

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Nazari v. El Assal*,
2024 BCSC 1018

Date: 20240612
Docket: S236252
Registry: Vancouver

Between:

Bejan Nazari

Petitioner

And

**Abdel Aziz El Assal, Amr El Assal,
Inas Ehmenbbawi, and Abdelrahman El Assal**

Respondents

Before: The Honourable Justice Kirchner

Reasons for Judgment on Costs

The Petitioner, appearing on his own behalf:

Bejan Nazari

Counsel for Respondent, Abdel El Assal:

M. Magaril

No other appearances:

Place and Dates of Written Submissions:

Vancouver, B.C.
March 1, 2024
April 2, 2024 and
April 8, 2024

Place and Date of Judgment:

Vancouver, B.C.
June 12, 2024

Introduction

[1] On February 1, 2024 I gave oral reasons for judgment dismissing the Petition for judicial review of a May 4, 2023 decision of an arbitrator under the *Residential Tenancy Act*, S.B.C. 2002, c. 78. The arbitrator awarded the respondent, Abdel Aziz El Assal, \$4,012.93 for the petitioner’s wrongful withholding of a security deposit after the end of a tenancy (the “RTB Order”). Mr. El Assal sought special costs for that application but in a separate oral ruling also given on February 1, 2024, I adjourned the application for special costs and directed the parties to provide written submissions on the issue. This is my judgment on that part of the application.

Background

[2] Mr. El Assal, together with his late father, was a tenant of the petitioner, Bejan Nazari. Mr. Nazari ended the tenancy effective November 30, 2022 under a provision of the *Residential Tenancy Act* that permits a landlord to end a tenancy if the landlord or a close family member intends in good faith to occupy the rental unit. Mr. El Assal complied with the notice to end tenancy and he and his father gave up vacant position of the rental unit as required. However, Mr. Nazari withheld their damage deposit and failed to make the required application under s. 38(1) of the *Residential Tenancy Act* for dispute resolution in respect of the deposit. Mr. El Assal therefore applied under s. 38(6) of the *Residential Tenancy Act* for dispute resolution and was awarded \$4,012.93, which is double the amount of the security deposit plus the filing fees and interest.

[3] Mr. Nazari did not attend the hearing at the Residential Tenancy Branch (RTB) when this order was made. He claimed that he had not been properly served with Mr. El Assal’s notice of dispute resolution. He applied for reconsideration of the RTB Order on that and other bases but that application was not successful.

[4] In the meantime, Mr. El Assal attempted to collect on the award made in the RTB Order, including by taking enforcement proceedings in Provincial Court.

[5] On September 11, 2023, Mr. Nazari commenced this proceeding seeking judicial review of the RTB Order and the reconsideration decision. On October 23, 2023 counsel for Mr. El Assal wrote to Mr. Nazari providing him with the number for the Lawyer Referral Service and advising him that his petition contained so many flaws that, in counsel’s opinion, it was bound to fail. Counsel outlined those deficiencies in a draft petition response attached to the letter. He cautioned Mr. Nazari that the deficiencies may be a basis for a special costs order if he did not amend or discontinue the petition. He asked for Mr. Nazari’s available dates for an application to strike the petition. Counsel followed up with another letter dated November 20, 2023 pointing out that the deficiencies in the petition had not been addressed and that Mr. Nazari had not taken steps to advance the petition.

[6] In the meantime, Mr. Nazari brought a without notice application within the petition seeking certain interlocutory relief, including an order transferring the Provincial Court enforcement proceedings to the Supreme Court, some procedural orders respecting the petition, and an order that the RTB Order be “struck out as an abuse of process”. Mr. Nazari also sought special costs for the application. Justice Tammen adjourned the application on October 26, 2023 and directed that Mr. Nazari reschedule it after giving notice to the respondents. Mr. Nazari sent the notice of application to counsel for Mr. El Assal by email on November 20, 2023 and the respondents filed an application response on January 4, 2024. Mr. Nazari never proceeded with the application despite telling counsel for Mr. El Assal that the application had been brought without notice because the “matter was urgent”.

[7] On January 4, 2024, Mr. El Assal filed and served the application to summarily dismiss the petition under Rule 9-5(1) of the *Supreme Court Civil Rules*. Throughout January, his counsel attempted to secure a date with Mr. Nazari for the hearing of the petition but Mr. Nazari was not responsive. When he did respond, he was not co-operative in offering available dates. After two attempts to have the matter heard (one of which failed due to insufficient court time being available) the application came before me on February 1, 2024. In oral reasons given the same

day, I found it was plain and obvious that the petition was bound to fail and I granted Mr. El Assal's application to strike.

[8] Very briefly, I found parts of the petition were incomprehensible, that many allegations or grounds for relief sought in the petition lacked any factual foundation, and the petition sought relief that is not available on judicial review or at all. I found that Mr. Nazari's pleaded explanations for not responding to Mr. El Assal's notice of dispute resolution and failing to attend the RTB hearing lacked any merit or were so imprecise (referring only unspecified "extenuating circumstances") as to not constitute a valid pleading. I found the petition failed to plead any facts in support of allegations that the RTB process was unfair, that the proceeding was casually handled, that the arbitrator was biased, that the decision contained obvious or inadvertent errors, and that Mr. El Assal had based the proceeding on a "misrepresentation". I also found that Mr. Nazair had identified no supporting facts for the allegations in the petition in the affidavit he filed in support of the petition or in his oral submissions responding to the application to strike. I therefore struck out the petition as failing to disclose a reasonable claim.

[9] I now turn to the cost consequences of that decision.

Legal Principles

[10] The court has a discretion to award special costs against a party to punish or deter reprehensible conduct in the litigation by that party. Reprehensible conduct may include scandalous or outrageous behavior by the party but also milder forms of misconduct that is deserving of rebuke by the court: *De Cotiis v. Hothi*, 2020 BCSC 1545 at paras. 8-10, leave to appeal ref'd 2021 BCCA 60. An award of special costs is exceptional and typically arises where, for example, there is evidence of improper motive, where a party makes improper allegations of fraud, where a party recklessly pursues a manifestly deficient claim, where party attempts to mislead the court, or where a party abuses the court's process: *De Cotiis* at paras. 12 and 17; *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at para. 11.

Analysis

[11] Mr. El Assal raises several different grounds on which he submits an order for special costs is justified. I propose only to address those that I find have some merit. I have not considered any conduct that is outside of this litigation, including conduct in the Provincial Court which is a separate proceeding. A party's conduct in other litigation is not normally a consideration for special costs: *Sandhu v. Sun Life Assurance Company of Canada*, 2016 BCSC 1077 at para. 38. My focus is on how Mr. Nazari has conducted himself in this proceeding.

[12] I will say at the outset that Mr. Nazari conducted himself with courtesy and respect for both the court and counsel for Mr. El Assal at the hearing of this application. Nothing in his behavior in court that day calls for a rebuke. The focus of Mr. El Assal's application is on Mr. Nazari's conduct leading up to that hearing, not conduct in the hearing itself.

[13] Mr. Nazari submits that special costs ought not be awarded. He points out that he was self represented in both the RTB and in this court. He states that he is unfamiliar with the court process and has no familiarity with court rules. He says he believes he was wronged by the RTB Order and he wanted a higher court to hear his "appeal". He says he genuinely tried to follow the rules of court as he thought he understood them but he acknowledges that he did not have adequate guidance.

[14] I accept that persons who find they must represent themselves in a court proceeding should be given leeway – even considerable leeway – in an application of this nature. It is challenging for non-lawyers to navigate the law and the rules of court procedure. It would not be appropriate or just to penalize them with an order of special costs if they find themselves getting lost in the process.

[15] However, that is not what has happened here. In this case, Mr. Nazari has, at a minimum, wilfully blinded himself to procedural requirements and to the patent deficiencies in his petition. He was keen to get before the court when he believed he could do so without giving notice to Mr. El Assal but once he found out he could not proceed in this way, he was far less willing to go to court, and he resisted efforts by

Mr. El Assal's lawyer to bring the application to strike to petition to a hearing. All the while, Mr. Nazari remained out of compliance with the RTB Order, which was not stayed pending the hearing of his petition, forcing Mr. El Assal to undergo the time and expense of enforcement proceedings. (Mr. Nazari eventually paid Mr. El Assal the amount of the RTB Order on February 23, 2024, three weeks after my oral judgment striking the petition.)

[16] Mr. Nazari knew or certainly ought to have known that his petition was so deeply flawed that it was bound to fail. On two separate occasions Mr. El Assal's counsel brought that fact to Mr. Nazari's attention but Mr. Nazari made no effort to amend the petition or discontinue it.

[17] As I found in the application to strike, there was only one point in the petition that could possibly have some merit and that was whether Mr. Nazari had been properly served with the notice of dispute in the RTB process. On that point, though, I found that Mr. Nazari received the dispute notice by registered mail and he either chose to ignore it or chose not to open the envelope in which it was delivered. Either way, Mr. Nazari ignored or was wilfully blind to the fact that he had been served with a notice of dispute.

[18] I find that Mr. Nazari was also wilfully blind to the substantial defects in his petition and made no effort to address those deficiencies when they were clearly drawn to his attention. Instead he continued to pursue his meritless claim, recklessly ignoring its obvious defects. That alone is unlikely to support an order for special costs: *O.W.L. (Orphaned Wildlife) Rehabilitation Society v. Day*, 2019 BCSC 1900 at para. 31. However, in my view, Mr. Nazari's purpose in pursuing this demonstrably flawed petition was to delay or hinder the Mr. El Assal's efforts to enforce a lawful order of the RTB arbitrator and prevent Mr. El Assal from receiving the award to which he was entitled. That award included a \$1,950 damage deposit that Mr. Nazari unlawfully refused to refund.

[19] Relying on the patently defective petition in this manner and for the purpose of delaying or hindering the enforcement of a valid RTB Order is an abuse of the

court's process. Moreover, it is an abuse of process that forced Mr. El Assal to incur legal costs to respond to and challenge the petition while still not receiving the \$4,012.93 to which he was entitled under RTB Order. It is worth mentioning that the dispute began over a \$1,950 damage deposit. In fact, it appears that, at its core, the dispute was over a mere \$700 repair cost. In my view, Mr. Nazari's use of the court's process with a patently defective petition to delay or hinder the collection of what began as a very small financial obligation to his tenant is reprehensible conduct deserving of rebuke by way of a special costs order.

[20] I add to this that the petition and Mr. Nazari's affidavit filed in support make a completely unfounded and unparticularized allegation of misrepresentation against Mr. El Assal. Without specifying that the alleged misrepresentation was innocent or negligent, the pleading amounts to an unsubstantiated allegation of fraud. Even self-represented litigants have an obligation to make such allegations responsibly, by being "measured, careful, and faithful to the evidence": *The Owners, Strata Plan LMS3259 v. Sze Hang Holding Inc.*, 2015 BCCA 424 at para. 11. This also attracts an award of special costs.

[21] I therefore grant Mr. El Assal's application and award him special costs for this proceeding to be assessed by the Registrar. To be clear, this order applies only to Mr. El Assal's costs for this proceeding and not the enforcement proceedings in Provincial Court over which I have no jurisdiction. It would, however, be open to Mr. El Assal to claim the cost of obtaining the transcripts from the Provincial Court proceeding as a disbursement in this proceeding since they were reasonably obtained to support the application to strike the petition.

"Kirchner J."