

CANADA / JUDGMENT

Russell v. Craigflower Housing Cooperative

2020 BCSC 1300

COURT

Supreme Court of British Columbia

DECIDED

11 August 2020

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2020 BCSC 1300 Russell v. Craigflower Housing Cooperative

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Russell v. Craigflower Housing Cooperative,

2020 BCSC 1300

Date: 20200811

Docket: S-202209

Registry: Victoria

Between:

Alison Russell

Appellant

And:

Craigflower Housing Cooperative

Respondent

Before: The Honourable Madam Justice Adair

On appeal from: a decision of the Craigflower Housing Co-operative

Board of Directors, May 12, 2020

Oral Reasons for Judgment

In Chambers

Counsel for the Appellant

(by teleconference):

D. Jackson

Counsel for the Respondent

(by teleconference):

G. Haddock

Place and Date of Hearing

(by teleconference):

Victoria, B.C.

August 7, 2020

Place and Date of Judgment

(by teleconference):

Victoria, B.C.

August 11, 2020

- [1] THE COURT: Ms. Russell appeals the May 12, 2020 decision of the board of directors of the Craigflower Housing Co-operative to terminate her membership in the Co-op and her occupancy of her Co-op unit (the "Unit") for non-payment of housing charges to the Co-op. Ms. Russell's appeal is brought pursuant to s. 37(3) of the Cooperative Association Act, S.B.C. 1999, c. 28 (the "Act").
- [2] The Co-op says that Ms. Russell's appeal must be dismissed, and it applies for an order of possession of the Unit, effective immediately, pursuant to s. 172(1) of the Act.
- [3] The facts are, generally speaking, straightforward.
- [4] The Co-op is a non-profit housing co-operative incorporated pursuant to the Act, and it provides low-cost housing to its members. Each year, pursuant to an operating agreement with Canada Mortgage and Housing Association, the Co-op receives subsidy funds from CMHA to administer. Members of modest means may apply to the Co-op, and, assuming they meet certain financial requirements, a member may be granted subsidy from the Co-op to assist the member with paying their monthly housing charge.
- [5] Ms. Russell has lived in the Unit with her now 17-year-old son since October 2018. Her monthly housing charge is \$1,066. Ms. Russell works full-time as a kitchen designer at a big-box home improvement store, and she is the sole provider for her household. By virtue of her appeal, Ms. Russell remains a member of the Co-op until her appeal is determined. She has continued to live in and remains in possession of the Unit.

- [6] From about the time she began living in the Unit, Ms. Russell has had difficulty making housing-charge payments on time and in full. As a result, the Co-op incurred NSF fees, and Ms. Russell incurred late fees. Copies of the Co-op's correspondence to Ms. Russell in this regard are attached as Exhibit "C" to the affidavit of the Co-op's treasurer, Karen Vandermeulen.
- [7] By letter dated April 18, 2020 from the Co-op's treasurer, the Co-op required Ms. Russell to pay all money due and owing to the Co-op. The letter stated that Ms. Russell's housing charge for April had been returned NSF, and she was in arrears for March and April 2020. The total amount owing (as stated in the letter) was \$2,261. The letter stated further that Ms. Russell would have to contact the treasurer before April 22, 2020. The letter was both delivered and emailed to Ms. Russell.
- [8] In her affidavit filed on the appeal, Ms. Russell explained that, as of April 18, 2020, she was ill and had been advised to self-isolate due to the COVID-19 virus and some of her symptoms at that time. Ms. Russell explained further that, because of her illness, she was not going through her email at that time.
- [9] On April 26, 2020, the Co-op board sent another email message to Ms. Russell concerning her arrears. The message read in part [all sic]:

We are reaching out on the behalf of the treasurer regarding your arrears situation. As you know, we as the BOD want to work creatively to ensure that our members are able to live here and afford their pad for a long time to come, particularly in the context of a pandemic.

However, members also have a responsibility to proactively communicate and work with the bod as, in the end, your housing fees are your responsibility.

We are concerned that your outstanding fees and lack of response to multiple attempts to make contact with you are going to result in a situation that cannot be sustained.

We encourage you to respond to [the email address is given] with your plan, both to repay your arrears and also to make payment on time going forward (perhaps you want to submit your information for subsidy or request your monthly fees be paid in two smaller biweekly payments) as soon as possible. . . .

- [10] Ms. Russell responded by email on April 28, 2020. She apologized for the delay in not getting in touch sooner, acknowledged that it was unacceptable, and said that she would ensure it would not happen again. Her email continued, in part [all sic]:

I have been quite overwhelmed and been trying to get things sorted so that I have a somewhat concrete plan to pay my arrears and go forward ensuring my future housing charge is covered. I have May's money in my account as well, I am also awaiting a medical expenses refund for \$300. In meantime, I have applied for a Housing subsidy through the government though as of yet I have not had a response.

...

Going forward it may be a good idea to split my monthly payments so that I can keep applying additional monies towards arrears and other bills are covered, without everything landing at the end of the month. As soon as I receive any correspondence in regards to the government subsidy and Health Insurance, I will update you. . . .

...

- [11] By letter dated May 1, 2020, and pursuant to the provisions of the Co-op's Rules and the Act, the Board provided Ms. Russell with seven days' notice to attend at a meeting of the Board (to be held via Zoom) where the Board would consider a resolution to terminate Ms. Russell's membership in the Co-op for non-payment of housing charges to the Co-op. According to Ms. Russell, she found a copy of this letter taped to her Unit door on May 2, 2020.
- [12] As of May 1, 2020, Ms. Russell's arrears stood at \$2,261.
- [13] The Board held its meeting on May 12, 2020. At that time, there were seven directors, all of whom attended the meeting. Ms. Russell also attended. As Ms. Russell recalled, at the meeting, she again apologized and stated that she would be giving the Co-op a bank draft for \$1,000 the next day. She informed the directors that she had her payday coming up, and she requested that, going forward, her payments be split in two. She informed the directors that she would pay one-half month in advance in order to show that payments going forward would be on time, and that there would be no further issues. There is no indication that Ms. Russell provided the directors with any update on the status of her application for a housing subsidy.
- [14] The minutes of the directors' meeting stated that: Ms. Russell "presents a repayment plan without firm dates and that relies on uncertain government subsidies. She proposes that she'll be able to pay amount owing in full if granted subsidies by May 20th, 2020. Going forward [Ms. Russell] would like to pay housing charges twice a month in advance."
- [15] After hearing from Ms. Russell and considering the matter, the directors voted on a resolution to terminate Ms. Russell's membership in the Co-op on account of her arrears, with her last day to be June 30, 2020. The resolution was passed unanimously.
- [16] Pursuant to the Co-op's Rules and the Act, Ms. Russell was notified of the outcome of the directors' meeting by letter dated May 13, 2020. The letter also advised Ms. Russell of her right of appeal and attached a copy of Form 9.1 of the Regulations under the Act in that regard.
- [17] Ms. Russell explained that, on May 13, 2020, she had obtained a draft for \$1,397.50 and dropped the draft off at the Co-op office on her way home. When she arrived home, she found an envelope taped to her door with the May 13, 2020 letter (and enclosure) informing her that her membership had been terminated.

- [18] The Co-op did not accept Ms. Russell's bank draft and returned it to her under cover of a letter dated May 23, 2020.
- [19] As of July 20, 2020, the outstanding amounts owed by Ms. Russell were \$3,177, plus \$150 in fines. The Co-op cancelled Ms. Russell's pre-authorized debit plan as of June 30, 2020, and amounts owing included amounts for overholding.
- [20] Ms. Russell says that she has looked at the housing market and "I am unable to afford anything that is out there." She says further (from paras. 13 and 14 of Ms. Russell's affidavit):
13. . . . As well, prior to moving into the coop, I was paying vast housing charges so filed a consumer proposal. Applications for new places request a rental history, which will show me being terminated, and require a credit check of which I have a poor one. As of June 30th, my only option is to put my belongings into storage, send my cat to a family member and send my 10 ½ year-old dog to the SPCA for rehoming. My son and I will then have to couch surf until such times as I can secure another coop or a place through another agency that will assist me.
14. Lastly to note I suffer from Crohn's disease and have large medical expenses, which have at times impacted my financial situation. Due to [the] current situation, I was in hospital recently and am now off on stress leave.
- [21] Section 35 of the Act provides for termination of a membership in a housing cooperative.
- [22] Under s. 35(1), a housing cooperative "may provide in its rules for the termination of a membership of a member." However, the ability to include provisions regarding termination in a co-op's rules is permissive. Moreover, s. 35(2) of the Act provides that the rules referred to in subsection (1) and the rules that a housing cooperative may adopt under subsection (3) "are subject to this section and sections 36 to 39."
- [23] Section 35(3) provides that:
- (3) A housing cooperative by its rules may adopt either of the following grounds as constituting grounds for termination of the membership of a member who has a right to possession or occupancy of residential premises that is dependent on the member's membership:
- (a) the member has not paid rent, occupancy charges or other money due by the member to the housing cooperative in respect of the residential premises and has not rectified the nonpayment within a reasonable time after receiving written notice to do so from the housing cooperative;
- . . .
- [24] Section 35(5) provides that:

A housing cooperative may exercise the powers under this section to terminate the membership of a member only by a resolution of the directors requiring a majority of at least 3/4 of all the directors and passed at a meeting of the directors called to consider the resolution.

[25] Section 36 of the Act deals with notices respecting termination of a membership, including notice of the passage by the majority of directors of a resolution to terminate a membership.

[26] Section 37 of the Act addresses appeals for termination of a co-op member's membership. Section 37(3), which is the relevant provision in this case, provides that:

(3) If a person's membership in a housing cooperative is terminated, the person may appeal the termination to the court

...

(b) on any one or more of the following grounds:

(i) the housing cooperative failed to observe the principles of natural justice in terminating the membership;

(ii) the decision of the housing cooperative is not reasonably supported by the facts;

(iii) the decision of the housing cooperative is not authorized by section 35.

The permitted grounds of appeal are strictly limited to those set out in s. 37(3).

[27] The ground of appeal on which Ms. Russell relies is that the Co-op failed to observe the principles of natural justice in terminating her membership. In particular, Ms. Russell says that the Co-op failed to engage in any meaningful discussion of repayment options, after suggesting some in the April 26 email, and did not give her enough time to deal with the Co-op's demands. Ms. Russell says that this was a breach of the principles of natural justice.

[28] The court has discussed in a number of cases the elements of natural justice as they apply to decisions of housing cooperatives. In *Kelly v. 115 Place Co-operative Housing Association*, 2009 BCSC 302, for example, Mr. Justice Barrow said, at para. 33:

[33] Without attempting to exhaustively define the content of due process or the principles of natural justice applicable to housing cooperatives, those principles include the right of members to be informed of when and where the membership will meet to consider a resolution terminating membership; the basis upon which the resolution is being considered; the right to attend the meeting and answer the allegations on which the resolution is based; and the right to have the matter determined by the membership.

[29] On the evidence presented on this appeal, I find that the Co-op observed the principles of natural justice in reaching the decision to terminate Ms. Russell's membership. She was given the required notice (in accordance with the Act and the Co-op's Rules) of the meeting at which termination of her membership and occupancy of the Unit was to be considered. She was given the right to appear at the meeting and make submissions, which she did. After

the decision was made, Ms. Russell was given notice of it in accordance with the Act. In my view, the principles of natural justice do not go so far as to obligate the Co-op to engage in "meaningful discussion" of options with Ms. Russell, and the time that she was given to address the issue of her arrears was reasonable in the circumstances. On the evidence, at the May 12 meeting, the directors considered what Ms. Russell had proposed, but rejected her proposals as not reasonable. However sympathetic Ms. Russell's circumstances may be, that was a decision that the directors were entitled to make. It is not open to me on this appeal to substitute my decision for that of the directors.

- [30] Accordingly, Ms. Russell has failed to make out any breach of the principles of natural justice.
- [31] This should be sufficient to dispose of Ms. Russell's appeal. However, Ms. Russell argues in the alternative that she is entitled to relief from forfeiture under s. 24 of the Law and Equity Act, R.S.B.C. 1996, c. 253. In this part of her argument, she relies on *False Creek Co-operative Housing Association v. Scipio*, 2015 BCSC 2419, as supporting her position that relief from forfeiture is available as a remedy in this case.
- [32] In *Scipio*, a petition was brought by a cooperative pursuant to s. 172 of the Act for an order for possession following termination of Mr. Scipio's membership. Mr. Scipio had not exercised his right to appeal under s. 37 of the Act. Mr. Justice Kent concluded (at para. 31) that the co-op had established it was entitled to the relief sought. However, Mr. Justice Kent then went on to say (at para. 32) that: "this court nonetheless retains inherent power to grant relief from forfeiture, a power that is, in any event, recognized by s. 24 of the Law and Equity Act in this province." In the result, Mr. Justice Kent concluded that Mr. Scipio was entitled to one last chance, and granted relief from forfeiture on terms. It is unclear from the reasons whether, prior to the hearing, Mr. Scipio (who was self-represented) filed anything giving notice that he was intending to seek relief from forfeiture.
- [33] On the other hand, the Co-op says that *Scipio* should not be followed, as it does not refer to the Court of Appeal's decision in *Ganitano v. Metro Vancouver Housing Corporation*, 2014 BCCA 10, which, it appears, was not brought to the attention of the court. The Co-op says that I should instead follow the decision of Madam Justice MacNaughton in *West v. Killarney Gardens Housing Co-operative* (unpublished oral reasons dated November 29, 2017, in S.C.B.C. Vancouver Registry Action No. S-178854). In contrast to *Scipio*, Madam Justice MacNaughton, in ruling on an appeal under the Act, cites *Ganitano* and says at paras. 28 and 29:
- [28] Although not part of Ms. West's oral submissions, her written material suggests that she is also seeking the equitable remedy of relief from forfeiture. That remedy is, in my view, not available to her. As Frankel J. wrote, on behalf of a five-person panel in the Court of Appeal, in *Ganitano v. Metro Vancouver Housing Corporation*, 2014 BCCA 10, the question of whether courts have power to relieve against statutory forfeiture has long been settled. In that case, Ms. Ganitano unsuccessfully argued that her obligation to pay rent to a landlord

was contractual in nature, not statutory.

- [29] At para. 40, the Court concluded that the Residential Tenancy Act set out a comprehensive scheme for dealing with matters relating to the non-payment or late payment of rent in residential tenancies and that equitable relief from forfeiture was not available. In my view, those comments are equally applicable, perhaps more so, to cooperative housing organizations under the Act. The legislature clearly and expressly sets out a legislative framework governing the termination of membership in cooperatives, which amounts to a statutory forfeiture, and, which is not subject to equitable relief.
- [34] Ms. Russell accepts that a party cannot rely on s. 24 of the Law and Equity Act to obtain relief from statutory forfeitures. She argues, however, that unlike the Residential Tenancy Act, the Act does not provide for a statutory forfeiture. She says that the Act only sets out the procedure where a member fails to pay housing costs and does not describe the consequence of failing to pay those costs, whereas the Residential Tenancy Act sets out the result. Ms. Russell says that relief from forfeiture is available, and the equities in her case favour granting it.
- [35] However, I agree with Madam Justice MacNaughton's analysis in *West* of the effect of the Act. In the Act, the Legislature clearly and expressly sets out a comprehensive legislative framework governing the termination of membership in cooperatives. This, in my view, amounts to a statutory forfeiture, and equitable relief is not available in those circumstances. The decision in *Scipio* to the contrary appears to have been reached without the benefit of full argument on the point, and without the court being referred to *Ganitano*.
- [36] Moreover, I agree with Mr. Haddock's submissions on behalf of the Co-op that s. 37(3) of the Act creates a complete code concerning how appeals such as Ms. Russell's are to be conducted, and that the grounds of appeal are limited to those set out in s. 37(3)(b). No other grounds of appeal, including relief from forfeiture, are permitted. To entertain relief from forfeiture as a remedy on an appeal would be to add a ground of appeal that is not authorized by the Act.
- [37] In summary, Ms. Russell's appeal is dismissed, and the Co-op's application for an order for possession and judgment for the arrears is granted.
- [38] That concludes my ruling, subject to any discussion counsel might have this morning concerning timing of the order for possession.
- [39] MR. HADDOCK: Mr. Haddock here, My Lady. I think probably September -- end of September, September 30th. It is 'way too early to have her out this month, but generally we go over to -- yes, September 30, even September 30th would be the date for -- that we would want to get a possession order for.
- [40] THE COURT: All right, and Mr. Jackson, do you have any submissions on that point?
- [41] MR. JACKSON: I would agree with my friend. That seems reasonable in the circumstances.

- [42] THE COURT: All right. The order for possession will go with a date for vacation of the Unit by all occupants of September 30, 2020. And in terms of the arrears, Mr. Haddock, you gave me a number at the hearing of the amount owing as of August 7.
- [43] MR. HADDOCK: Yes.
- [44] THE COURT: It was \$4,243.
- [45] MR. HADDOCK: Yes, and that is the order we want for judgment. She has not incurred September yet. So it is hard to -- I do not think I can get that. I do not think I can add her housing -- September housing charge today --
- [46] THE COURT: All right. All right.
- [47] MR. HADDOCK: -- which I believe [indiscernible/teleconference] for September.
- [48] THE COURT: All right. So, the Co-op will have judgment for the arrears in the amount of \$4,243.
- [49] MR. HADDOCK: And costs.
- [50] THE COURT: You are seeking, on behalf of the Co-op, Mr. Haddock, costs on Scale B, are you?
- [51] MR. HADDOCK: Yes.
- [52] THE COURT: Mr. Jackson, do you have any submissions in that respect?
- [53] MR. JACKSON: Briefly, just that Ms. Russell, obviously, is in a precarious financial situation and will be facing significant difficulties in finding new housing that she can afford, and, also, that given the competing cases at the Supreme Court level regarding whether relief from forfeiture was available on this appeal that there was some utility in pursuing this, trying to get this area of the law more firmly settled. That is all that I would say.
- [54] MR. HADDOCK: I will note, like, full disclosure, I have been practicing in this area for a couple of decades and I do not -- I do not get costs often even when I win because of situations with members.
- [55] MR. JACKSON: Thank you for that.
- [56] THE COURT: All right. I thank you for -- I thank you for that, Mr. Haddock. I see in the West case, for example, that Madam Justice MacNaughton ordered costs to the co-op on the basis that it was the successful party and was entitled to its costs, and she ordered costs for half a day. In the normal course, the Co-op here would be entitled to its costs as the successful party. But the court does have the discretion to otherwise order, and I would say, in Ms. Russell's circumstances, she is facing considerable difficulty now in finding new housing and she has a judgment against her for the arrears. In my view, it is in the interests of justice that there be no order with respect to costs.

[57] MR. HADDOCK: All right.

[58] THE COURT: That concludes my ruling.

"Adair J."

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