
CANADA / JUDGMENT

Wong v. Magnuson

2020 BCSC 1752

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 1752 Wong v. Magnuson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wong v. Magnuson,

2020 BCSC 1752

Date: 20201023

Docket: S209368

Registry: Vancouver

Between:

Peter Kam Wah Wong

Petitioner

And

Neil Magnuson and Serious Hope Society

Respondents

Before: The Honourable Mr. Justice Majawa

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner

appearing by teleconference:

A. Leung

Counsel for the Respondents

appearing by teleconference:

J.W. Conroy, Q.C.

Place and Date of Hearing:

Vancouver, B.C.

October 19, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 23, 2020

Introduction

- [1] This is a petition pursuant to s. 21 of the Commercial Tenancy Act, RSBC 1996, c. 57. The petitioner, Mr. Wong, seeks an order issuing a writ to the sheriff commanding him or her to place the petitioner in the possession of certain premises that were leased to the respondents, Neil Magnuson and the Serious Hope Society.
- [2] The respondents concede that the petitioner has met the requirements necessary to obtain the aforementioned writ. However, the respondents seek an adjournment of the petition for a period of six months and a reinstatement of the lease pursuant to s. 24 of the Law and Equity Act, RSBC 1996 c. 253.

The Lease and its Termination

- [3] Mr. Wong and his wife are the registered owners of two properties on Cordova Street in Vancouver: 157 and 161 East Cordova Street. These proceedings to obtain a writ of possession only involve 157, as Mr. Magnuson has already vacated 161. I will refer to 157 East Cordova as 157 or "the Premises".
- [4] In June 2020, Mr. Magnuson approached Mr. Wong about renting 157 and 161. There is some dispute as to exactly what Mr. Wong was told the property would be used for, but suffice it to say that Mr. Wong accepted that the property would be used in some manner for the purpose of assisting individuals on the Downtown Eastside who suffer from substance use disorders. However, Mr. Wong has deposed that he was unaware that the respondents would be operating a cannabis storefront from the Premises.
- [5] The parties subsequently entered into a verbal lease of the Premises in or around June 2020, and the respondent occupied the Premises shortly thereafter. Among other things, the lease provided that the tenancy was monthly with no termination date.

- [6] On July 13, 2020, the City of Vancouver delivered an order to Mr. Wong. In that order, the City's Chief Licence Inspector stated that an inspection of the Premises on June 24, 2020, had determined that 157 was being operated as a cannabis retailer without the required permit. The order required that the Premises cease being used as a cannabis retailer within 14 days. The order notes that a failure to comply will be referred to the City Prosecutor, and if charges were laid, the property's owners would face liability upon conviction of a fine of no less than \$250 per day for each day the offence continues.
- [7] It is the possibility of prosecution and the associated fines - which would be \$7,500 per month at a minimum - that appears have motivated Mr. Wong to terminate the lease. Mr. Wong states that the City of Vancouver has agreed, on an informal basis, not to pursue the matter further, so long as Mr. Wong takes the necessary steps to have the tenant cease operations or vacate the Premises.
- [8] Mr. Wong subsequently delivered a Notice of Termination and a Notice to Quit, both dated July 29, 2020. These documents terminated the lease effective on August 31, 2020. The respondents do not dispute having received these documents. Nonetheless, the respondents did not vacate the Premises by August 31st. Consequently, Mr. Wong delivered a demand for possession in respect of the Premises dated September 1, 2020. As of the date that this petition was heard, the respondents remain in possession of the Premises and continue to operate a cannabis storefront.
- [9] The parties are ad idem that there has been no breach of any of the lease's terms. The respondents paid the rent up to the end of August, which is when the petitioner terminated the tenancy. The respondents have offered to continue to pay the rent after September 1, 2020, but Mr. Wong has understandably not accepted those rent payments, given that the tenancy has been terminated.
- [10] On the evidence before me, I am satisfied that the requirements of s. 21 of the Commercial Tenancy Act have been met, and in particular, I am satisfied that the tenant wrongfully holds the Premises against the right of the landlord, as set out in s. 18(1) of the Commercial Tenancy Act. Furthermore, as stated above, the respondents concede the requirements of s. 18 and 21 have been met.
- [11] What remains to be decided then is whether the writ of possession should issue or whether I should accede to the respondents' submission and exercise my discretion pursuant to s. 24 of the Law and Equity Act to relieve the respondents against forfeiture of the Premises. Before I determine this, it is necessary to provide some background to the Program being operated by the respondents at the Premises.

Background

- [12] Mr. Magnuson is the operator, with others, of a project called The Healing Wave. The Healing Wave provides space to a registered non-profit society called the Serious Hope Society that runs a cannabis substitution program, which I will refer to as "the Program".

The Program provides cannabis as an option for individuals addicted to opiates. I understand the objective of the Program is to sell cannabis as a substitute to opioids at a price less than the cost of an opioid to those who may otherwise obtain or use opiates purchased illegally on the street. The Program is described as being low barrier. I am told that it relies on donations and does not seek to make a profit.

- [13] The Serious Hope Society and Mr. Magnuson have run the Program from the Premises leased from Mr. Wong since June 2020. Mr. Magnuson deposes that the Program provides high-potent cannabis to individuals with substance abuse issues that are unable to access legal sources of medical cannabis. The inability to access a legal source is partly to do with their status as homeless people or as those that do not have computers or telephones or other personal means of digital communication. I am told that without these means of communication, it is difficult or impossible for individuals to access legal medical cannabis.
- [14] Prior to June 2020, the Program operated out of the Vancouver Area Network of Drug Users location at Hastings Street for approximately three and one-half years. For a number of reasons, the Program sought a new location to provide its services. Mr. Magnuson deposes that one of the reasons he sought a new location for the Program was a motion put forward by a Vancouver City councillor in June 2019 that encouraged the creation of low-barrier access to cannabis in the Downtown Eastside within a zone in which the distribution of cannabis is currently prohibited. However, it did not appear this motion passed, and therefore, the Premises remains located in an area of the city where the zoning prohibits the sale of cannabis and cannabis dispensaries.
- [15] Mr. Magnuson and the Society need to take a number of steps with municipal and federal authorities in order to legally operate the Program from the Premises. As I understand it, the respondents will need to apply to the City of Vancouver for a development permit. It is expected that the permit will be rejected because of the current zoning restrictions. The respondents will then need to apply to the City for a variance to make an exception to the zoning on grounds of hardship. I am told the B.C. Compassion Club Society located on Commercial Drive is in the process of going through such a variance application.
- [16] It is not clear how long this process will take, but it is safe to say that it will likely take more than six months and the outcome of the variance application is not at all certain.
- [17] The respondents are also required to obtain a licence from Health Canada to sell cannabis for medical purposes pursuant to the regulations made under the Cannabis Act, S.C. 2018, c. 16. The respondents also need various exemptions from Health Canada in order to provide medical cannabis from a storefront instead of online or by mail and also to provide cannabis with a level of THC that is currently in excess of those permitted by the federal regulations.

- [18] The respondents submitted what they called an "urgent emergency application" to Health Canada seeking the licence and exemptions on September 16, 2020. Health Canada has acknowledged receipt of the application, but other than saying it would be given "timely consideration", it has not indicated how long such an application will take to be processed.
- [19] Counsel for the respondent advised me that he would expect this process to take longer than six months. Again, as with the variance application, the outcome of the federal licence and exemption application is not at all certain. I also note that it appears that the Program's cannabis suppliers are not currently authorized to produce cannabis under the federal legislation, and thus, their suppliers would also need to be transitioned into the legal market.
- [20] Mr. Magnuson attached a letter from M-J Milloy, PhD, to the application for the federal licence. According to the letter, Dr. Milloy is the Canopy Growth Professor of Cannabis Science at the University of British Columbia. He is conducting research to evaluate the efficacy of cannabis in the ongoing opiate and overdose crisis in British Columbia and the Downtown Eastside of Vancouver. He is supportive of the Program and states that the preliminary findings indicate the Program "might" help lower the risk of overdoses by helping people stay on treatment for substance use disorder, avoid high-risk drug use practices like injecting illicit opiates, and helping people substitute cannabis for illicit opiates to treat chronic pain.
- [21] Dr. Milloy is of the view that the distribution of high-quality cannabis products to vulnerable and marginalized people in the Downtown Eastside fills a gap that exists due to the lack of retail outlets in that area and other barriers that put legal cannabis out of reach to many of these individuals.

Application of the Law and Equity Act

- [22] Section 24 of the Law and Equity Act provides that:

24 The court may relieve against all penalties and forfeitures, and in granting the relief may impose any terms as to costs, expenses, damages, compensations and all other matters that the court thinks fit.

- [23] Relief against forfeiture under s. 24 is an equitable remedy. The respondents urge me to exercise my discretion to grant them relief from forfeiture, to reinstate the lease, and adjourn these proceedings for six months while they pursue the necessary licences.
- [24] The factors to consider under s. 24 include the conduct of the respondents, the gravity of the breaches, the disparity between the value of the property forfeited, and the damage caused by the breach: *Saskatchewan River Bungalows v. Maritime Life Assurance Co*, [1994] 2 S.C.R. 490. The party seeking relief from forfeiture should come to the court with "clean hands" and must also disclose all relevant matters to the court: *600443 B.C. Ltd. v. XJ Motors Ltd.*, 2011 BCSC 1144 at 34 and 36.

- [25] The petitioner does not allege that the respondents have not disclosed all relevant matters, and on the evidence before me, I find that the respondents have been forthright.
- [26] In this case, the terms of the lease itself were not broken and the respondents paid the rent due until the time they were evicted from the property. The landlord terminated the month-to-month lease with sufficient notice and it appears he did so because of the potential for the City to take enforcement action against him. Thus, strictly speaking, the gravity of the breach itself does not weigh against the respondents.
- [27] Nonetheless, upon consideration of the remaining factors, I am declining to exercise my discretion to provide relief from forfeiture under the Law and Equity Act.

The Respondents' Conduct

- [28] When considered in its entirety, the respondent's conduct does not weigh in favour of granting relief from forfeiture. There is no evidence on the record before me that the property owner consented to the tenants making use of the Premises in a manner that did not conform with the City's bylaws and that exposed the property owner to potential prosecution. Although the respondent may have felt encouraged to operate the Program at the Premises by statements made by City councillors in support of the Program, I find it likely that the respondents were aware that the Program was being operated without the necessary federal and municipal licences.
- [29] Thus, although the respondents' hands may be clean in respect of the payment of rent, I cannot conclude that they have come to the Court with clean hands when it comes to their conduct in respect of the illegal operation of the Program.
- [30] This is not to say that the respondents' conduct with the petitioner himself has been poor. To the contrary, I am satisfied the respondents are concerned for the petitioner's well-being. During the hearing, counsel for the respondents emphasized that Mr. Magnuson does not want any prejudice visited upon the petitioner as a result of the Program's operation at the Premises. However, counsel advised the Court that in light of the Program's goals and his belief in the Program's effectiveness, Mr. Magnuson cannot cease operations in good conscience.
- [31] The respondents are of the view that the only reason that Mr. Wong has proceeded with this petition is because of the potential prosecution by the City Prosecutor. It is their view that the City's legal department will hold off on taking any proceedings against the respondents while they make their various municipal and federal applications. However, they do not have a similar indication from the City Prosecutor. Counsel for the respondents argue that if an adjournment is granted, then the City will halt proceedings against Mr. Wong because he will have taken all the steps that are required to have the respondents vacate the Premises.

- [32] Thus, the respondents argue that the granting of equitable relief in the form of an adjournment will permit the Program to continue operating while the necessary licence applications are made and that Mr. Wong will not be penalized.
- [33] I am not of the view that an adjournment of these proceedings will necessarily lead to the City halting enforcement action against Mr. Wong. While counsel for the respondents urged me to draw such an inference, the materials before me fall well short of establishing that. Counsel for the respondents directly asked the City Prosecutor if he would commit to not taking enforcement action while the respondents pursued the necessary federal and municipal licences. The City Prosecutor declined to make such a commitment.
- [34] Further, in a letter to counsel for the respondent dated September 18, 2020, the City indicated that the proper municipal approvals are required, notwithstanding whether a provincial or federal licence is obtained or pursued. The City also stated that it is taking strict enforcement action against all cannabis storefronts operating without a valid permit.
- [35] During the hearing, counsel for the respondents stated that they would vacate the Premises immediately if the City commenced a prosecution notwithstanding that an adjournment was granted. I note that this commitment did not appear in the respondents' affidavit materials. In any event, as I understand it, if the petitioner is convicted following prosecution, the petitioner may be retroactively liable for the fines mentioned earlier. This would mean that the petitioner may be liable for what would be significant fines retroactive to the date of the City's order in July 2020 (or somewhere near that time). Counsel for the respondents have confirmed that neither of the respondents are in a position to provide security for any such fines, nor are they in a position to commit to an indemnification.

Damage Caused by the Conduct

- [36] This brings me to my consideration of the final factor, that being the disparity between the value of the property forfeited and the damage caused by the breach.
- [37] In the circumstances of this case, as there was no breach, I will consider the damage caused by the continued conduct of operating the program from the Premises as opposed to the breach.
- [38] The rent for the Premises is \$1,800 per month. Even if I were to grant relief from forfeiture and the respondents paid the rent as they have indicated they are willing to do, the amount of rent pales in comparison with the damage that may be caused to the property owner by the continued operation of the Program. If prosecuted and convicted, the property owner would be liable for a fine of at least \$7,500 per month. This factor weighs heavily in favour of not granting relief from forfeiture.

[39] Given that the respondents are unable to provide security or indemnification for the potential fines faced by the petitioner, and that they will not commit to ceasing operations at the Premises, I am unable to see what terms I could impose in conjunction with relief from forfeiture that would be fair and equitable in the circumstances.

Conclusion

[40] The goals of the Program may in fact be laudable. There is no doubt that the opiate crisis in this province has taken and will likely continue to take the lives of many people, including a disproportionate amount of those who reside in the Downtown Eastside. It is up to the appropriate policy makers to consider whether to allow programs that are proven to reduce the risk of harm from opiates to operate.

[41] On the evidence before me, the effectiveness of the respondents' program has yet to be proven, although, according to one individual with experience in this field, the very preliminary results are promising.

[42] Nonetheless, the potential prejudice faced by the petitioner should he be prosecuted in relation to the illegal operation of the respondents' Program is such that it would not be appropriate to grant relief from forfeiture. It would, in my view, be unjust for the petitioner to be held financially responsible for the respondents' illegal operation of the Program.

Conclusion

[43] The petitioner has validly terminated the lease. I am satisfied that the requirements of s. 21 of the Commercial Tenancy Act have been met.

[44] For the reasons given above, I decline to exercise my discretion to grant the respondents relief from forfeiture.

[45] Thus, I order that the respondents shall deliver vacant possession of the Premises to the petitioner no later than 5:00 p.m. on October 30, 2020, and the petitioner is entitled to a writ of possession in those terms.

[46] The petitioner is entitled to his costs of these proceedings.

"Majawa J."

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