



Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Cohen Buchan Edwards LLP v. Pighin*, 2020 BCCRT 397

B E T W E E N :

COHEN BUCHAN EDWARDS LLP

APPLICANT

A N D :

EVAN PIGHIN and SANDRA PIGHIN

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Rama Sood

INTRODUCTION

1. This dispute is about a seller's responsibility to make a property status declaration to the City of Vancouver (City) under its Vacancy Tax By-law.
2. The applicant, Cohen Buchan Edwards LLP, is a law firm that represented the buyer, KW, in a real estate transaction. KW purchased a residential strata unit from

the respondents, Evan Pighin and Sandra Pighin. The applicant says the respondents should have made the declaration so the strata unit would be exempt from the vacancy tax. The applicant seeks \$4,126.23 for the vacancy tax levy, the 5% penalty on the vacancy tax levy, and interest accrued on the vacancy tax levy and the penalty.

3. The respondents say they could not make a declaration once KW became the registered owner. The respondents also say that the vacancy tax levy, penalty, and interest would not have been imposed if KW had brought the issue to the respondents' attention in a timely manner.
4. KW is not a party to this dispute but assigned her claim to the applicant. In exchange the applicant paid the claimed \$4,126.23 to the City for the vacancy tax, penalty, and interest.
5. The applicant is represented by a lawyer, Jon Del Castillo.
6. The respondents are also represented by a lawyer, Sunnie Cheung.

JURISDICTION AND PROCEDURE

7. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.
8. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear this dispute through written submissions, because I find that there are no significant issues of credibility or other reasons that might require an oral hearing.

9. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
10. Where permitted by section 118 of the CRTA, in resolving this dispute the tribunal may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the tribunal considers appropriate.

ISSUES

11. The issues in this dispute are:
 - a. Whether KW or the respondents were responsible for making a property status declaration, and
 - b. To what extent, if any, must the respondents reimburse the applicant \$4,136.23 for the vacancy tax levy, penalty, and interest.

EVIDENCE AND ANALYSIS

12. In a civil claim such as this, the applicant bears the burden of proof on a balance of probabilities. I have only addressed the evidence and submissions below as necessary to explain my decision.
13. The applicant says the respondents are responsible for the vacancy tax levy, penalty, and interest because:
 - a. The respondents agreed to be responsible for all taxes related to the property before the adjustment date in the property's purchase and sale agreement, and
 - b. The respondents were required to make the 2017 declaration under the City of Vancouver Vacancy Tax By-law 11674 (By-law).

14. The respondents say KW was responsible for making the 2017 declaration after she became the registered owner. They also say that the vacancy tax would not have been imposed if KW had notified the respondents before the 2017 declaration submission deadline, which they say was December 31, 2018.
15. Based on the evidence before me, I find:
- a. In 2017 the respondents owned and resided in a residential strata unit (property).
 - b. The respondents received a property status declaration form and instructions to make a property status declaration from the City in November 2017 or December 2017 (2017 declaration). The 2017 declaration form required the respondents to make a declaration to the City by February 2, 2018. Neither party provided a copy of the 2017 declaration form.
 - c. The respondents sold their property to KW. The respondents did not notify KW about the 2017 declaration form. Neither party made a property status declaration for the property for 2017.
 - d. Under the purchase and sale agreement, the closing date was January 8, 2018 and the adjustment date for the sale of the property was January 11, 2018. Paragraph 6 of the agreement stated that the respondents were responsible for various charges, including all taxes, before January 11, 2018.
 - e. KW became the property's registered owner on Jan 8, 2018.
 - f. Both the applicant and ML, the respondents' lawyer, failed to address the 2017 declaration or the possibility that a vacancy tax may be imposed before the adjustment date.
 - g. KW received a notice from the City after February 2, 2018 that extended the 2017 declaration deadline to March 5, 2018 (February 2018 notice). It is not clear from the evidence whether the February 2018 notice was addressed to KW or the respondents.

- h. KW gave the February 2018 notice to the respondents. After consulting with ML, the respondents informed KW by text that she had to address this matter herself. Neither party provided a copy of the February 2018 notice.
- i. The City imposed a \$3,760 vacancy tax, a \$188 penalty, and \$188.23 interest on the property. The City mailed 4 notices about the vacancy tax, penalty, and interest to the registered owner from March 6, 2018 to October 15, 2018 (notices). The parties did not specify who the notices were addressed to and did not provide a copy of them. I infer from the By-law that the notices did not contain further information about making the 2017 declaration.
- j. KW did not receive any of the notices because the property's mailbox was broken into multiple times and the notices were stolen. As a result KW did not pay the vacancy tax, penalty, and interest.
- k. On August 19, 2019, the applicant paid \$4,136.23 to the City on KW's behalf for the vacancy tax, penalty, and interest.

Were the respondents responsible for paying the vacancy tax under the terms of the property's purchase and sale agreement?

- 16. The applicant says that the respondents were responsible for all taxes, rates, local improvement assessments, fuel utilities and other charges before January 11, 2018 under paragraph 6 of the purchase and sale agreement. The respondents agree but say the vacancy tax, penalty, and interest arose due to KW's negligence and failure to mitigate and it would be "unfair, unjust and contrary to common sense and law" for them to be responsible for it. I address the issue of mitigation below.
- 17. Although the vacancy tax was technically imposed on the property after the adjustment date, I find that it fell within paragraph 6 of the purchase and sale agreement as a tax liability. I also find the applicant should have known the vacancy tax was an issue in the transaction. The applicant provided the property's December 18, 2017 tax certificate to ML on December 19, 2017. The tax certificate stated under the heading "Empty Home Tax Declaration" that the 2017 declaration had not

been received and this was a “Potential Liability”. Based on the tax certificate, the applicant should have included the estimated vacancy tax in the vendor’s statement of adjustments but did not do so.

18. Even though it was not in the vendor’s statement of adjustments, I find the respondents were still contractually required to reimburse KW for the vacancy tax. Note 5 of the vendor’s statement of adjustments stated that any items not specifically adjusted in this statement shall be adjusted and settled between the parties. I find the vacancy tax falls within this definition. However, I find the penalty and the interest do not. I find the parties would have addressed the vacancy tax issue before February 2, 2018 if the applicant had noticed the respondents had not made the 2017 declaration when it prepared the vendor’s statement of adjustments. I find the only reason the penalty and interest were imposed was because of the applicant’s error in preparing the vendor’s statement of adjustments. I dismiss the applicant’s claim for the penalty and interest charges.

Who was responsible for making the 2017 declaration under the By-law?

19. I find the respondents were required to make the 2017 declaration even after they were no longer the registered owners of the property based on section 4.2 and section 4.5 of the By-law. Section 4.2 of the By-law states that by December 31 of each year, either a property status declaration form or instructions to make a property status declaration for that year must be mailed “to each registered owner of residential property whose name appears on the real property tax roll”.
20. Section 4.5 of the By-law states that a registered owner must complete and return only one property status declaration to the City by February 2 “following the receipt of the property status declaration form or instructions to make the property status declaration”. I find section 4.5 of the By-law requires the registered owner who received the property status declaration by December 31 to make the declaration for that year, not the property’s registered owner on the declaration’s due date on February 2.

21. The respondents admit they received the 2017 declaration form. I find that since the respondents received the 2017 declaration form, they were the registered owner for the purposes of section 4.5 of the By-law. Since KW gave the February 2018 notice to the respondents in late March 2018, I infer the respondents were identified as the registered owners in the February 2018 notice as well.
22. The respondents say the City sent KW 4 additional notices from March 6, 2018 to October 15, 2018 plus a notice in November 2018 to make the 2017 declaration. Again, the respondents did not provide a copy of any of these notices. This appears to be based on ML's conversation with "Don" from the City's Vacancy Tax Department. ML did not identify Don's job title, qualifications or the source of his information. I find Don's statement to ML to be hearsay and give it little weight. I find the respondents have not proved that the City instructed KW to make the 2017 declaration.
23. Further, based on the By-law I find the 4 notices only addressed the amount of the vacancy tax, penalty, and interest charges (see section 2.5, section 2.6, section 4.13, and section 4.14). I also find the November 2018 notice was about the 2018 declaration, not the 2017 declaration. As a result, I find the respondents were still responsible for making a declaration even after KW became the registered owner on January 8, 2018.

Could the respondents still make the 2017 declaration after KW became the registered owner?

24. The respondents say they could not make the 2017 declaration after KW became the property's registered owner. They say the 2017 declaration had to be submitted online. They also say they could not access the property's online property tax account to make the 2017 declaration because their online property tax account access code would have been cancelled once KW became the registered owner on January 8, 2018. I find there is no evidence that the respondents could only submit the 2017 declaration online. Also, I find the By-law's wording implies a property

status declaration can be mailed in since section 4.5 states that a property status declaration must be completed and “returned” to the City.

25. The respondents also say any declaration they made after January 8, 2018 would be false under By-law section 5.3 since they were no longer the registered owners. Section 5.3 states that a registered owner cannot make a false property status declaration. I find the extended deadline (March 5, 2018) for making the 2017 declaration had already passed by the time the respondents received the February 2018 notice in late March 2018. The respondents did not provide any evidence that the City would have accepted the 2017 declaration after March 5, 2018. As a result, I find whether making the 2017 declaration after January 8, 2018 would contravene section 5.3 is moot.
26. Even if the City did accept the 2017 declaration, section 4.9(b) of the By-law permits a registered owner to submit “statutory declarations or affidavits regarding the status of the property”. Based on my finding that the respondents were the registered owners in the 2017 declaration form and the February 2018 notice, I find they could have submitted a statutory declaration or affidavit explaining their situation to the City under section 4.9(b).
27. The applicant also says KW would be making a false property status declaration after she became the registered owner of the property because she had no way of knowing the status of the property in 2017. I find I do not need to address this issue given my finding that the respondents were responsible for making the 2017 declaration.
28. I find the vacancy tax was imposed because the respondents did not make the 2017 declaration. The parties did not provide the actual date the vacancy tax was imposed by the City. Based on section 2.5 of the By-law, I find it was imposed on April 10, 2018.

Did KW fail to mitigate?

29. The respondents say the deadline to make the 2017 declaration was December 31, 2018. They say KW was negligent because she did not address the 2017 declaration or the vacancy tax, penalty, or interest before December 31, 2018 and did not notify the respondents that she had not made the 2017 declaration. The respondents say if KW had tried to contact them or ML regarding their residency status in 2017, they would have disclosed that they were exempt from the vacancy tax since they resided on the property in 2017. They also say they would have provided a statutory declaration about their residency status to submit to the City if the applicant had asked for one.
30. The December 31, 2018 deadline appears, again, to be based on ML's conversation with Don. For the reasons stated above, I find Don's statement to ML about the 2017 declaration deadline to be hearsay and give it little weight. Aside from Don's discussion with ML, the respondents have not provided any evidence that the 2017 declaration was due by December 31, 2018.
31. After reviewing the By-law, I find the respondents are incorrect about the deadline. The By-law identifies December 31, 2018 as the deadline for submitting a notice of complaint if the vacancy tax was imposed due to an error or omission by the City, or by the registered owner when completing a property status declaration (section 6.2 and section 6.3). The By-law states the registered owner must complete and return a property status declaration by February 2 after receiving the form or instructions (section 4.5). It does not specify how or even if a property status declaration can be made after February 2.
32. As stated above, I find the February 2018 notice stated the deadline for making the 2017 declaration was March 5, 2018. There is no evidence the City would have accepted the 2017 declaration after March 5, 2018. Since the deadline had passed before the respondents even received the February 2018 notice in late March 2018, I find the issue of failure to mitigate is moot. There is no reason to believe the

outcome would have been different if the applicant or KW had sent the February 2018 notice to ML.

33. Even if I am incorrect and the deadline to make the 2017 declaration was December 31, 2018, I find the respondents have not provided any evidence that the City would have reversed or cancelled the vacancy tax levy, penalty, and interest based on their statutory declaration. As mentioned above, the By-law does not address late property status declarations. The only recourse to challenge a vacancy tax levy is contained in section 6.2 of the By-law. This section states that a registered owner can submit a notice of complaint about the decision to impose a vacancy tax to a vacancy tax review officer under 2 scenarios. The first is if the tax was imposed based on an error or omission made by the registered owner in completing the property status declaration. The second is if an error or omission was made by the City. I find the respondents have failed to show that failure to actually make a property status declaration would be an error or omission under the By-law.
34. I award the applicant \$3,760 for the vacancy tax imposed on the property. For the reasons set out above, I dismiss the applicant's claim for reimbursement of the penalty and interest that was charged on the vacancy tax.
35. The *Court Order Interest Act* applies to the tribunal. The applicant is entitled to pre-judgement interest on the \$3,760 from April 10, 2018, the date the vacancy tax was imposed, to the date of this decision. This equals \$132.03.
36. Under section 49 of the CRTA and tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. I see no reason in this case not to follow that general rule. I find the applicant is entitled to reimbursement of \$175 in tribunal fees. The applicant did not claim dispute-related expenses.

ORDERS

37. Within 30 days of the date of this order, I order the respondents to pay the applicant a total of \$4,067.03, broken down as follows:
 - a. \$3,760 as reimbursement for the vacancy tax imposed on the property,
 - b. \$132.03 in pre-judgment interest under the *Court Order Interest Act*, and
 - c. \$175 in tribunal fees.
38. The applicant is entitled to post-judgment interest, as applicable.
39. Under section 48 of the CRTA, the tribunal will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The time for filing a notice of objection is 28 days after the party receives notice of the tribunal's final decision.
40. The Minister of Public Safety and Solicitor General has issued Ministerial Order No. M086 under the *Emergency Program Act*, which says that tribunals may waive, extend or suspend a mandatory time period. The tribunal can only waive, suspend or extend mandatory time periods during the declaration of a state of emergency. After the state of emergency ends, the tribunal will not have this ability. A party should contact the tribunal as soon as possible if they want to ask the tribunal to consider waiving, suspending or extending the mandatory time to file a Notice of Objection to a small claims dispute.
41. Under section 58.1 of the CRTA, a validated copy of the tribunal's order can be enforced through the Provincial Court of British Columbia. A tribunal order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and the time for filing a notice of objection has passed. Once filed, a tribunal order has the same force and effect as an order of the Provincial Court of British Columbia.

Rama Sood, Tribunal Member