

CANADA / JUDGMENT

## The Owners, Strata Plan NW 2395 v. Nikkel

2020 BCSC 282

COURT

Supreme Court of British Columbia

DECIDED

2 March 2020

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2020 BCSC 282 The Owners, Strata Plan NW 2395 v. Nikkel

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

The Owners, Strata Plan NW 2395 v. Nikkel,

2020 BCSC 282

Date: 20200302

Docket: L216891

Registry: New Westminster

Between:

The Owners, Strata Plan NW 2395

Petitioner

And

Darlene Nikkel

Peter Jackson

Respondents

Before: The Honourable Armstrong

Reasons for Judgment

Counsel for the Petitioner:

G.S. Hamilton

Representative appearing on behalf of the Respondents:

R.G. Harrison

Place and Date of Hearing:

New Westminster, B.C.

November 20, 2019

Place and Date of Judgment:

New Westminster, B.C.

March 2, 2020

- [1] The respondents are registered owners of strata lot 81 that is one of 100 strata lots in Strata Plan NW 2395.
- [2] The applicant seeks an order that the respondents be found in contempt of a Civil Resolution Tribunal order by failing to remove their dog from their strata lot. The applicant also seeks an order restraining the respondents from bringing their dog on to any part of the lands and premises comprising Strata Plan NW 2395.
- [3] The applicant, The Owners, Strata Plan NW 2395 has passed bylaws that include Strata Corporation By-law 7(2) permitting strata lot owners to keep dogs in their strata units provided that such dogs do not exceed 14 inches in height.
- [4] The respondents owned a dog for almost 2 years and that dog resided in the respondents' strata lot. The applicant contends that the respondents' dog exceeded 14 inches in height and initiated a dispute notice with the Civil Resolution Tribunal (the "CRT") to cause the respondents to stop contravening Bylaw 7(2).
- [5] Following a hearing at the CRT on March 8, 2019, the CRT made the following orders (the "CRT Order"):
  - 1. The respondents will have 120 days from the date of this decision to provide the applicant (strata) with evidence that their dog, Molly, has passed the BC Guide Dog and Service Dog Assessment (Assessment) and that the respondents have submitted the Assessment Certificate to the Certification Unit for Guide Dog and Service Dog Act (GDSDA) at the Ministry of Public Safety and solicitor General Ministry (Ministry).
  - 2. If Molly has not passed the Assessment and the respondents have not submitted the assessment certificate to the Certification Unit for the GDSDA at the Ministry after 120 days from the date of this decision, the respondents will immediately remove Molly from their strata lot.
  - 3. If the Ministry rejects an application that Molly be certified despite Molly passing the Assessment, the respondents will remove Molly from their strata lot within 30 days of receiving notice of the Ministry's rejection.

## The Applicant's Position

- [6] The applicant supported this contempt application with an affidavit from Denise Becker who is the strata council president for the applicant.
- [7] Ms. Becker's affidavit included the following information on which the claim is based:
5. The respondents have owned their dog, Molly, for almost 2 years. Molly resides with respondents in the strata lot 81.
  11. The respondents have failed to, within 120 days of the CRT Order, provide the Strata Corporation with evidence that their dog, Molly, has passed the BC Guide Dog and Service Dog Assessment and evidence that this Assessment Certificate has been submitted to the Certification Unit for the Guide Dog and Service Dog Act at the Ministry of Public Safety and Solicitor General.
  14. As of the date of the swearing of this affidavit, the Strata Corporation has not received from the respondents evidence that their dog, Molly, has passed the BC Guide Dog and Service Dog Assessment or evidence that the respondents have submitted the Assessment Certificate to the Certification Unit for the Guide Dog and Service Dog Act at the Ministry of Public Safety and Solicitor General.
- [8] On the basis of these assertions the applicant contends that as of October 23, 2019 the respondents were in breach of the CRT Order and in contempt of court.
- [9] The applicant described the legislative scheme for addressing strata property disputes. This includes the granting of exclusive jurisdiction to the CRT including ss. 57 and 60 of the Civil Resolution Tribunal Act, S.B.C. 2012, c. 25 [CRTA]. Section 57 permits enforcement of a CRT decision by filing a copy in the Supreme Court. Once filed the decision has the same force and effect as if it was a judgment of this Court.
- [10] Section 60 of the CRTA provides that a person failing or refusing to comply with an order of the tribunal is liable to be punished for contempt as if in breach of an order or judgment of the court.
- [11] The applicant contends the CRT possesses specialized expertise by reason of Part 10 and s. 1(4) of the CRTA.

## Definitions and interpretation

1

- (4) For the purposes of this Act, the tribunal is to be considered to have specialized expertise in respect of a claim if the claim is in a claim category in respect of which the applicable Division of Part 10 provides that the tribunal is to be considered to have specialized expertise.

## Part 10 -- Tribunal Jurisdiction

## Specialized expertise of tribunal

116 (1) If, under section 1 (4), the tribunal is to be considered to have specialized expertise in respect of a claim category, or a class of claims in a claim category, the tribunal is to be considered to have specialized expertise to inquire into, hear and determine all those matters and questions of fact, law and discretion arising under this Act or required to be determined by the tribunal under this Act, and to make any order permitted by this Act to be made, in respect of the claim category or the class of claims in the claim category.

(2) A decision of the tribunal made in a claim in respect of which the tribunal is to be considered to have specialized expertise is final and binding on the parties, except the decision may be judicially reviewed in accordance with section 56.7 (1) (b) [standard of review].

[12] The application for a contempt order rests on the respondents "failing to remove their dog Molly from their strata unit", because they did not submit an Assessment Certificate to the certification unit for the GSDA at the Ministry.

## The Respondents' Position

[13] It is important to recognize that the respondents sought the assistance of a friend to present their submissions on this application. This gentleman, a Mr. Harrison, was not a lawyer and the respondents appeared limited in their capacity to address the court, I permitted Mr. Harrison to speak.

[14] In part, the respondents contend that the order was unclear and did not set out a specific requirement breached by them.

[15] They sought to distinguish some authority provided by the applicants. They offered no defence except their belief that the CRT should have considered Ms. Nikkel's need for a comfort dog as considered by the Human Rights Tribunal in other cases. They believed that the complaint should have been resolved before the BC Human Rights Tribunal because of Ms. Nikkel's medical condition that would qualify her under s. 8 of the Human Rights Code, R.S.B.C. 1996, c. 210, which provides protection against discrimination in accommodation, service and facility.

## Analysis

[16] Civil contempt proceedings are quasi criminal processes. Typical contempt proceedings proceed on a bifurcated basis where liability is addressed first and separate penalty phases follow a finding of contempt: see *Carey v. Laiken*, 2015 SCC 17 [Carey] at para. 18. In *Carey*, the Court endorsed, at para. 26, the description of civil contempt as "the intentional doing of an act which is in fact prohibited by the order" and, at para. 30, that the purpose of contempt is "first and foremost a declaration that a party has acted in defiance of a court order".

- [17] In *Carey*, the Court said civil contempt is a coercive process, rather than a punitive one, although sentencing for civil contempt is punishment for breach of the order: see para. 31.
- [18] The alleged contemnor is not required to provide evidence; sometimes contemnors will provide evidence lacking in the applicant's material and when provided it can be used to support the contempt order.
- [19] In *Carey*, the Supreme Court summarized the three essential elements in civil contempt:
- (a) The order breached must be stated clearly and unequivocally concerning what should and should not be done: para. 33. If an order is unclear or is missing essential detail about where, when, or to whom it applies; if it incorporates overly broad language or if external circumstances obscured its meaning, the alleged contemnor may be excused;
  - (b) The person must have actual knowledge of the order: para. 34. It may be possible to infer knowledge in some circumstances or if the contemnor has been wilfully blind; and
  - (c) The party alleged to be in breach must have done the act intentionally: para. 35. Intent to interfere with the administration of justice is not an element of civil contempt and the lack of contumacy is not a defence: para. 47.
- [20] In *Peel Financial Holdings Ltd. v. Western Delta Lands Partnership*, 2003 BCCA 551, the court summarized a number of principles governing contempt applications:
- [18] The principles governing a motion of contempt are uncontroversial. I would summarize the principles relevant to this case in this way:
1. The proceedings are quasi-criminal in nature and the rules of *strictissimi juris* apply, meaning for example that the evidence supporting the motion must conform to the rules of admissibility at a trial; so no hearsay, opinion, conclusions and the like are receivable: *Glazer v. Union Contractors Ltd. and Thornton* (1960), 33 W.W.R. 145 (B.C.S.C.) at 151.
  2. The applicants bear the onus of proving the elements of contempt on the criminal standard, viz. beyond a reasonable doubt: *Bhatnager v. Canada (Minister of Employment and Immigration)*, [1990] 2 S.C.R. 217 at 229.
  3. If the order said to be breached is ambiguous, the alleged contemnor is entitled to the most favourable construction: *Melville v. Beauregard*, [1996] O.J. No. 1085 (Gen. Div.) at para. 13; see also *Berge v. Hughes Properties Ltd.* (1988), 24 B.C.L.R. (2d) 1 (C.A.) at p. 8, cited in *Hama v. Werbes* (2000), 76 B.C.L.R. (3d) 271 (C.A.) at para. 8 where the need for clarity and precision in the order to be enforced was discussed.
- [21] The precise terms of the order breached must be clear and unambiguous. In *Jackson v. Honey*, 2009 BCCA 112, the court said:
- [17] In *Gurtins v. Goyert*, 2008 BCCA 196, 81 B.C.L.R. (4th) 8, Frankel J.A., for the Court, provided the following summary of the relevant principles on this issue:

[16] A concise and most helpful summary of the principles applicable to the interpretation of an order in contempt proceedings is found in *R. (Mark Dean Harris) v. The Official Solicitor to the Supreme Court*, [2001] EWHC Admin 798 (Q.B.C.), wherein Mr. Justice Munby stated (at para. 68):

(i) No order will be enforced by committal unless it is expressed in clear, certain and unambiguous language. So far as this is possible, the person affected should know with complete precision what it is that he is required to do or to abstain from doing.

(ii) It is impossible to read implied terms into an injunction.

(iii) An order should not require the person to whom it is addressed to cross-refer to other material in order to ascertain his precise obligation. Looking only at the order the party enjoined must be able to find out from the four walls of it exactly what it is that he must not do.

(iv) It follows from this that, as Jenkins J said in *Redwing Ltd v. Redwing Forest Products Ltd* (1947), 177 LT 387 at p 390,

a Defendant cannot be committed for contempt on the ground that upon one of two possible constructions of an undertaking being given he has broken that undertaking. For the purpose of relief of this character I think the undertaking must be clear and the breach must be clear beyond all question.

[22] There is some confusion in the CRT Order that must be resolved. I will set out the relevant terms again for ease of reference. First, paragraph 1 of the CRT Order:

1. The respondents will have 120 days from the date of this decision to provide the applicant (strata) with evidence that their dog, Molly, has passed the BC Guide Dog and Service Dog Assessment (Assessment) and that the respondents have submitted the Assessment Certificate to the Certification Unit for Guide Dog and Service Dog Act (GDSDA) at the Ministry of Public Safety and solicitor General Ministry (Ministry).

[23] The CRT allowed that "the respondents will have 120 days to provide the applicant with evidence that their dog has passed the assessment and that they submitted the Certificate to the Ministry". This provision of the CRT Order gives the respondents a set amount of time to provide evidence.

[24] However, paragraph 2 goes on to say:

2. If Molly has not passed the Assessment and the respondents have not submitted the assessment certificate to the Certification Unit for the GDSDA at the Ministry after 120 days from the date of this decision, the respondents will immediately remove Molly from their strata lot.

[25] The respondents were required to immediately remove Molly from their lot if: (i) Molly had not passed the Assessment; and (ii) the respondents had not submitted the Assessment Certificate to the Ministry. As such, although paragraph 1 says the respondents "will have" a

set amount of time to collect evidence, the requirement to remove Molly from the strata is not linked to a failure to do so; namely, the CRT Order does not say Molly must be removed if the respondents do not provide the evidence as set out in paragraph 1. The CRT Order specifically provides that Molly must be removed if she has not passed the assessment and the respondents have not submitted the assessment to the Ministry.

- [26] There is no evidence confirming that the dog passed or failed the assessment or that the respondents had not submitted an Assessment Certificate to the Ministry. They clearly had not provided "evidence that their dog, Molly, has passed the assessment" to the Strata, however the provision of the CRT Order requiring removal of the dog is conditional on Molly's failure to pass the assessment and the respondents' failure to submit the certificates to the Ministry.
- [27] I raised this problem with the applicant; it responded that it had no means of obtaining information from the Ministry concerning whether the dog passed or whether the certificate had been submitted. The applicant argued it would defeat the process if the applicant was required to provide first hand evidence from the Ministry. He said the CRT Order needs to be read in the context of all of the circumstances and it would be inescapable for the respondents not to understand that they were required to remove the dog if a certificate was not given and provided to the applicant. Counsel reiterated that paragraph three of the CRT Order is not the part of the order relied on in this contempt application.
- [28] Although I appreciate the difficulty faced by the applicant in this case, to succeed it must nevertheless provide proof beyond a reasonable doubt that Molly failed the test and the respondents failed to submit an Assessment Certificate to the Ministry and failed to remove Molly from the strata. The obligation to remove Molly is only triggered if Molly has not passed the assessment and no certificate was filed with the Ministry within 120 days of the decision. The first paragraph of the CRT order permitted the respondents 120 days to provide the Strata evidence concerning the dog's certification and passing the B.C. Guide Dog Assessment and to submission of a certificate to the Ministry.
- [29] The applicant would like the court to infer that the respondents' failure to comply with the first paragraph of the CRT order was sufficient evidence to prove beyond a reasonable doubt that the respondents breached paragraph two. In my view the applicant's contention that both paragraphs read together demonstrates a breach of a clear and unambiguous order is not sustainable; in order to find the respondents in contempt of paragraph two, there must be evidence that Molly had not passed the assessment and the respondents had not submitted an Assessment Certificate to the Ministry of Public Safety and Solicitor General. The ambiguity inherent in interpretation of the facts argued by the applicant persuades me that it would be unsafe to find the respondents in contempt. It would have been a simple matter if the CRT Order had required Molly to be removed from the Strata lot if the respondents failed to provide the applicant with evidence concerning the Assessment Certificate or failed to provide the applicant with proof that the Assessment Certificate had been submitted to the Ministry. The CRT did not so order.

[30] It is not beyond a reasonable doubt that Molly passed the service dog assessment and an Assessment Certificate was delivered to the Ministry but the respondents failed to provide evidence of those events to the strata. On the whole of the evidence, I am not convinced beyond a reasonable doubt that the respondents breached the CRT order.

## Conclusion

[31] Accordingly, the applicant has failed to prove the respondents' contempt beyond a reasonable. The application is dismissed.

"Armstrong J."

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