

Citation: ☀ Leruyet v. Friesen et al.
2012 BCPC 0264

Date: ☀20120803
File No: 20368
Registry: Abbotsford

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

BETWEEN:

ROBERT LERUYET

CLAIMANT

AND:

**ROD FRIESEN, LANDMARK REALTY CORP.
and THE OWNERS STRATA PLAN NW3240**

DEFENDANTS

**RULING ON APPLICATION
OF THE
HONOURABLE JUDGE K. D. SKILNICK**

Appearing in person:	Robert Leruyet
Appearing for the Defendants:	B. L. Hoffmann
Place of Hearing:	Abbotsford, B.C.
Date of Hearing:	July 27, 2012
Date of Judgment:	August 3, 2012

Introduction

[1] The Claimant Robert Leruyet has commenced an action for damages against the Defendants arising out of the Claimant's removal, by police officers, from his condominium unit. The Notice of Claim does not specifically spell out what wrong the Defendants have committed, but it suggests that they were wrong to enforce a court order for removal of the Claimant from his home.

[2] In setting out why the Defendants are apparently liable for this, the Notice of Claim reads as follows:

18. The course of conduct of the Defendant Strata Corporation and the Defendant Realtor was done intentionally, or alternatively, with reckless disregard as to their effect on the Claimant.

19. The conduct of the Defendant Strata Corporation and the Defendant Realtor was flagrant, outrageous and extreme and of a type calculated to cause, and did cause, a recognizable psychiatric illness in the Claimant, the specific psychiatric illness being suffered by the Claimant including post-traumatic stress disorder and primary insomnia.

20. The Defendant Landmark is vicariously liable for the actions of the Defendant Realtor, which occurred during the course of the Defendant Realtor's employment with the Defendant Landmark.

[3] The Defendant Owners Strata Plan NW3240 ("the Owners") are the plaintiffs in an action in the Supreme Court of British Columbia in which they sought to foreclose on the Claimant for non-payment of his strata fees. They successfully obtained an order nisi for foreclosure and an Order for Right of Forced Entry. The Owners entered into a listing agreement with the Defendant Landmark Realty Corp. (Landmark) to list and sell the Claimant's under the authority of the court orders they had obtained. The Defendant Rod Friesen was the real estate agent acting on behalf of Landmark in connection with this listing.

[4] The Defendants take the position that the Claim does not disclose any cause of action against any of them. At a settlement conference held in this matter, the Defendants applied for an order dismissing the Claim pursuant to Rule 7 (14) (i) of the *Small Claims Rules*. The Settlement Conference Judge adjourned the matter for argument. Following are my reasons for the ruling made on that application.

Applications to Dismiss Claims Prior to Trial

[5] At the Settlement Conference held in this matter, the Defendants brought an application under Rule 7(14) of the *Small Claims Rules* for an order that the Claim in the matter be dismissed because it does not disclose any cause of action against them.

This Rule reads in part as follows:

What Happens at a Settlement Conference

(14) At a settlement conference, a judge may do one or more of the following:

(b) decide on any issues that do not require evidence;...

(i) dismiss a claim, counterclaim, reply or third party notice if, after discussion with the parties and reviewing the filed documents, a judge determines that it

(i) is without reasonable grounds,

(ii) discloses no triable issue, or

(iii) is frivolous or an abuse of the court's process;...

(l) make any other order for the just, speedy and inexpensive resolution of the claim.

[6] One of the functions of the judge at a Small Claims settlement conference is to serve as a gatekeeper, determining which claims have a triable issue and which can be decided without the expenditure of trial time. Currently, trial time is a precious resource. In criminal courts charges are often stayed because trial time can not be allocated

within a reasonable time. In family court, children sometimes remain in foster care longer than they should because early court dates are not available to resolve their status. Accordingly, any measures which can prune trials with no reasonable chance of success are beneficial to everyone so that court time can best be utilized optimally. The Defendants allege that this is such a trial, while the Claimant alleges that he has a good cause of action.

[7] In order to give the Claimant his day in court on this issue, I must first be satisfied that (a) there is a claim before the court on which the court has jurisdiction to make an order and (b) that there is a triable issue, i.e. that there is some evidence on which the trial judge could rest a finding of liability on the Defendants or any of them (without any weighing of that evidence). If either of these are lacking, Rule 7(14) gives the court jurisdiction to terminate the proceedings prior to trial, in effect to close the gate on what can clearly be seen to be a claim that lacks merit and one which should not utilize valuable court time.

Undisputed Facts

[8] In his submissions, the Claimant admits that he was in arrears of payment of his strata fees owing to the Owners. The Claimant says that he was withholding payment not because he lacked funds, but because he disagreed with a policy of the Owners and he was withholding payment in protest for what he believed to be a matter of principle. Having made this choice, the Claimant found himself as a party to a legal action commenced by the Owners in the Supreme Court of British Columbia. The action was commenced on March 5, 2008.

[9] On November 10, 2009, Master Keighley made an order in the Supreme Court of British Columbia giving the Owners judgement against the Claimant for the sum of \$9,776.65. Both the Owners and the Claimant were represented by counsel when this order was made, according to the order. The order (called an “Order Nisi”) gave the Claimant a right of redemption, meaning that if he paid the outstanding balance plus any accruing strata fees and costs, then the Owners would be prevented from enforcing their order. Master Keighley’s order also provided that “the last date for redemption is January 9, 2010” and thereafter the property was to be offered for sale on terms set out in the order. The order also required the Claimant to permit the Owners or their authorized agent to “inspect, appraise or show to any prospective purchaser or purchasers the property, including the interior of the property, between 9:00 a.m. and 7:00 p.m. on any day of the week, without hindrance or condition”.

[10] It is not in dispute that the Claimant did not redeem in accordance with Master Keighley’s order by January 9, 2010. On February 17, 2010, another order was made in the Supreme Court of British Columbia. Once again, both the Owners and the Claimant were represented by counsel. At that time Master Caldwell ordered that the Owners and their agents were granted “the right of forced entry, effective February 26, 2010 at 4:00 p.m.” The right was conditional on the Claimant being given 24 hours prior written notice, which could be provided by posting such written notice on the front door to the residence. The right of forced entry was to be exercised between 9:00 a.m. and 6:00 p.m., but not on a Sunday or a holiday.

[11] The Claimant alleges in his notice of Claim that on or about February 26, 2010 the Claimant, through his counsel, tendered funds sufficient to pay the strata fees to

counsel for the Owners. Counsel for the Owners has tendered a brief of law that is silent on this aspect of the Claim, but in his oral submissions, Counsel admits that a cheque was tendered by the Claimant (though not in the full amount owing) but it was not accepted by the Owners. The Owners instead chose to enforce their remedies under the Supreme Court Orders. It is the position of the Owners that they were within their rights to do so and that the court orders provided full justification for their actions.

[12] It is not clear when the written notice was posted on the door to the residence, but it was posted at least 24 hours prior to the Owners' exercise of their right of forced entry. March 19, 2010 was a Friday and it was not a statutory holiday. It was the Defendant Rod Friesen who attended to the Claimant's residence to enforce the order. In order to prevent a breach of the peace, Mr. Friesen contacted the Abbotsford Police Department and requested that police officers be present at the time of the execution of the order. Two Abbotsford police officers attended for that purpose.

[13] When the order was enforced, the police officers detained the Claimant. The Claimant objects to the manner in which he was dealt with by the police. Neither the individual officers nor the Abbotsford Police Department have been named as defendants in this action. No claim is brought against them. I will therefore not set out in detail the conduct that the Claimant objects to, or the reasons given by the officers in their report as to the concerns that they had about the Claimant.

[14] The Notice of Claim does not specifically allege what wrongdoing on the part of the Defendants is alleged, other than as set out in the paragraphs quoted in the introduction to these reasons. If the Claimant has any chance of success at trial in this

matter, it must be either because the Defendants have done something wrong in choosing to enforce their order, or because they are somehow liable for the actions of the police officers (giving the Claimant the benefit of the doubt as to whether or not he can prove that he has a cause of action against the police officers.)

Decision to Enforce the Supreme Court Orders

[15] The right of a strata corporation to apply for an order for sale of a strata unit due to non-payment of strata fees comes from section 117 of the *Strata Property Act*. That section reads as follows:

117 (1) After the strata corporation has registered a Certificate of Lien against a strata lot, the strata corporation may apply to the Supreme Court for an order for the sale of the strata lot.

(2) If the strata corporation has obtained a judgment for the amount owing, the court may, after considering all the circumstances, make an order for the sale of the strata lot.

(3) If the strata corporation has not obtained a judgment for the amount owing, the court may try the issue and may

(a) order that judgment be entered against the owner in favour of the strata corporation for the amount of the lien or for an amount that the court, as a result of the trial, finds owing, and

(b) if judgment is entered against the owner, make an order for the sale of the strata lot after considering all the circumstances.

(4) An order for the sale of a strata lot must provide that, if the amount owing is not paid within the time period required by the order, the strata corporation may sell the strata lot at a price and on terms to be approved by the court. (Emphasis added).

[16] Subsection (4) expressly gives the owners the right to sell the subject property where the amount determined by the court as owing has not been paid within the time specified in the order, as is the case here. In this case, the Supreme Court Order

provided that the outstanding amount was to be paid by January 9, 2010. It is not in dispute that the Claimant did not make payment within this time frame.

[17] The Supreme Court Order was not appealed or amended and therefore, under the terms of section 117(4) of the *Strata Property Act*, the Owners were under no obligation to accept late payment or partial payment. They were within their rights to enforce the Supreme Court Order, despite the tendering of this payment and their choice to do is not something on which to support a claim against them.

Actions of the Police Officers

[18] Much of the Claimant's complaint concerns the manner in which he was treated by the police officers, although he has not brought any action against the police and he may now possibly be out of time to bring such a claim. In raising this complaint as part of this claim, the Claimant must be able to attribute the actions of the police officers to the parties he has sued (assuming that the police had done anything wrong). Counsel for the Defendants argues that the Claim must fail on this basis because the actions of the police are not the actions of the Defendants.

[19] I agree that this is the correct position at law. The police officers are independent of the Defendants. They are not subject to the directions of the Defendants and the Defendants are not vicariously liable for the actions of the police officers.

[20] Counsel for the Defendants cites some rather ancient authority for this proposition: *McCleave v. City of Moncton* (1902) 32 S.C.R. 106. This principle has been reaffirmed more recently in *R.G. v. City of Vancouver Police Board* 2012 BCSC 30. In

that case, Mr. Justice Burnyeat reviewed the law pertaining to vicarious liability, especially as it pertains to the actions of police officers. It is clear that the Defendants are not the employers of the police officers and that the police officers were under no obligation to follow the directions of any of the Defendants. Even on the most generous interpretation of the facts, no basis exists for finding any of the Defendants to be vicariously liable for the actions of the police officers.

[21] From the foregoing it should not be inferred or assumed that the police officers committed any wrong or acted improperly. The materials filed on this application in the form of police reports suggest justification for the actions which the police took. For the purposes of this application, we proceed on the assumption that the Claimant would be able to prove such an allegation if a trial was held, although at this stage this is merely an allegation he is making,

Jurisdiction of this Court

[22] Counsel for the Defendants also argues that this court lacks jurisdiction to hear this claim against the Owners because of section 164 of the *Strata Property Act*. That section provides as follows:

164 (1) On application of an owner or tenant, the Supreme Court may make any interim or final order it considers necessary to prevent or remedy a significantly unfair

(a) action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant, or

(b) exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.

[23] In *Frechette v. Crosby Property Management Ltd.* 2007 BCPC 174, the Honourable Judge Meyers of this court held that where the essence of a claim is that a strata corporation has failed to act fairly, section 164 requires such actions to be brought in the Supreme Court. It is only that court which can make remedial orders, and section 164 removes from this court the jurisdiction to remedy any such wrongs.

[24] This is essentially what the Claimant is alleging against the Owners in paragraphs 18 and 19 of his claim and the law requires that such claims may not be litigated in this court, but must be heard in the Supreme Court. I agree with the submissions of counsel for the Defendants that the law does give this court the jurisdiction to adjudicate such a claim.

Order

[25] For the foregoing reasons, I am satisfied that the claims brought by the Claimant in this action against the Defendants disclose no triable issue within the meaning of Rule 7 (14) of the *Small Claims Act*. More specifically, the undisputed facts do not support the allegation that the Defendants were somehow acting wrongly in enforcing the orders they were able to obtain in the Supreme Court. Even if it could be established that the Claimant was unfairly treated by police, the Defendants can not be held responsible for the actions of the police officers. Finally, even if the claim brought by the Claimant against the Owners disclosed a triable issue, section 164 of the *Strata Property Act* requires such claim to be heard in the Supreme Court of British Columbia and not in this court. This is not a claim that should get through the gate to consume two days of trial time that can be better utilized by others in the cue.

[26] For these reasons, this Claim is dismissed pursuant to Rule 7 (14) (i) of the *Small Claims Rules*.

Dated at the City of Abbotsford, in the Province of British Columbia this 3rd day of August, 2012.

The Honourable Judge K. D. Skilnick