
CANADA / JUDGMENT

University of Victoria v. Gerd'son

2010 BCSC 3

COURT

Supreme Court of British Columbia

DECIDED

5 January 2010

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2010 BCSC 3 University of Victoria v. Gerd'son

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

University of Victoria v. Gerd'son,

2010 BCSC 3

Date: 20100105

Docket: 08-5340

Registry: Victoria

Between:

The University of Victoria

Plaintiff

And

Alkis Gerd'son

Defendant

Before: The Honourable Mr. Justice Truscott

Reasons for Judgment

Counsel for the Plaintiff:

M.R. Mark

Counsel for the Defendant:

R.B. Farvolden

Place and Date of Hearing:

Victoria, B.C.

November 30, 2009

Place and Date of Judgment:

Victoria, B.C.

January 5, 2010

- [1] The University of Victoria ("the University") applies for an order of possession of premises occupied by the defendant on the University grounds, while the defendant applies for a dismissal of the University's application or adjournment of it as being inappropriate at this time.

The Circumstances

- [2] The defendant has resided in student premises since 1991. In 1993 he obtained a Bachelor of Arts degree and in 1997 a Bachelor of Education degree. Since that time he has not completed any credit courses leading to a degree and is not now enrolled in any such credit courses.
- [3] However, he is presently registered in the diploma program in business administration in the Business Management and Technology Programs, Division of Continuing Studies.
- [4] The defendant has the provincial status as a Person with Disability.
- [5] The defendant entered into a Residence Apartment Tenancy Agreement with the University that commenced on May 1, 2004 and continued thereafter month to month with no defined termination date. It was in written form and required one month notice of termination by the defendant and three months' notice of termination by the University, except for reasons of cause. No notice of termination was given by either party under this agreement to my knowledge.
- [6] The defendant says that in August 2007 he was presented with a new Residence Apartment Tenancy Agreement. He says that the new agreement did not appear to him to grant him any benefits beyond his existing agreement and in fact appeared to be more restrictive. One new clause restricted the term of the new agreement to one year and he says he sought clarification about this new clause from Ms. Lalonde, the Manager of Residence Administration at the University.
- [7] The defendant taped the telephone conversation with Ms. Lalonde and sets out part of that conversation in his affidavit as follows:

- a. I said "I'm hoping there's not going to be an issue um you know within the next two or three years where my residency status here is going to be in question, because it puts me under a great deal of stress."
 - b. Ms. Lalonde said "And I mean not that I'm aware at this point."
 - c. I then said "So the renewal thing at the end of August of every year is just like a regular procedure"
 - d. Ms. Lalonde then said, "Yeah it's just to make sure everybody's on the same track, just so you guys know if there has been rent changes or you know if there is you know something that we feel everybody should be on the same page about, I mean its pretty much, I mean, as far as I know you're sticking to the rules and I don't I mean (unintelligible)"
- [8] The University appears to accept that this is an accurate record of that portion of the conversation between the two but in its own affidavit sets out a separate excerpt of the same conversation where the following was said:

Gerd'son: It's just that if I sign something, I don't want it to be a dispute later.

Lalonde: Ummhmm... well... I mean if you could... I mean probably the best thing... I mean any exceptions... I mean we are making the change to the eligibility, re-wording that. And, I mean any exceptions to the agreement, of course, I mean, are best done just in writing, on like, as an addendum to the agreement and I have no problems doing that if that's what's required, um...

Gerd'son: Sure. Can I ask a question?

Lalonde: Mmhmm.

Gerd'son: Is Steve coming back in a year? Is that...

Lalonde: Not that I am aware of.

- [9] The defendant's reply is that the University's excerpt is a portion of the conversation that occurred well before the portion that he sets out in his affidavit.
- [10] The defendant says he only signed the new Tenancy Agreement because he understood that his agreement would be renewed every year as long as he did nothing wrong.
- [11] The new Tenancy Agreement which the defendant signed says that it is available to single undergraduate or graduate full-time students on an academic term or year-round basis, although students registered with the resource center for students with a disability may be eligible for a reduced course load based on the center's recommendation.
- [12] The new Tenancy Agreement is for a fixed term of September 1, 2007 to August 31, 2008, although it allows that additional terms may be considered up to but not exceeding five years or 15 academic sessions, provided that the terms and conditions in the Agreement are met by the tenant.

[13] Rent is set at \$655 per month instead of the amount set out in the prior Tenancy Agreement of \$605 per month.

[14] The new Agreement contains a "Notice of Termination" clause that states:

If notice of termination is given by either the University or the Tenant, such notice shall be in writing and shall be given by 12:00 noon or before the last day of a calendar month, to take effect on the last day of an ensuing calendar month. The tenancy shall end at 12:00 noon on the day of termination. Once notice of termination is given, the Tenant agrees to allow the premises to be shown to any and all prospective Tenants at all reasonable times, subject to notice.

and an "Overholding" clause that states:

If the Tenant remains in possession of the premises after the expiry date of the Agreement, the Tenant will be assessed a charge equal to 15% of one month's rent/day plus legal and court costs. The University shall not be liable for any loss or damage on account of inability to deliver vacant possession. If the Tenant remains in occupation of the premises and the Landlord accepts rent after the expiration of the Term, any new tenancy thereby created shall be a tenancy from month to month and not a tenancy from year to year and shall be subject to the terms of this agreement so far as the same are applicable to a tenancy from month to month.

[15] The University served the defendant with a "Notice to End License to Occupy Student Residence Space" on August 29, 2008, to vacate and give up possession by September 30, 2008. The stated reasons given in the Notice were "persistent violation of requirement to maintain enrolment status" and "default in rent".

[16] The defendant did not vacate the premises by September 30, 2008 and to my knowledge continues to reside there today. The University says it has continued to receive payments from a government ministry on behalf of the defendant on a monthly basis after the expiration of the agreement in amounts equal to the rent amounts. The University says it has applied these amounts to the overholding charges allowed and not to rent. The outstanding balance owing by the defendant as of November 26, 2009 for overholding charges was \$41,461.50.

[17] The University has recorded these payments in its system, after September 30, 2008, as "rent", but says that is only because its system is not set up to post the payments as overholding charges.

The Submissions

[18] The University says it requires vacant possession of the defendant's residence as the number of registered students with disabilities in degree-granting programs who require this limited type of accommodation far exceed the number of available rooms for them.

- [19] The defendant says that there is nothing about his living quarters that make them specifically suited for a disabled person and he says that on August 25, 2008 Ms. Sneddon of the University told him that "this apartment is for students who are well enough to go to school" and "this residence is a place for healthy students who are able to take the courses".
- [20] Ms. Sneddon says in her affidavit that these comments of hers have been taken out of context and at no time was it her intention to suggest that student residences are only for healthy people. She says her comments were made out of concern that the defendant's health and wellness needed to be the University's primary focus as he was failing to pursue available alternative off-campus housing.
- [21] The defendant says he firmly believes the University is attempting to evict him because of his disabilities and on December 10, 2008 he filed a Human Rights complaint against the University. A hearing date is set for June 1, 2010, with a settlement conference date of February 10, 2010.
- [22] The University submits that as the Residential Tenancy Act, S.B.C. 2002 c. 78 says that it does not apply to living accommodation owned or operated by an educational institution and provided to its students or employees, the one month notice of termination given to the defendant on August 29, 2008 in accordance with the new Tenancy Agreement was effective September 30, 2008 to bring his tenancy to an end that day.
- [23] The University submits that the issue of the defendant's eligibility and its stated reasons for notice put in the Notice to End License are irrelevant to the University's rights as the term in the new Tenancy Agreement allowing the University to give one month's notice for no reason is all the right it needed to end the Tenancy Agreement.
- [24] Alternatively, the University submits that the term of the new Tenancy Agreement ended according to its wording on August 31, 2008 and the defendant has been trespassing on the premises ever since.
- [25] The defendant submits that the 2004 Tenancy Agreement still governs and he is entitled to three months' notice of termination from the University according to its terms.
- [26] The defendant submits that he relied on representations that his tenancy would be allowed to continue as long as he was in compliance with all the other requirements of the new Tenancy Agreement and he only signed that Agreement on that representation.
- [27] Alternatively, if the new Tenancy Agreement governs, it is submitted that as the University has continued to accept his rent after August 31, 2008 and after September 30, 2008, he is now on a month to month tenancy with the University as the new Tenancy Agreement stipulates.

- [28] Finally, the defendant submits that as he has filed a Human Rights complaint that is set to be heard on June 1, 2010 and the tribunal could order that the University make residential accommodation available to him, the Court should decline the University's application for possession at this time until the Human Rights complaint is heard and decided.
- [29] The University submits that the claim of misrepresentation to the defendant as to the right of renewal is an effort by him to introduce parol evidence into the new Tenancy Agreement to contradict it or vary its terms and that as a matter of law this is not allowed unless the representation constitutes a collateral agreement, which it is submitted it does not.
- [30] The University also submits that the Human Rights tribunal should be deferring to court rulings and not the Court deferring to Human Rights rulings on matters of legal rights.

Analysis and Decision

- [31] The parties agreed to abandon the 2004 Tenancy Agreement and replace it with the new Tenancy Agreement for the term September 1, 2007 to August 31, 2008. The new Tenancy Agreement is sufficiently inconsistent with the 2004 Tenancy Agreement with a new fixed term, a new rental rate and other new provisions, that it must be considered as a completely new agreement that the parties entered into.
- [32] However, what must still be considered is whether the defendant was induced to enter into this new Tenancy Agreement by a representation made to him as to its effect on him, such that he would not have agreed to the new Tenancy Agreement otherwise and the 2004 Tenancy Agreement may still be in effect.
- [33] The defendant relies on the portion of the telephone conversation with Ms. Lalonde that he quotes for the representation to him that his Agreement would be renewed from year to year as long as he did nothing wrong and the renewal component would simply be a mechanism for rent increases or other charges.
- [34] On my review of the excerpt of the conversation the defendant has set out in his affidavit as being the representation he says he relied upon, I do not see that the words of Ms. Lalonde constitute the representation he alleges.
- [35] In answer to the defendant's expressed hope that there would not be an issue of his residency status for the next two or three years, Ms. Lalonde says "not that I am aware at this point".
- [36] This is an answer that deals only with her present awareness and not with a situation that might prevail at a renewal time. It cannot offer the defendant the representation of a right of renewal as he alleges.

- [37] When the defendant then asks Ms. Lalonde whether the renewal at the end of August of every year is just a regular procedure, she tells him it is to make sure everybody is on the same track so that the tenants know if there are any rent changes "or if there is something we feel everybody should be on the same page about...".
- [38] I do not see how these statements of Ms. Lalonde can be reasonably construed as a representation of a right to a renewal. She informs the defendant that it depends on ensuring everybody is on the same page, which is a broad enough statement to cover anything that might be the situation at the time of renewal.
- [39] The new Tenancy Agreement itself is clear in stating that the term is to end August 31, 2008. There is no right of renewal given in the written Agreement. All that is stated is that "additional terms may be considered", which is not any promise or agreement for renewal.
- [40] The message the defendant says he received is completely at odds with the words of the written Agreement and I conclude it is not supported by the excerpt of the conversation he sets out with Ms. Lalonde.
- [41] This is particularly so when Ms. Lalonde also told him in the same conversation, whether before or after the excerpt that the defendant sets out, that the University was making a change to the eligibility and any exceptions to the Agreement are best done in writing as an addendum to the Agreement.
- [42] No such written addendum was ever entered into by the parties and I conclude that the defendant cannot rely on any representation of the University as he alleges, to induce him to enter into the new Tenancy Agreement.
- [43] I find that the new Tenancy Agreement is enforceable on its terms.
- [44] The term of the new Tenancy Agreement ended on August 31, 2008. For some reason the University decided to give the defendant another one month's notice and issued him that notice on August 29, 2008 to be effective September 30, 2008.
- [45] I assume this notice was given pursuant to the "Notice of Termination" clause in the new Tenancy Agreement.
- [46] Absent any new tenancy agreement after September 30, 2008, in my view the new Tenancy Agreement came to an end on that date. The reasons given by the University for the notice are in my view irrelevant because no reasons for notice are required by common law or by the new Tenancy Agreement.
- [47] As it has developed, the defendant has stayed in the premises after September 30, 2008 and the University has continued to accept the same rent amounts thereafter every month right through to at least November 2009.

- [48] The University says that it has been applying these amounts as credits towards the overholding charges it is entitled to under the new Tenancy Agreement and has recorded these receipts as "rent" only because its internal recording system is not set up to record the payments otherwise.
- [49] However, I observe that the University has submitted no evidence that the defendant, or for that matter the Government, has ever been told that the payments received after September 30, 2008 were being applied to overholding charges, until these affidavits were sworn.
- [50] Ms. Sneddon says that the overholding charges as of November 26, 2009 were \$41,461.50. This is a significant amount of money. I would expect that the University would have advised the defendant of these charges long before they became so large and told him that they were due and owing as overholding charges. Yet no such evidence has been put before me.
- [51] With the University receiving the monthly rental amounts after September 30, 2008 and recording them as rent and with no notice to the defendant of any different application of these monies before these affidavits were sworn, I reject the University's explanation and conclude that the parties have entered into the month to month tenancy as stipulated in the new Tenancy Agreement, and that is the relationship existing between the parties at the present time.
- [52] On this basis the application of the University for an order for possession is dismissed and the defendant will have his costs of these applications.

"The Honourable Mr. Justice Truscott"

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