

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Kong v. Lai*,
2024 BCCA 302

Date: 20240813
Docket: CA50045

Between:

Stephen Poh Chew Kong

Appellant
(Petitioner)

And

Yan Bo Kevin Lai and Jilei Sun

Respondents
(Respondents)

Before: The Honourable Mr. Justice Abrioux
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated
July 29, 2024 (*Kong v. Lai*, Vancouver Docket S243864).

Oral Reasons for Judgment

The Appellant, appearing in person
(via videoconference):

S.P.C. Kong

Counsel for the Respondents:

C. Ke

Place and Date of Hearing:

Vancouver, British Columbia
August 12, 2024

Place and Date of Judgment:

Vancouver, British Columbia
August 13, 2024

Summary:

The applicant applies for a stay of an order refusing to extend an interim stay of an order of possession. The order of possession was issued after a settlement agreement was reached by the parties before the Residential Tenancy Branch HELD: Application dismissed. A stay of this order would have no bearing on the landlord's ability to enforce the order of possession and there exists no serious question to be tried with respect to the judge's refusal to extend the interim stay. The applicant's allegations of irreparable harm are unsupported by the record. The balance of convenience favours the landlord and it would not be in the interests of justice to grant this application.

ABRIOUX J.A.:

Overview

[1] The appellant, Mr. Kong applies for a stay of Justice Latimer's order of July 29, 2024 (the "order") in which she refused to extend a stay of an order of possession made at a Residential Tenancy Branch (RTB) dispute resolution proceeding.

[2] On August 1, 2024, Registrar Outerbridge ordered that this application be heard on an urgent basis and set the matter down for hearing on August 12, 2024. Mr. Kong also applies for leave to appeal the order but that application is not before the Court at this time.

[3] The respondent, Yan Bo Kevin Lai, who has been acting as the landlord's agent in this matter, seeks to have the landlord Jilei Sun substituted as the respondent in this proceeding. I will not make that order, but will order that Mr. Sun be added as a respondent in this proceeding.

Background

[4] Mr. Kong entered into a residential tenancy agreement in December 2021 to rent a property in Vancouver for \$3,060 per month. Mr. Lai has been acting as the landlord's agent in managing the property in question, which I am advised is a two-bedroom penthouse suite in the Dunbar neighbourhood.

[5] On March 26, 2024, the landlord filed a 10-day notice with the RTB to end the tenancy on the basis of unpaid rent. On April 29, 2024, Mr. Kong filed his own notice seeking to cancel the landlord’s 10-day notice, obtain compensation for loss of quiet enjoyment, and obtain a rent reduction for repairs which he had incurred.

[6] The landlord then made an application for dispute resolution with the RTB; he also sought an order of possession. On May 6, 2024, a hearing was held before Arbitrator Doyon to address the landlord’s application. The arbitrator dismissed the application for possession on the basis that the landlord had failed to submit the required form under s. 52 of the *Residential Tenancy Act*, S.B.C. 2002, c. 78 [the *Act*].

[7] A second dispute resolution hearing was held on May 24, 2024 at which time Arbitrator Casler provided the parties with an opportunity to settle the dispute pursuant to s. 63 of the *Act*. The decision dated that day (the “May 24 decision”) provides that the parties:

... agreed to the following terms of a final and binding resolution of the Tenant’s application and the issues in dispute arising out of this tenancy and at this time that they did so of their own free volition and without any element of coercion.

[8] The terms of the settlement which were set out in the decision were:

- 1) the tenancy would end at 1:00 pm on June 14, 2024, by which time the Tenant agreed to have vacated the rental unit;
- 2) the landlord would retain the full value of the security deposit;
- 3) all financial claims regarding the tenancy were resolved; and
- 4) these particulars “comprise the full settlement of all aspects of the Tenant’s current application for dispute resolution”.

[9] To give effect to the settlement, the arbitrator granted an order of possession to the landlord to be effective June 14, 2024.

[10] On May 27, 2024, Mr. Kong filed an application for review of the May 24 decision. He submitted that he could not be evicted as Arbitrator Doyon had already decided that the landlord's 10-day notice was not in a proper form. He also alleged that the settlement was obtained by fraud. His position was that Arbitrator Doyon's decision "now needs to be Judicially reviewed by the Supreme Court".

[11] Mr. Kong's application for review was dismissed on May 28, 2024 by Arbitrator Campbell who also confirmed the order issued on May 24, 2024.

[12] On June 11, 2024, Mr. Kong filed a petition for judicial review of Arbitrator Campbell's review decision in which he also sought a stay of the order of possession pending disposition of the judicial review. As at the date of the hearing of this application, no date has been set in the Supreme Court for the hearing of the petition for judicial review.

[13] On June 11, 2024, Justice Thompson granted an interim stay of the order of possession from June 14, 2024 to June 25, 2024. This stay was then extended on July 4, 2024 by Justice Kent to July 29, 2024.

[14] On July 29, 2024, Justice Latimer refused to further extend the interim stay. This is the order at issue in this Court.

[15] On July 31, 2024, the landlord's counsel notified Mr. Kong that the landlord intended to enforce the order of possession. Mr. Kong then sought a reconsideration of Justice Latimer's dismissal of his interim stay application. The application for reconsideration was dismissed by Justice Baker on July 31, 2024.

Applications before this Court

[16] On July 29, 2024, after Justice Latimer refused to extend the interim stay, Mr. Kong filed a notice of appeal as well as an application for a stay in this Court.

[17] As I have noted, on August 1, 2024, the parties appeared before Registrar Outerbridge who granted Mr. Kong leave to bring the stay application on an urgent basis.

[18] The landlord contests the stay application.

[19] The issue of whether leave to appeal is required and, if so, whether it should be granted is not before the Court at this time.

The Stay Application

Legal Framework

[20] Under s. 33(1) of the *Court of Appeal Act*, S.B.C. 2021, c. 6, “a justice may, on terms and conditions the justice considers appropriate, order a stay of all or part of proceedings, including execution, in the cause or matter from which the appeal is brought”.

[21] To obtain a stay, the applicant must satisfy a three-part test, establishing that: (1) there is a serious question to be tried; (2) the applicant will suffer irreparable harm if the stay is refused; and (3) the balance of convenience favours granting the stay: *Save-A-Lot Holdings Corp. v. Christensen*, 2022 BCCA 39 at paras. 9–10.

[22] The overarching consideration is whether the stay is in the interests of justice: *Aulakh v. WIT Management Corp.*, 2022 BCCA 356 at para. 64. The power to grant a stay “is discretionary and should be exercised only where necessary to preserve the subject matter of the litigation and pending final decision of the Court or to prevent irremediable damage, or where there are other special circumstance”: *Air Palace Co., Ltd. v. Rotor Maxx Support Limited*, 2023 BCCA 197 at para. 40 citing *Contact Airways Limited v. De Havilland Aircraft of Canada Limited* (1982), 42 B.C.L.R. 141 at 143 (C.A.).

Discussion

[23] I begin by observing that a stay of Justice Latimer’s order refusing to extend the interim stay would have no bearing on the landlord’s ability to enforce the order of possession. Mr. Kong’s petition for judicial review dated June 11, 2024, has not yet been heard and decided. The order under appeal is that of Justice Latimer refusing to extend the stay which expired on July 29, 2024.

[24] *Lee v. Wedekind*, 2021 BCCA 372 is of assistance on this point. In that case, the applicant also sought a stay of a Supreme Court order refusing to stay an order of possession which had initially been made by the RTB. Justice Stromberg-Stein, sitting in chambers, noted that the applicant’s purpose in seeking a stay of the refusal was “ill-conceived and based on her mistaken belief that a stay in this Court would achieve a stay of the order of possession in the underlying matter”: at para. 32. It appears that Mr. Kong holds the same mistaken belief.

[25] Mr. Kong’s submissions in relation to whether there is a serious question to be tried are focused on the merits of the May 24 decision. Relying on *Uber Technologies Inc. v. Heller*, 2020 SCC 16, he argues that the settlement agreement was unconscionable and favoured the landlord. He states that he was not given an opportunity to make submissions about emergency repair costs that were owed to him, which were sufficient to offset any amount of rent owed to the landlord. Mr. Kong also alleges that he was “forced to forfeit his monetary claims concerning a loss of quiet enjoyment for 8 months in the amount of \$24,480”. He also argues that the arbitrator essentially forced him into accepting a settlement by inferring that if he did not do so, she would grant the landlord an order of possession.

[26] In any event, the arguments he seeks to make regarding the May 24, 2024 hearing should be made at the hearing of the judicial review proceedings. As was the case in *Lee*, there are no questions to be decided regarding Justice Latimer’s July 29, 2024 decision to refuse to extend the stay. This is the order for which leave to appeal and the stay in this Court is being sought. This decision is discretionary and one which attracts a highly deferential standard of review.

[27] Mr. Kong has obtained a CD rom disc of the May 24, 2024 hearing but it was not filed in support of this application. He was also apparently advised by counsel shortly after the petition seeking judicial review was filed on June 11, 2024 to have a transcript of the May 24, 2024 hearing prepared but that has not yet occurred.

[28] I also note that Justice Latimer did not issue written reasons and Mr. Kong had not obtained a transcript of the July 29, 2024 hearing before the judge for the purposes of this stay application.

[29] It bears emphasizing that it is for Mr. Kong to establish the requirements for the granting of a stay.

[30] Mr. Kong alleges that he will face irreparable harm if the requested relief of an interim stay is refused because his judicial review petition will become moot. The residential premises will have been rented to another tenant and he would not be given an opportunity to argue the judicial review on the merits.

[31] At the hearing of this application he submitted that he is in the process of completing an advanced draft of his doctoral thesis for the University of Warwick in England and that he needs to be close to UBC to access certain library materials and interact with some professors at UBC. He stated that he will face irreparable harm if he is obliged to move residences at this time.

[32] But there was no evidence before the Court on this issue. While it may be inconvenient to him to have to change residences, there is nothing in the record to suggest that for approximately \$3000 per month he will be unable to find alternative accommodation.

[33] In any event, this submission is based on Mr. Kong's mistaken belief that a stay of Justice Latimer's order would prevent the landlord from enforcing the order of possession. "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other": *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 341. The Court must decide "whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied...": *RJR-MacDonald Inc.* at 341.

[34] Mr. Kong will be able to pursue his judicial review proceeding even if the landlord enforces the order of possession which is but one aspect of the settlement that he seeks to challenge. As Justice Stromberg-Stein observed in *Lee* “[m]oving into a new home is unlikely to bring about the grievous harm Ms. Lee predicts”: at para. 33.

[35] In my view, the materials Mr. Kong has filed in support of the stay application fall far short of establishing a risk of irreparable harm.

[36] The balance of convenience and the interests of justice also weigh greatly in denying the stay. At best, the merits are extremely weak. While Mr. Kong challenges the landlord’s position that he was habitually late in making his rental payments, I am satisfied that there was evidence on the record from which the judge could have reached that conclusion.

[37] The May 24 decision incorporated the settlement reached between the parties that day. There is no record of the proceedings that day to assist the Court in considering the merits of the arguments Mr. Kong seeks to advance that he was effectively coerced by the Arbitrator to enter into the settlement.

[38] Furthermore, Mr. Kong’s attempt to relitigate the circumstances surrounding the May 6, 2024 decision in which, ironically, he was successful with respect to the 10-day notice, were well known by the parties when they reached their agreement on May 24, 2024. They nonetheless reached a “final and binding resolution of the Tenant’s application and the issues in dispute arising out of this tenancy and at this time ... they did so of their own free volition and without any element of coercion”.

[39] The landlord has also been unable to enforce the order of possession for the past three months. Furthermore, rather than moving forward with his petition for judicial review in a timely manner, Mr. Kong has sought to rely on extensions of the interim stay to remain in possession of the premises.

[40] For these reasons, I conclude that it is not in the interests of justice to grant Mr. Kong’s application for a stay.

Disposition

[41] The application is dismissed.

[42] The landlord seeks special costs in this Court, essentially on the basis that Mr. Kong's repeated applications in the Supreme Court, notwithstanding the settlement he agreed to amounts to an abuse of process. In my view, this case is very close to the line. I understand the landlord's frustration with the protracted nature of the underlying proceedings, but it is Mr. Kong's conduct in this Court which is relevant. Special costs are generally rare and are awarded "if the conduct of a party was scandalous, outrageous or reprehensible": *College of New Caledonia v. Kraft Construction Company Ltd.*, 2011 BCCA 172 at para. 27. It appears that this application was filed in large part based on the "ill-conceived and ... mistaken belief" referred to in *Lee* that a stay in this Court would achieve a stay of the order of possession in the underlying matter.

[43] I appreciate that the respondent in *Lee* was awarded special costs. In my view, the circumstances there were particularly egregious in that this Court found that the applicant attempted to "manipulate" and "abuse" the judicial process: at para. 36.

[44] I do not reach the same conclusion with respect to Mr. Lee's conduct in bringing this stay application. In the exercise of my discretion, I would not award the landlord special costs for this application.

[45] The landlord also seeks an order that Mr. Kong be refrained from bringing further applications without notice to the respondent. The record is to the effect that Mr. Kong has a history of bringing *ex parte* applications in the court below and failing to serve materials. That has not yet occurred in this Court and I would decline to make this order. I do remind Mr. Kong, however, that he is required to observe the

provisions in the *Court of Appeal Rules*, B.C. Reg. 120/2022, including those which relate to service.

[Discussion with parties re: costs]

[46] **ABRIOUX J.A.:** I have dismissed the application for special costs, so it is ordinary costs.

“The Honourable Mr. Justice Abrioux”