workers at Vancouver Coastal Health, Hailey Smith and Dave Markland, and from her community psychiatrist, Dr. Irwin. The letters spoke about Ms. Rogers's long history of serious and complex physical and mental health illness. In particular, Ms. Smith's letter described Ms. Rogers accessing medical care at St.

Paul's on March 2, 2023 in connection with feeling confused and having difficulty distinguishing what was real and what was not. It also stated that Ms. Rogers discontinued her psychiatric medication on or about March 8, 2023, and was back at St. Paul's Emergency Department shortly after that. Ms. Rogers was subsequently certified under the Mental Health Act, R.S.B.C. 1996, c. 288, and involuntarily admitted to St. Paul's Psychiatric Unit on March 18, where she remained until May 16, 2023.

- [11] Ms. Smith advised that the key concerns related to Ms. Rogers's condition were suicidal ideation and paranoid delusions.
- [12] Both Ms. Smith and Mr. Markland stated in their respective letters that when they saw Ms. Rogers on March 17, 2023, she told them about receiving an eviction notice a couple of days prior.

B. The Decision

- [13] On July 12, 2023, Arbitrator Kaila denied Ms. Rogers's request for extension of time and dismissed the application (the "Decision"). In the Decision, Arbitrator Kaila noted that under s. 66 of the RTA, the Director of the RTB may extend a time limit established by the RTA only in exceptional circumstances. He also noted that under the Residential Tenancy Policy Guidelines, the word "exceptional" implies that the reason for failing to do something at the time required is strong and compelling, and an ordinary reason or a mere excuse would not be sufficient. The party putting forward a strong and compelling reason must have some persuasive evidence to support the truthfulness of it.
- [14] Arbitrator Kaila's rationale for denying Ms. Rogers an extension of time is found at paragraph 12 of the decision. In that paragraph, he stated:

I find the tenant failed to provide sufficient evidence that she did not receive the One Month Notice until March 15, 2023. The tenant's own evidence in the form of the support letter indicates that although she attended the hospital on March 2, 2023, she was admitted to the in-patient care until March 18, 2023.

(I gather this was a typo and it meant to say she was not admitted to the in-patient care unit until March 18, 2023).

- [15] Continuing on with paragraph 12 of Arbitrator Kaila's reasons:

I do not find the tenant's testimony credible that she was AWOL for this entire period and did not return to the rental unit. The tenant testified she was AWOL for the entire period which does not explain how she could have received or became aware of the One Month Notice on March 15, 2023. Although I am sympathetic with the tenant's mental health issues, I find these are not exceptional circumstances which would have prevented the tenant from seeking assistance to file the application on time.

- [16] Arbitrator Kaila concluded that, since the application did not comply with the prescribed limits pursuant to s. 47(5) of the RTA, Ms. Rogers was presumed to have accepted that the tenancy ended on the effective date of the notice, which was April 30, 2023. He dismissed the application to cancel the notice and granted an order of possession in favour of the landlord pursuant to s. 55 of the RTA.

C. The Review Decision

- [17] On July 14, 2023, Ms. Rogers applied for a reconsideration of the decision pursuant to s. 79 of the RTA, which provides, in part, that a party may request that a decision be reviewed on the basis of new and relevant evidence not available at the time of the hearing.
- [18] Along with this application for review, Ms. Rogers provided a letter from Dr. Irwin advising that Ms. Rogers was experiencing very serious health problems requiring hospitalization on multiple dates in March 2023, including on March 2, 5, 7, 10, 13, 14, 16, 17, and 18. Dr. Irwin's clinical notes on those dates were also provided.
- [19] Arbitrator Kaila found that this evidence was not "new" and was available to Ms. Rogers on the previous hearing date. He added that "in the original hearing, the tenant only stated that she was AWOL after her initial March 2, 2023 hospital visit until being admitted again on March 18, 2023. The tenant failed to mention in the original hearing that she was still regularly visiting her physician throughout this period".
- [20] Arbitrator Kaila dismissed the application for the reconsideration on July 19, 2023 (the "Review Decision").

IV. Standard of review

- [21] By operation of subsections 5.1 and 84.1 of the RTA, and subsection 58(2)(a) of the Administrative Tribunals Act, S.B.C. 2004, c. 45 ("ATA") the standard of review for a finding of fact or law or an exercise of discretion by RTB arbitrators in respect of matters within their exclusive jurisdiction is one of patent unreasonableness.

- [22] Section 58(3) of the ATA states:

For the purposes of subsection (2)(a), a discretionary decision is patently unreasonable if the discretion

- (a) is exercised arbitrarily or in bad faith,
- (b) is exercised for an improper purpose,
- (c) is based entirely or predominantly on irrelevant factors, or
- (d) fails to take statutory requirements into account.

- [23] Courts have described a patently unreasonable decision as one that is: openly, evidently or clearly irrational; unreasonable on its face; unsupported by evidence or vitiated by failure to consider the proper factors; incapable of withstanding a probing examination; and almost bordering on the absurd: *Shuster v. Prompton Real Estate Services Inc.*, 2023 BCSC 1605, para. 21, citing *Hollyburn Properties Limited v. Staehli*, 2022 BCSC 28, para. 25.

V. Preliminary issue

- [24] In this case, there is a preliminary issue that must be determined and that is whether it is the Decision or the Review Decision that is properly the subject of this judicial review. In the case of *Najaripour v. Brightside Community Homes*, 2023 BCSC 2032, appeal dismissed at 2024 BCCA 250, Justice MacNaughton discussed the analysis that must be undertaken. She stated at paras. 49 to 53:
- [49] As a preliminary issue, I must determine whether it is the 2022 RTB decision or the Review Consideration Decision that is subject of this judicial review.
- [50] There has been some controversy about whether, when a statutory scheme provides for an internal review procedure, it is the original or the review decision that is the proper subject of the judicial review.
- [51] In *Sereda v. Ni*, 2014 BCCA 248, the Court followed *United Steelworkers, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union, Local 2009 v. Auyeung*, 2011 BCCA 527, and determined that the review decision was the subject of the judicial review but that the original decision should form part of the record and "inform" the inquiry on judicial review: at para. 26.
- [52] In *Martin v. Barnett*, 2015 BCSC 426, Justice Burke reviewed the law in this area and concluded that in two subsequent decisions, being *Yellow Cab Co. v. British Columbia (Passenger Transportation Board)*, 2014 BCCA 329 and *Fraser Health Authority v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2014 BCCA 499, the Court of Appeal clarified the law and concluded that when an internal review decision does not address the merits of the underlying decision, the original decision should be the subject of the judicial review . . .
- [53] In this case, the Review Consideration Decision did not review the merits of the 2022 RTB Decision. The scope of the Review Consideration Decision was whether new evidence should be admitted and whether fraud occurred. Therefore, it is the 2022 RTB Decision that is the subject of the judicial review. I note that this is what Ms. Najaripour sought in her amended petition.
- [25] Similarly, in this case, in deciding the Review Decision, Arbitrator Kaila did not review the merits of the Decision and the review was confined to the issue of whether there was new evidence. In the circumstances, I conclude it is the Decision that is the subject of the judicial review. I also note that this is what is sought in the amended petition filed by Ms. Rogers.

VI. Analysis

- [26] I agree with the petitioner that the Decision is patently unreasonable. In my view, in deciding whether there were exceptional circumstances to warrant an extension of time limit, Arbitrator Kaila failed to consider Ms. Rogers's evidence as to why she was not able to file an application for dispute resolution within the prescribed time limit.
- [27] The thrust of Ms. Rogers's evidence was that in March 2023, she was experiencing serious mental health issues that significantly impaired her ability to function. During this time, she felt confused, experienced delusions, and had difficulty distinguishing what was real from what was not. The seriousness of Ms. Rogers's mental health condition is demonstrated by her admission to the hospital in a psychotic delusionary state on March 2, 2023, and her involuntary admission to St. Paul's psychiatric unit on March 18, where she remained for a significant period of time.
- [28] Although Arbitrator Kaila acknowledged Ms. Rogers's mental health issues, it is clear from his decision that his analysis focused on whether Ms. Rogers had provided sufficient evidence that she was not physically present at her place of residence to receive the notice. While he accepted that Ms. Rogers was hospitalized on March 2 and again on March 18 to May 16, his consideration of these incidents appears to be limited to the extent to which they demonstrated that Ms. Rogers was not home on those dates. Hence, Arbitrator Kaila stated:
- I do not find the tenant's testimony credible that she was AWOL for this entire period and did not return to the rental unit.
- [29] With respect, the Decision missed the point of Ms. Rogers's evidence, which was not simply that she was not home on the relevant dates, but that she was seriously mentally or psychologically impaired during that time, regardless of where she was physically located. In my view, the arbitrator failed to take this important context into account.
- [30] The fact that Ms. Rogers, during the hearing, could not provide a detailed account of her whereabouts between March 2nd and 18th did not detract from the evidence of her mental health challenges. Rather, it was consistent with it.
- [31] Neither did the fact that Ms. Rogers became aware of the notice on March 15 negate the compelling and undisputed evidence of her significant mental health issues. In failing to consider whether Ms. Rogers's mental health issues amounted to exceptional circumstances that warranted an extension of the prescribed time limit, in my view, the arbitrator exercised his discretion arbitrarily and failed to take relevant factors into account. Further, the Decision was based on largely irrelevant factors by focusing on Ms. Rogers's physical whereabouts between her respective hospitalizations on March 2nd and 18th.
- [32] In the circumstances, the Decision is openly, evidently, and clearly irrational, and unreasonable on its face.

VII. Remedy

- [33] Having found that the decision is patently unreasonable, I must set it aside. I am mindful that the courts should, as a general rule, respect the legislature's intention to entrust the matter to the administrative decision maker, and it would be most often appropriate to remit the matter back to the decision maker to have it reconsider its decision, this time with the benefit of the court's reasons.
- [34] However, there are exceptions to this general rule, and I am of the view that this is one of those limited scenarios in which remitting the matter back to the RTB for a rehearing on the issue of extension of time limits would stymie the timely and effective resolution of the dispute in a manner that no legislature could have intended: See *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, paras. 141 to 142; *Flynn v. Pemberton Holmes Ltd.*, 2021 BCSC 1143, paras. 42 to 43.
- [35] If I were to remit this matter back to the RTB for a rehearing with direction that the arbitrator consider the significance of the petitioner's mental health problems in March 2023, evidence that was neither disputed at the original hearing nor rejected by the arbitrator, in my view, the inevitable outcome would be a conclusion that exceptional circumstances existed to warrant an extension of the time limit for the petitioner's application for dispute resolution.
- [36] Further, there is an urgency to providing a resolution to the substantive dispute between Ms. Rogers and the respondent landlord which arose about 17 months ago now and, in all of the circumstances, it would not be an efficient use of public resources to allow the issue of extension of time for the filing of the application to stymie the proceedings and further delay the resolution of the actual dispute.
- [37] I therefore grant the petitioner's request to set aside the RTB's decision dated July 12, 2023, along with the associated order of possession issued on the same date, and I would substitute an order granting the extension of time limit for the filing of the application for dispute resolution to the RTB to March 24, 2023, the day that the application was filed.
- [38] Since the decision did not address the substance of the dispute between the parties, I will remit this matter back to the RTB for a rehearing on the substance of the dispute.
- [39] I decline to grant the petitioner's request for costs. I accept the Director's submission that it is not generally appropriate to order costs against a decision maker such as the RTB following a judicial review in which the petitioner is successful, absent evidence of misconduct or perversity in the proceedings before the decision maker or inappropriate argument on the merits of the judicial review. I am satisfied that there is no basis to order costs against the Director with respect to the judicial review, and I do not think it is appropriate to order costs against the respondent landlord in these circumstances.

"Laurie J."

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