IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *City2City Real Estate Services Inc. v. Wang,* 2024 BCSC 1267

Date: 20240715
Docket: S240453
Registry: Vancouver

Between:

City2City Real Estate Services Inc.

Petitioner

And

Mohan Wang

Respondent

Before: The Honourable Madam Justice W.A. Baker

On judicial review from: An order of the Residential Tenancy Branch dated November 26, 2023

Reasons for Judgment

The Petitioner, Zihao Chen, appearing in person and for City2City Real Estate Services Inc.:	Z. Chen
The Respondent, Mohan Wang, appearing in person:	M. Wang
Place and Date of Hearing:	Vancouver, B.C. July 5, 2024
Place and Date of Judgment:	Vancouver, B.C. July 15, 2024

[1] The petitioner landlord brings this application for judicial review of a decision of Arbitrator Kirk dated November 26, 2023, under the *Residential Tenancy Act,* S.B.C. 2002, c. 78 (the "*Act*"), in calculating the rental payment obligation of the respondent tenant.

[2] The petitioner filed a review consideration application on November 29, 2023, alleging the decision was obtained by fraud because a WeChat conversation was not accurately translated. That application was refused on December 1, 2023.

[3] The landlord does not seek to set aside the whole of the decision of Arbitrator Kirk, as that decision addressed numerous issues which are no longer in dispute. On the sole issue of the monetary order for unpaid rent owing by the tenant, the landlord argues on this Review that the decision of Arbitrator Kirk was procedurally unfair because he was not served with the tenant's evidence in accordance with the *Act* and regulations, in advance of the hearing, and he was not given an opportunity to provide his own responsive evidence to counter the tenant's evidence.

[4] The Director of the RTB filed a response on March 1, 2024. The Director provided submissions on the relevant standard of review and on the available remedies on a judicial review.

What is the appropriate standard of review

[5] The appropriate standard of review of an arbitrator's decision under the *Act* has been determined many times by this court, and is grounded in ss. 5.1 and 84.1 of the *Act* and s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (the "*ATA*"). Questions of fact, law and discretion are only open to review if such decisions are patently unreasonable: *Campbell v. The Bloom Group*, 2023 BCCA 84 [*Campbell*] at para 11-14. Questions of procedural fairness, however, must be decided "having regard to whether, in all of the circumstances, the tribunal acted fairly": *Campbell* at para. 4.

Was the Hearing Procedurally Unfair?

[6] The tenancy in this case began on December 5, 2021, and as of January 1, 2023 the monthly rent was $6,120 due on the first of the month.

[7] On March 10, 2023 the tenant provided the landlord with a notice to vacate the rental unit on April 6, 2023. The tenant wanted to pay rent only for the period up to April 6, 2023. The landlord wanted the tenant to stay to the end of April 2023. In reviewing the evidence, the arbitrator found the following facts:

> On March 28, 2023, the Tenant and the Landlord discussed rent for April 2023. The Tenant told the Landlord's agent he would pay for the 6 days he would be there in April 2023, stating that he understood the Landlord wanted rent for the month. The Landlord's agent did not object to the Tenant's proposal of paying rent for the 6 days and informed the Tenant it "was not a problem."
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> On April 6, 2023, the Tenant again informed the Landlord's agent that they would pay for the 6 days in April 2023 and requested that the sum be deducted from the security deposit. The Landlord's agent did not object. Copies of the messages between the parties were submitted in evidence.

[8] In her analysis, the arbitrator held:

> The written correspondence between the parties establishes that the Landlord's agent agreed that the Tenant would only pay for the 6 days of rent while the Tenant was present in the rental unit in April 2023. The Landlord's agent did not object to that request, nor did the Landlord's agent object to the Tenant's request that the sum be withheld from the security deposit.
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> Based on the evidence before me, I find that the Tenant was obligated to pay rent to the Landlord for the period April 1 to April 6, 2023, pursuant to the parties' agreement. I find that pro-rated rent for this period totals $1,224.00.

[9] The landlord challenges this decision of Arbitrator Kirk on the following bases:

a) The hearing was procedurally unfair because the landlord did not receive the tenant's evidence in advance of the hearing.

b) The decision was procedurally unfair because the arbitrator relied on a non-certified translation of a Chinese language text exchange to find the parties had reached an agreement on the payment of rent, but the landlord only received the translation for the first time at the hearing and could not provide a responsive certified translation.

[10] Section 89 of the *Act*, and s. 43 of the Regulation, set out the rules for service of documents in a residential tenancy dispute. They permit personal service, service by registered mail, and service by email where an email address has been provided for service by the person.

[11] The arbitrator found that:

> The Tenant testified he served copies of his evidence by email to the Landlord on or about October 11, 2023, and the Landlord acknowledged receipt of the evidence.

[12] In this case, the landlord did not give an email address for service on the tenancy agreement. There was also no evidence that the landlord executed a Form 51 – authorizing service at an email address.

[13] The arbitrator did not expressly refer to the evidence upon which she relied in concluding the landlord acknowledged receipt of the evidence. The transcript of the hearing reveals the arbitrator did raise the question with the landlord as to when he received the evidence package. This evidence can be summarized as follows.

[14] The arbitrator asked the tenant if he provided the landlord with copies of everything he submitted to the RTB. The tenant confirmed he sent an email to the landlord. The arbitrator then asked the landlord if he received the email from the tenant with his evidence for the hearing. The landlord replied that he did not, and stated the tenant did not send the evidence by registered mail.

[15] The arbitrator then acknowledged the tenant did not send the evidence by registered mail, and again asked the landlord if he got the evidence package by email. The landlord stated he was checking his email right then during the hearing. The landlord confirmed that on checking his email during the hearing, he saw the email, saw it had been sent on November 16, but again testified that he had not checked his email before this time. He told the arbitrator that he could read the evidence during the hearing itself because he had not received the email. The arbitrator asked the landlord to locate a document in the tenant's evidence package, and the landlord again stated, "I don't have enough time to read them."

[16] The only evidence before the arbitrator as to when the landlord saw the tenant's evidence, was the landlord's evidence that during the hearing itself he checked his email and saw it at that point for the first time. While it is true that the landlord acknowledged, during the hearing, that the email was sent to him by the tenant on November 16, 2023, that is not evidence which would support a finding that the landlord was served with the tenant's evidence in accordance with the *Act*, or that the landlord acknowledged receipt of the evidence at any time prior to the hearing. Further, there was absolutely no evidence before the arbitrator that the landlord received the tenant's package on October 11, 2023, which is suggested in the arbitrator's decision.

[17] The *Act* and the Regulation set out service and delivery methods to ensure that people receive materials in sufficient time for them to respond. If a person has notified the other party that they will accept service by email, it is incumbent upon them to check their email in a timely way so that they can respond to any information served upon them. However, if they have not given an email address for service, the same obligation does not arise. A person cannot be faulted for failing to check their email for important documents, if they have never consented to the use of their email for service of documents.

[18] If the landlord has not consented to the use of email for service of documents, and the tenant chooses to serve them by email nevertheless, the onus is on the tenant to prove that the landlord actually did receive and review the documents sent by email prior to the hearing. The arbitrator can then determine whether the landlord had adequate time to respond to the materials such that the hearing may fairly proceed.

[19] In this case, the arbitrator had no evidence to contradict the landlord's testimony that he saw the email for the first time during the hearing. The arbitrator did not enquire as to whether the landlord required time to address the evidence. To the contrary, the landlord expressly told the arbitrator that he did not have time to

read them and the arbitrator took no steps to assess the prejudice to the landlord in proceeding relying on the tenant's evidence.

[20] This gives rise to a significant procedural fairness argument because the landlord takes issue with the uncertified translation which was sent to him by email, and which the arbitrator relied upon in concluding that the landlord accepted the tenant's proposal to pay a partial amount of rent for the month of April.

[21] On the application before me, the landlord provided a certified translation which is different from the tenant's translation, and which may support a finding that, on the whole of the evidence, the landlord did not consent to the unilateral decision of the tenant to pay only a portion of the rent for April. This translation was not available to the arbitrator because the landlord did not receive the tenant's evidence prior to the hearing, and was therefore unable to provide his own evidence to challenge the tenant's evidence.

[22] I find the arbitrator's decision to proceed with the hearing in circumstances where the tenant had not complied with the statutory requirements for service of his evidence in advance of the hearing, and there was no evidence which could support a conclusion that the landlord had actual notice of the tenant's evidence before the hearing, was procedurally unfair to the landlord.

[23] The most basic tenet of procedural fairness is that a person is entitled to know the case against them, and be able to respond to that case: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 28. The landlord was denied the ability to review the evidence submitted against him prior to the hearing, and was denied the ability to provide his own responsive evidence.

[24] I find the landlord was deprived of procedural fairness in the hearing before Arbitrator Kirk. The decision of Arbitrator Kirk as it relates to the monetary order for unpaid rent, therefore, cannot stand.

Conclusion

[25] The decision of arbitrator Kirk dated November 26, 2023 on the sole issue of whether the landlord is entitled to a monetary order for unpaid rent, is set aside, and the Director or her delegate are directed to reconsider the landlord's application pursuant to *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 5.

"W.A. Baker J."