
CANADA / JUDGMENT

Yee v. Montie

2016 BCCA 256

COURT

British Columbia Court of Appeal

DECIDED

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2016 BCCA 256 Yee v. Montie

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Yee v. Montie,

2016 BCCA 256

Date: 20160615

Docket: CA43207

Between:

Trevor Alan Yee

Appellant

(Petitioner)

And

David Wayne Montie and Carla Evans Montie

Respondents

(Respondents)

Before:

The Honourable Madam Justice Neilson

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Savage

On appeal from: An order of the Supreme Court of British Columbia, dated September 29, 2015 (Yee v. Montie, Vancouver Docket No. S157156).

Counsel for the Appellant:

G.K. Martin

Respondent Appearing In Person:

D. Montie

Place and Date of Hearing:

Vancouver, British Columbia

May 10, 2016

Place and Date of Judgment:

Vancouver, British Columbia

June 15, 2016

Written Reasons by:

The Honourable Madam Justice Neilson

Concurred in by:

The Honourable Mr. Justice Savage

Concurring Reasons by: (p. 11, para. 32)

The Honourable Madam Justice Bennett

Summary:

The appellant landlord appeals from the dismissal of his judicial review application of a Residential Tenancy Branch review arbitrator's finding that he failed to comply with the Residential Tenancy Act by not returning the respondent tenants' security deposit to the forwarding address provided to him at the end of tenancy. The landlord submitted that the review arbitrator erred in failing to find he complied with the act when he mailed the security deposit to an address registered in the tenants' names which he obtained from a land title search. HELD: Appeal dismissed. The review arbitrator's decision was logically supported by the evidence and was not patently unreasonable. Bennett J.A., concurring, would also dismiss the appeal.

Reasons for Judgment of the Honourable Madam Justice Neilson:

- [1] This appeal arises from a dispute between the appellant landlord, Trevor Alan Yee, and the respondent tenants, David Wayne Montie and Carla Evans Montie, over the return of a security deposit at the end of the tenancy. The central issue is whether the landlord's attempt to return the deposit complied with the Residential Tenancy Act, S.B.C. 2002, c. 78 (the "Act").

The Legislative Context

- [2] Section 38(1) of the Act requires a landlord to return a security deposit within 15 days of the later of the end of the tenancy or the date the tenant provided a forwarding address in writing. Section 38(8) stipulates that the landlord must return the deposit by giving it personally to the tenant, or by using one of the modes of service described in ss. 88(c), (d) or (f) of the Act:

88 All documents, other than those referred to in section 89 [special rules for certain documents], that are required or permitted under this Act to be given to or served on a person must be given or served in one of the following ways:

- (c) by sending a copy by ordinary mail or registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;
 - (d) if the person is a tenant, by sending a copy by ordinary mail or registered mail to a forwarding address provided by the tenant;
 - (f) by leaving a copy in a mail box or mail slot for the address at which the person resides or, if the person is a landlord, for the address at which the person carries on business as a landlord;
- [3] Section 39 of the Act provides that if a tenant does not give the landlord a forwarding address in writing within one year of the end of the tenancy the landlord may keep the security deposit.

Background

- [4] The landlord rented residential premises to the tenants from September 1, 2013 to August 30, 2014. The monthly rent was \$1,325 and the tenants provided a security deposit of \$662.50.
- [5] At the end of the tenancy, the parties met to conduct an exit inspection. The tenants provided the landlord, in writing, with Mr. Montie's place of business as a forwarding address for the return of the security deposit. The landlord refused to accept it, however, because someone at the Residential Tenancy Branch had advised him by telephone that he could not send registered mail or deliver in person to a tenant's business address.
- [6] The parties exchanged emails on September 9 and 10, 2014, in which the tenants sought to correct the landlord's misapprehension. They referred him to on-line information from the Residential Tenancy Office, and affirmed their same forwarding address. They heard nothing further from the landlord.

- [7] Because the tenants had told him they had bought property near Pemberton, B.C., the landlord undertook to identify their residential address by doing a land title search. This revealed a property registered in the tenants' names in Mount Currie, B.C. On September 12, 2014, the landlord sent a cheque for \$662.50 to this address by registered mail.
- [8] The letter was not claimed and was returned to the landlord by Canada Post on October 21, 2014. Thus, the security deposit was not returned to the tenants within 15 days, as required by s. 38(1) of the Act.
- [9] On November 2, 2014, the tenants applied to the Residential Tenancy Branch for dispute resolution, seeking double the security deposit due to late payment pursuant to s. 38(6)(b) of the Act. A hearing by telephone before an arbitrator was scheduled for June 25, 2015, but the landlord failed to attend. Upon the tenants establishing that he had been properly served with the application for dispute resolution and the notice of hearing, the arbitrator found the landlord was deemed to have been served, pursuant to s. 90 of the Act, and the hearing proceeded in his absence. In a decision delivered on June 29, 2015, the arbitrator found a tenant is entitled to give any address as a forwarding address at the end of a tenancy; the tenants had given the landlord a written forwarding address; and the landlord had rejected that address and had not returned the deposit. Pursuant to s. 38(6)(b) of the Act, the arbitrator awarded the tenants double the amount of the security deposit plus the hearing fee.
- [10] On July 15, 2015, the landlord applied to the Residential Tenancy Branch for a review of the arbitrator's decision under s. 79 of the Act. He relied on two of the grounds permitted by s. 79(2). First, he said he was unable to attend the original hearing because of circumstances that could not be anticipated and were beyond his control; second, he stated he had new and relevant evidence that was not available at the time of the original hearing. The landlord submitted he had not been served with documents regarding the initial arbitration, and presented evidence of his attempt to return the security deposit by registered mail in September 2014.
- [11] On July 22, 2015, the review arbitrator dismissed the landlord's application for review and confirmed the initial decision. The arbitrator rejected the landlord's first ground, finding he had failed to provide evidence to rebut the deemed service provision:

The [original] arbitrator found that the landlord was deemed served with notice of hearing. I find that the landlord has failed to provide evidence to rebut the deeming provision of the Act, and therefore he is not entitled to a review hearing on the ground that he was unable to attend the original hearing because of circumstances that could not be anticipated and were beyond his control.

- [12] As to the second ground, the review arbitrator concluded that "the landlord failed to comply with the Act and return the security deposit to the address that the tenants provided". The arbitrator concluded that any new evidence that the landlord had sent the cheque to the Mount Currie address was therefore irrelevant, and he could not succeed on his second ground.
- [13] The landlord applied for judicial review of the review arbitrator's decision on the second ground. His petition did not challenge that decision on the first ground. He argued the arbitrator erred in concluding he had failed to comply with the Act when he sent the security deposit to the tenants' residential address in accordance with s. 88(c) of the Act.
- [14] On September 29, 2015, a Supreme Court judge, sitting in chambers, dismissed the landlord's petition. She determined that the appropriate standard of review was patent unreasonableness. She accepted that the tenants had given the landlord a forwarding address and, instead of sending the security deposit to that address, he had arbitrarily sent it to an address he found through a title search. She noted there was no evidence that address was the residence of the tenants at the time. She also observed that the uncontradicted evidence was the Mount Currie property was located in a rural area with limited access and no home mail delivery. She concluded the petitioner had failed to establish the decision of the reviewing arbitrator was patently unreasonable.

Issues on Appeal

- [15] The landlord submits the chambers judge erred in ruling he failed to comply with the Act, and in failing to find the decision of the review arbitrator was patently unreasonable.

Analysis

- [16] At the hearing of this appeal, we raised a question as to the status of this proceeding, given the landlord's failure to challenge the review arbitrator's finding on his first ground that he had not rebutted the presumption of deemed service. The review arbitrator stated he was therefore not entitled to a review hearing on the ground that he had been unable to attend the original arbitration. Having failed to justify his non-attendance, the question arises as to whether the landlord should have been permitted to introduce "new and relevant evidence" on his second ground, particularly as there was nothing to suggest this evidence was unavailable at the time of the original hearing. It is arguable that the landlord's failure to demonstrate the patent unreasonableness of this aspect of the review arbitrator's decision is sufficient to dispose of this appeal.

- [17] I am disinclined to reach that conclusion, however. The review arbitrator treated the two grounds raised by the landlord as independent of each other and proceeded to determine the second ground despite the dismissal of the first ground. As well, this issue was not raised by the respondents before the chambers judge or before us. Instead, all parties have focussed on the review arbitrator's decision on the second ground. I will accordingly consider this issue.
- [18] Whether a chambers judge presiding over a judicial review identified the appropriate standard of review and properly applied it is a question of law reviewable on a standard of correctness: *British Columbia (Ministry of Children and Family Development) v. Harrison*, 2012 BCCA 277 at para. 58; *Sereda v. Ni*, 2014 BCCA 248 at para. 35.
- [19] In this Court, and before the chambers judge, the landlord properly conceded that the standard for review of the review arbitrator's decision was patent unreasonableness. By virtue of s. 78.1 of the Act, s. 58 of the Administrative Tribunals Act, S.B.C. 2004, c. 45 (the "ATA") applies to dispute resolution proceedings in residential tenancy matters. Because s. 84.1 of the Act contains a privative clause, the director and his delegates are considered to be an expert tribunal under s. 58(1) of the ATA. Section 58(2) provides that a finding of fact or law or an exercise of discretion by such a tribunal must not be disturbed unless it is patently unreasonable.
- [20] The landlord argues that the review arbitrator's finding that he was required to use the forwarding address provided by the tenants was a discretionary decision, and was patently unreasonable because it failed to take into account the statutory requirements of the Act as required by s. 58(3)(d) of the ATA. I am unable to agree. To my mind the issue under review - whether the landlord returned the security deposit to the tenants in compliance with the Act - is a question of mixed law and fact.
- [21] The ATA does not define patent unreasonableness as the term applies to questions of fact or law. In *Manz v. Sundher*, 2009 BCCA 92 at para. 39, Saunders J.A. adopted the meaning of the phrase in relation to factual matters from *Speckling v. British Columbia (Workers' Compensation Board)*, 2005 BCCA 80:
- [37] As the chambers judge noted, a decision is not patently unreasonable because the evidence is insufficient. It is not for the court on judicial review, or for this Court on appeal, to second guess the conclusions drawn from the evidence considered by the Appeal Division and substitute different findings of fact or inferences drawn from those facts. A court on review or appeal cannot reweigh the evidence. Only if there is no evidence to support the findings, or the decision is "openly, clearly, evidently unreasonable", can it be said to be patently unreasonable. That is not the case here.

[22] In *Pacific Newspaper Group Inc. v. Communications, Energy and Paperworkers Union of Canada*, Local 2000, 2014 BCCA 496 at paras. 39-44, this Court affirmed that the standard of patent unreasonableness is at the high end of the deference spectrum, and endorsed this description of the phrase from *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at para. 52:

a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason". A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand. [Citations omitted.]

[23] The landlord contends it was patently unreasonable for the review arbitrator to rule that he "failed to comply with the Act and return the security deposit to the address that the tenants provided". He says he was entitled to select any of the modes of service enumerated in ss. 88(c), (d), or (f) of the Act to return the security deposit, and he was not required to use the forwarding address provided by the tenants. He argues the land title search provided sufficient evidence of the address at which the tenants resided for the purpose of s. 88(c), and he discharged his statutory obligation to them by mailing the security deposit to the Mount Currie address. He submits the Act only requires the landlord to make reasonable efforts to return the deposit, and does not require proof that the letter was actually received. He contends the review arbitrator wrongly interpreted the Act in finding otherwise.

[24] In support of his submission, the landlord points out that under s. 149(1) of the Land Title Act, R.S.B.C. 1996, c. 250 (the "LTA") the address on a land title document tendered for registration is sufficient for mailing notices pursuant to the LTA. As well, he relies on *Atchison (Residential Tenancy Act, Dispute Resolution Office) v. British Columbia*, 2008 BCSC 1015, a case in which he says the Court accepted an address identified by a skip tracer as the residential address of the tenant.

[25] I am not persuaded that the decision of the review arbitrator was patently unreasonable. In my view, the landlord's argument is premised on a mischaracterization of that decision. I am unable to accept that the review arbitrator was unaware of the multiple modes of effecting service under s. 88 of the Act. Instead, I interpret the review arbitrator's conclusion as a finding that, while it was permissible under s. 88(c) to return the deposit to the tenants' residential address, compliance with that provision implicitly requires ascertaining that address with certainty. Using a land title search to try to locate it in this case was not reasonable or acceptable.

[26] There is nothing patently unreasonable in this conclusion. The tenants had given the landlord their forwarding address in writing as required by s. 39 of the Act. He rejected it because he believed he could not use their business address. The Act contains no such prohibition. The tenants sought to correct his misapprehension in a follow-up email, reiterating that the "forwarding address we provided is valid". They also referred him to and

quoted from a "rto" government website for advice. Instead of investigating further, the landlord embarked on what was, to use the tenants' word, a "speculative" and potentially unreliable means of identifying their residential address so he could attempt to serve them under s. 88(c) of the Act.

- [27] I note the landlord presented no law or evidence in the proceedings before the review arbitrator to support his contention that he would have been at risk of non-compliance had he used the tenants' business address to return the security deposit.
- [28] As the tenants submit, there are a number of reasons why property title may fail to correlate with an individual's place of residence. An individual may own a home but not live in it. In the specific case of tenants, they are often in a state of transition at the conclusion of a tenancy and, even if they own a home, may not yet have settled there.
- [29] The fact a certificate of title includes an address sufficient for providing notice under the LTA has no bearing on whether that address is the residence of the owner. Nor is Atchison of assistance to the landlord. While he submits that the judge in that case accepted an address located by a skip tracer as a residential address for the purpose of s. 88(c), the validity of doing so was not an issue in that case. Moreover, even if one accepts the landlord's interpretation of Atchison, it is readily distinguishable. There the tenants deliberately withheld their forwarding address from the landlord, while here the landlord rejected the forwarding address provided by the tenants.
- [30] The tenants offered the landlord a straightforward and appropriate means of delivering the security deposit to them under s. 88(d) of the Act by giving him their forwarding address in writing as required by s. 39 of the Act. The landlord declined to accept this and instead sent the deposit to a speculative residential address. I conclude the review arbitrator's finding that the landlord failed to comply with the Act was not patently unreasonable, but logically supportable on the evidentiary record.
- [31] I would dismiss the appeal.

"The Honourable Madam Justice Neilson"

I AGREE:

"The Honourable Mr. Justice Savage"

Reasons for Judgment of the Honourable Madam Justice Bennett:

- [32] I have had the opportunity to review the draft reasons for judgment of Madam Justice Neilson. I agree with her conclusion that the appeal should be dismissed. I depart from her analysis on the basis that in my view, the appeal should be resolved on the first issue she discusses, and that is whether it was patently unreasonable for the review arbitrator to conclude that the landlord, Mr. Yee, was not entitled to a review hearing. The decision is set out in the reasons of Neilson J.A., at para. 11.

[33] In my opinion, this conclusion was not patently unreasonable, and I would dismiss the appeal on this basis.

"The Honourable Madam Justice Bennett"

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