

CANADA / JUDGMENT

Somji v. Alderson

2022 BCSC 1933

COURT

Supreme Court of British Columbia

DECIDED

4 November 2022

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2022 BCSC 1933 Somji v. Alderson IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Somji v. Alderson, 2022 BCSC 1933 Date: 20221104 Docket: S134086 Registry: Kelowna Between: Feisal Somji and Robin Raelynne Somji Plaintiffs And Timothy Alderson Defendant And Richard Ilich and William Joseph Wilson Third Parties Before: The Honourable Mr. Justice G.P. Weatherill Reasons for Judgment Counsel for the Plaintiffs: K. Ihas Counsel for the Defendant: D. Kautz Place and Date of Trial/Hearing: Kelowna, B.C. October 3, 2022 Place and Date of Judgment: Kelowna, B.C. November 4, 2022

INTRODUCTION

- [1] This application concerns the 28-day filing deadline imposed by s. 13.2 of the Civil Resolution Tribunal Act, S.B.C. 2012, c. 25 [CRTA]. The plaintiffs, Feisal and Robin Somji (the "Somjis" and/or the "applicants"), apply for leave to file and serve a notice of civil claim retroactively to May 18, 2022. The defendant, Timothy Alderson, opposes the application.
- a. The Dispute
- [2] Briefly, the dispute is about the right to use parking stall number B40 ("Stall B40") in a condominium complex located at 1301 - 4014 Pritchard Drive North, West Kelowna, BC (the "Strata"). More specifically, the dispute centres on whether unregistered private use agreements between strata lot owners are valid and binding as against subsequent purchasers, in this case the Somjis, who were not parties to the agreement.
- b. Background
- [3] By way of a contract of purchase and sale dated September 22, 2020 (the "Purchase Agreement"), the Somjis purchased Strata Lot 5 from Richard Ilich. The Strata's bylaws assigned two parking stalls to Strata Lot 5: Stall B40 and the adjacent stall B41 (collectively, the "Stalls"). However, ten years previously Mr. Ilich had granted the owners of another lot the exclusive use of Stall B40 for 99 years under a document called "Parking Stall Exclusive Use Agreement" (the "2010 Agreement"). On April 25, 2017, Mr. Alderson was party to another "Parking Stall Exclusive Use Agreement" (the "2017 Agreement"), under which he paid \$30,000 for the assignment of Stall B40's use to him.

- [4] Neither the 2010 Agreement nor the 2017 Agreement were registered against Strata Lot 5's title under the Land Title Act, R.S.B.C. 1996, c. 250.
- [5] When the Somjis purchased Strata Lot 5, they were advised of and acknowledged the existence of the 2010 Agreement, but not the 2017 Agreement. The 2017 Agreement contains almost identical terms to the 2010 Agreement.
- [6] The Purchase Agreement includes acknowledgments that only one parking stall is included, and that the seller had previously assigned his interest in Stall B40.
- [7] The Somjis took possession of Strata Lot 5 on October 15, 2020 and commenced using the Stalls. In early 2021, Mr. Alderson began using Stall B40. The Somjis demanded that Mr. Alderson cease using Stall B40 but he refused to do so. Attempts by the Somjis to have the Strata corporation enforce its bylaws, which assign the Stalls to Strata Lot 5, were unsuccessful.
- [8] On June 25, 2021, Mr. Somji--and not Ms. Somji--filed a claim with the Civil Resolution Tribunal ("CRT"), seeking the following relief:
- a) a declaration that the Stalls are limited common property of Strata Lot 5;
 - b) an order that Mr. Alderson is not permitted to use Stall B40; and
 - c) an order that the Strata corporation enforce the parking bylaws.
- [9] Mr. Somji's position before the CRT was that neither he nor Ms. Somji assumed any of the responsibilities or obligations under the 2010 Agreement and that they were unaware of the 2017 Agreement when they purchased Strata Lot 5.
- [10] On March 18, 2022, the CRT issued its reasons (the "CRT Decision"), refusing to resolve the dispute for want of jurisdiction and advising that the matter ought more appropriately to be dealt with by this Court. Mr. Somji and Mr. Alderson received an email with the CRT decision on March 18, 2022, which also stated: What you can do After the CRT has refused to resolve the dispute under section 10 or section 11 of the Civil Resolution Tribunal Act (Act), a party may file the claim in that court within 28 days of receiving this decision.
- [11] Following receipt of the CRT Decision, Mr. Somji contacted a lawyer, Ms. Moorhouse, and instructed her to prepare a notice of civil claim on April 8, 2022, 21 days after receiving the CRT Decision. In accordance with those instructions, Ms. Moorhouse prepared and filed the subject notice of civil claim (the "NOCC") on May 13, 2022. The NOCC named both Mr. and Ms. Somji as plaintiffs and sought the following relief:
- a) an injunction restraining Mr. Alderson from trespassing upon Strata Lot 5 and its associated limited common property, specifically Stall B40;
 - b) a declaration that the 2010 Agreement and the 2017 Agreement are not binding on the Somjis; and

c) damages for trespass.

[12] On May 16, 2022, a process server personally served the NOCC on Mr. Alderson. On May 18, 2022, Mr. Kautz advised Ms. Moorhouse that Mr. Alderson had retained him and that he would provide a response to civil claim in due course.

[13] On June 6, 2022, Mr. Kautz served Ms. Moorhouse with a response to civil claim (the "RTCC"), in which he alleged that the NOCC is time-barred in accordance with s. 13.2 of the CRTA.

[14] Section 13.2 of the CRTA sets out a time limit of 28 days for a party to file a notice of civil claim after that party receives notice of the CRT's decision to decline jurisdiction, unless this Court orders otherwise. Specifically, s. 13.2 reads as follows: Time limit - certain claims brought or continued in court 13.2 Unless the court orders otherwise, a party may not bring or continue a claim in a court, which claim may be brought or continued under section 16.4 (1) [bringing or continuing claim in court], more than 28 days after whichever of the following dates is applicable:

(a) the date on which the party receives notice of the tribunal's decision

(i) not to give an initiating notice under section 6 [initiating notice], (ii) refusing to resolve the claim under (A) section 10 [claims to be resolved must be within tribunal authority], or (B) section 11 [general authority for tribunal to refuse to resolve claim or dispute], or (iii) declining jurisdiction in respect of the claim under section 114 [limited jurisdiction and discretion to decline jurisdiction to apply the Human Rights Code];

(b) the date of a court order under section 16.2 [court may order that tribunal not adjudicate claim] that the tribunal not adjudicate the claim. DISCUSSION

[15] By its wording, it is clear that s. 13.2 of the CRTA gives this Court discretion to grant the order sought where a party misses the standard 28-day filing deadline. Indeed, Mr. Alderson takes no issue with the Court having such discretion.

[16] The parties referred me to the only decision to date involving s. 13.2 and an extension of time: *Arbour v. That Darn Yarn Shop Ltd.*, 2022 BCPC 22 [Arbour]. In *Arbour*, the defendant complied with s. 13.2 of the CRTA by filing her claim within 28 days after receiving notice, but missed a second deadline under the Small Claims Rules requiring service on the defendant within 28 days of filing. The Court dismissed the claimant's application to renew the notice of claim, largely on the basis that there was a delay of seven months between filing and service.

[17] In my view, the *Arbour* decision is distinguishable on its facts. In *Arbour*, the claimant missed the 28-day deadline by over seven months, compared to one month here. In *Arbour*, the CRT had decided the case on its merits, unlike here where the CRT Decision only addresses jurisdictional concerns.

- [18] The defendant here argues that he will suffer substantial prejudice if the renewal is allowed because he: i) paid valuable consideration--\$30,000--for the exclusive use of Stall B40; and ii) waited 28 days for the filing period to lapse after receiving the CRT Decision. Further, he argues that the Somjis were never entitled to the use of Stall B40 in the first place. He points out that the Somjis acknowledged in the Purchase Agreement that Strata Lot 5 included only Stall B41 and that Mr. Ilich had assigned his interest in Stall B40 under the 2010 Agreement. He also notes that the Somjis signed a property disclosure agreement, which states that the purchase of Strata Lot 5 includes only one parking stall.
- [19] Respecting the 28-day time limit set out in s. 13.2 of the CRTA, counsel for Mr. Alderson emphasizes that it should have been clear to Mr. Somji from reading the email attached to the CRT Decision that he was required to file a claim within 28 days of receiving it. He argues that Mr. Somji's evidence that he was unaware of the 28-day time limit until receiving the RTCC on June 6, 2022 is disingenuous. He argues that although Ms. Moorhouse accepts the blame for the missed filing deadline, Mr. Somji must share that responsibility.
- [20] In short, Mr. Alderson argues that:
- The Somjis were aware, or ought to have known, on March 18, 2022, that they only had 28 days to file a notice of claim.
 - The defendant is not at fault for the delay in filing the NOCC and a discretion under s. 13.2 of the CRTA cannot be judiciously and fairly exercised against him.
 - The defendant is prejudiced because he ought to have had peace of mind that he would not have to face any further claims after 28 days.
 - The applicants are not prejudiced because their claim has no merit regardless.

ANALYSIS

- [21] Given the absence of any case law directly interpreting the discretion granted in s. 13.2 of the CRTA, I conclude the factors that should be considered in exercising that discretion are as follows:
- promptness of the claim's filing and the application to extend the time limit;
 - prejudice to both parties;
 - reason for the delay; and
 - interests of justice.
- [22] These factors are similar to the factors the court considers when asked to extend time limits in other circumstances, for example, under R. 3-2(1), 23-6(8.2) or 22-4(2): *Fast Fuel Services Ltd. v. Michelin North America (Canada) Inc.*, 2008 BCCA 216 at para. 9, citing *Bearhead v. Moorhouse* (1977), 3 B.C.L.R. 81 at 83-84, 1977 CanLII 346 (S.C.); *Buddenhagen v. MacDonald*, 2013 BCSC 154 at para. 6. They also resemble the non-exhaustive factors relevant to granting

a nunc pro tunc order outlined by the Supreme Court of Canada in *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60 [CIBC] at para. 90. These factors may inform the present analysis, although the order sought here is not in the nature of a nunc pro tunc order because such orders only apply to a court's own orders: CIBC at para. 85.

a. Did the applicants act in a timely manner?

[23] Yes.

[24] The 28-day deadline for filing the NOCC under s. 13.2 was April 15, 2022. The applicants instructed their counsel to file the NOCC on April 8. Ms. Moorhouse filed the NOCC on May 13, and served the defendant three days later.

[25] Ms. Moorhouse first learned of the 28-day time limit when she received the RTCC on June 6, 2022. She filed this ensuing application relatively promptly afterwards, on July 4, 2022.

[26] In these circumstances, it cannot be said that the Somjis did not act in a timely manner.

b. Is there any prejudice to the parties?

[27] The Somjis essentially seek a one-month extension of the NOCC's filing deadline. No specific prejudice to the defendant arises from what I consider to be a minor delay. This is especially so considering that had the CRT claim not been filed, the two-year limitation period under the Limitation Act, S.B.C. 2012, c. 13 would not yet have expired.

[28] Further, it is noteworthy that the CRT claim was filed by Mr. Somji alone, not Ms. Somji. The CRT Decision therefore only applies to Mr. Somji's claim. Nothing prevents Ms. Somji from filing a notice of civil claim as the CRT Decision does not bind her.

[29] In contrast, without an extension Mr. Somji could not continue his claim, which has not yet been heard on the merits.

c. Reason for the delay

[30] Under R. 3-2(1), the primary concerns of the court in considering whether to renew an unserved notice of civil claim should be:

- a) the rights of the litigants and not the conduct and failures of their solicitors; and
- b) ensuring that the outcome would not create a substantial injustice to either the plaintiff or the defendant (*Gill v. Basic*, 2021 BCSC 875 at para. 20, citing *Sutherland v. McLeod*, 2004 BCCA 653 at paras. 28-29).

[31] Mr. Somji instructed Ms. Moorhouse to bring this claim on April 8, 2022, seven days before the expiration of the 28-day limit.

[32] Ms. Moorhouse deposed that she was not aware of the 28-day time limit until receiving the RTCC on June 6, 2022. As a result, the inadvertence here, in my view, is attributable to Ms. Moorhouse and not to the Somjis.

d. Interests of justice

[33] At issue in this dispute is who owns and who may use Stall B40. The issue is whether the 2010 Agreement and the 2017 Parking Agreement are effective as against the Somjis. Without adjudication, uncertainty around who may use Stall B40 will persist, affecting not only the parties to this dispute, but also future owners of their properties.

[34] It is in the interests of justice that the issue between the parties be resolved.

e. Ruling

[35] In my view, the applicants' application must be allowed. The applicants missed the April 15, 2022 filing deadline due not to their own inadvertence, but to that of their counsel. They filed the NOCC shortly after the 28-day limit expired. They brought this application to extend the filing time promptly after learning of the 28-day time limit. The defendant faces no prejudice other than having to defend the action. The applicants face significant prejudice in that they would lose their right to claim entitlement to Stall B40. DECISION

[36] For the above-noted reasons, the application is allowed. I grant the Somjis leave to file and serve the NOCC retroactively to May 18, 2022, pursuant to s. 13.2 of the CRTA.

[37] Each party shall bear their own costs of this application. "G.P. Weatherill J."

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