

CANADA / JUDGMENT

Shea v. Tyrrell

2007 BCSC 1601

COURT

Supreme Court of British Columbia

DECIDED

26 January 2007

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2007 BCSC 1601 Shea v. Tyrrell IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Shea v. Tyrrell, 2007 BCSC 1601 Date: 20070126 Docket: S065833 Registry: Vancouver In the Matter of the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241 and Residential Tenancy Act, S.B.C. 2002, c. 78 And in the Matter of a Decision of an Arbitrator Appointed Under Section 86 of the Residential Tenancy Act Dated July 13, 2006 Between: Ruby Shea, Landlord Petitioner And Steven Tyrrell and Residential Tenancy Office (Ministry of Public Safety and Solicitor General) Respondents Before: The Honourable Mr. Justice Pitfield Oral Reasons for Judgment In Chambers January 26, 2007 Counsel for the Petitioner: C. Clark Appearing on his own behalf: S. Tyrrell Place of Trial/Hearing: Vancouver, B.C.

- [1] THE COURT: This is an application by the petitioner, Ruby Shea, as landlord, for an order by way of judicial review setting aside a decision of an arbitrator acting under the Residential Tenancy Act, S.B.C. 2002, c. 78.
- [2] The application arises in these circumstances. Mr. Tyrrell occupies a unit at a property municipally known as 857 Beattie Street in Vancouver.
- [3] The development permit under which that property was developed or renovated stipulated that the property should be used as to not less than 70 percent of its space for commercial or business purposes, and as to not more than 30 percent of its space for residential purposes.
- [4] The lease which Mr. Tyrrell signed with the landlord stipulates the following at paragraph 6 in relation to use and occupancy: The tenant shall be the only permanent occupant of the premises. The tenant shall use the premises only for the business purpose of using the studio as a working studio and dwelling in the attached unit. Not less than 70 percent of the total square footage of the premises shall be used for the production, display and sale of the tenant's art work.
- [5] The dispute arose out of Mr. Tyrrell's application for a return of a security deposit required by the landlord, the amount of which appeared to be the maximum permitted by the Residential Tenancy Act. When the application was not acknowledged or responded to, Mr. Tyrrell resorted to the Residential Tenancy Act for purposes of procuring return of the deposit.

- [6] The matter proceeded before an arbitrator under the Residential Tenancy Act. The arbitrator granted the tenant's application and ruled that the tenancy was subject to the Residential Tenancy Act. The relevant portion of the reasons of the arbitrator appears at page 2 thereof: I find nothing in the Act which allows for the apportionment of a security deposit (or for that matter any other aspect of a tenancy agreement) between different types of tenancies where there is one agreement and one rental unit. In fact the Act appears to contemplate that a tenancy which includes living accommodation and which is subject to one agreement only is either fully covered by its provisions or does not fall under the Act at all. Those occupancies that are not covered by the Act are set out in section 4, the relevant portion of which states that the act does not apply to living accommodation included with premises that are primarily occupied for business purposes and are rented under a single agreement (section 4, paragraph (d)). Residential tenancy policy guideline 14 sets out factors which I must consider in applying that provision. Neither party contended that the Act has no application to this tenancy. The tenant's claim was brought under its provision and the landlord's position is that the Act has partial application. Having regard to section 4 and to the guideline, I find that the exclusion does not apply. Therefore I find that the provisions in the Act apply to the entire amount of the security deposit.
- [7] I am satisfied that in terms of an application for judicial review in respect of this particular application, the standard of review which must be applied in relation to a matter of jurisdiction is that of correctness. In other words the arbitrator must be correct in stating the conclusion that the Residential Tenancy Act can apply in the circumstances, notwithstanding the predominant use of the property for business purposes.
- [8] Having heard the submissions of counsel on behalf of the landlord and the response of Mr. Tyrrell as tenant, I am persuaded that the arbitrator erred in concluding that the Residential Tenancy Act had application in the circumstances of this case. The predominant purpose by reference to both the development permit and the lease must be a business purpose rather than a residential use.
- [9] Section 4(d) of the Residential Tenancy Act provides as follows: 4 This Act does not apply to ...
- (d) living accommodation included with premises that
 - (i) are primarily occupied for business purposes, and (ii) re rented under a single agreement,
- [10] On the evidence that is before me on this application including the development permit, the lease and the affidavit evidence tendered by the landlord, and by Mr. Tyrrell, it appears that this property was primarily occupied for business purposes. In that regard, I am prepared to adopt the reasoning of the Ontario Divisional Court in *Hahn v. Kramer*, [1979] 97 D.L.R. (3rd) 141, the reasoning of which was endorsed by the residential tenancy branch for guideline purposes.

- [11] That guideline states as follows: To determine whether the premises are primarily occupied for business purposes or not, an arbitrator will consider what the predominant purpose of the use of the premises is. Some factors used in that consideration are relative square footage of the business use compared to the residential use, employee and client presence at the premises and visible evidence of the business use being carried on at the premises.
- [12] With respect, I see nothing in the arbitrator's reasons which would suggest that any evidence of the actual use of the property, as opposed to the covenanted use of the property, was considered by the arbitrator.
- [13] In other circumstances, I would be inclined to remit the matter for reconsideration by the arbitrator. In the circumstances of this case, where the landlord does not seek any monetary recovery from the tenant, but rather merely clarification of whether or not the Residential Tenancy Act has application in the circumstances, I am prepared to allow the appeal and set aside the decision of the residential tenancy arbitrator, thereby confirming that the Residential Tenancy Act has no application in the circumstance of this case.
- [14] There will be no order with respect to costs. "Mr. Justice Pitfield"

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