



Citation:

Date:
File No:
Registry:

91744-1
Kelowna

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA
(Bylaw)

CITY OF KELOWNA

v.

JASON ACKERMAN

**REASONS FOR JUDGMENT
OF THE
JUDICIAL JUSTICE B. BURGESS**

Counsel for the City of Kelowna:
Appearing in Person:
Place of Hearing:
Dates of Hearing:
Date of Judgment:

T. DeSouza
J. Ackerman
Kelowna, B.C.
January 28, March 8 & 9, 2021
May 10, 2021

[1] This matter is a two count information against Mr. Jason Ackerman.

[2] There is a protracted history to this file.

[3] The first court date on this file was September 16, 2019. The matter was adjourned to November 9, 2019 to fix a date for a hearing. On November 9, 2019, the matter was adjourned to the Registry to fix a one day hearing. The Registry set the matter for hearing on April 1, 2020. Mr. Ackerman applied to adjourn the April 1 hearing and that application was heard on January 28, 2020. The application to adjourn the April 1 hearing was granted as the parties were attempting to resolve the matters. The next court date was March 5, 2020 and the matter was set over to March 24, 2020 for further resolution discussions. The March 24, 2020 date was set over to September 23, 2020 due to COVID-19 as the sitting of the court was suspended due to the pandemic. On September 23, 2020, Mr. Ackerman did not attend and an Endorsed Bench Warrant was issued. On October 8, 2020, the matter was adjourned for the Registry to set a one day hearing date. The Registry set the matter to January 28, 2021 for the hearing.

[4] The matter commenced for hearing on January 28, 2021. That morning Mr. Ackerman arrived late. Mr. Ackerman requested an adjournment in order to retain counsel. The adjournment request was denied as Mr. Ackerman had months to retain counsel but did not.

[5] The hearing was not completed on January 28, 2021 and was adjourned for continuation. On January 28, 2021, Mr. Ackerman provided the dates he would not be available. The continuation date was scheduled for March 8 and 9, 2021. On February 25, 2021, Mr. Ackerman filed an Application to adjourn the March 8 date and that application was heard on March 3, 2021. One his reasons provided on March 3, 2021 was that his daughter had Spring Break and he wanted to take her to Edmonton. The adjournment request was denied as the date was scheduled around Mr. Ackerman's availability that he had provided on January 28, 2021 and because of the difficulty of getting two full back to back days for the continuation.

[6] The hearing continued on March 8, 2021 and on March 9, 2021, the City completed its case. At that point Mr. Ackerman indicated that he wanted to put his 14 year old daughter on the stand to testify on his behalf. Mr. Ackerman indicated that he intended to have his daughter be his only witness. I did not permit Mr. Ackerman to have his daughter testify as, according to Mr. Ackerman, his daughter was not present at the subject property on August 16, 2019; and she should not have been privy to Mr. Ackerman's business affairs. At that point, Mr. Ackerman asked for a recess so that he could take his daughter to school, which raises the question as to why he would have to take her to school when she was on her Spring Break.

[7] The charges against the Disputant are set out in Information 91744-1 as follows:

Count 1. Jason Ackerman, as being the registered owner of property, did on or about August 16, 2019, at 698 Devonian Avenue, City of Kelowna, Province of British Columbia, permit noise from real property to disturb any person, contrary to the provisions of City of Kelowna Good Neighbour Bylaw 11500, Section 7.2; and

Count 2. Jason Ackerman, as being the registered owner of property, did on or about August 16, 2019, at 698 Devonian Avenue, City of Kelowna, Province of British Columbia, carry on a business without a licence, contrary to the provisions of the City of Kelowna Bylaw 7878, Section 4.4.

[8] The witnesses on behalf of the City of Kelowna were:

1. James Leonard, a bylaw officer with the City of Kelowna;
2. Pamela Nelson, a resident living next door to 698 Devonian Ave, Kelowna, B.C.;
3. Ashley Salvador, a renter of 698 Devonian Ave., Kelowna, B.C. on August 16 – 18, 2019; and
4. Leslie Ballen, a bylaw officer with the City of Kelowna.

[9] There were no witnesses on behalf of the Disputant.

[10] There is no issue that Mr. Ackerman is the owner of 698 Devonian Avenue, City of Kelowna, (the subject property). There is no issue that Mr. Ackerman was renting out the house and property at 698 Devonian Avenue, Kelowna, B.C. on a website Air Bed and Breakfast, also known as "Airbnb."

[11] There is no issue that there is a long history of neighbors complaining about the noise being generated by people at the subject property. There is no issue that Ms. Nelson has made multiple complaints to the city about the noise from this property.

[12] The issues for the court to determine are:

1. Whether the noise from the property municipally known as 698 Devonian Avenue, City of Kelowna, on August 16, 2019 disturbed any person; and
2. Whether Mr. Ackerman operated a business without a licence on August 16, 2019.

[13] Ms. Salvador works for a company in Vancouver. On behalf of the company, she booked a staff retreat at 698 Devonian Avenue, Kelowna, B.C. for August 16 - 18, 2019 by way of "Airbnb". Ms. Salvador made an agreement with Jason Ackerman for this rental. The fee paid by Ms. Salvador to Mr. Ackerman through "Airbnb" was \$5,188.93 for two nights rental of the property. In addition, Ms. Salvador paid Mr. Ackerman a further \$100 per person for extra people staying at the property. Mr. Ackerman advised Ms. Salvador about multiple noise complaints regarding the subject property and requested a further payment to cover anticipated bylaw tickets being issued as a result of Ms. Salvador's rental. This additional requested payment was not paid by Ms. Salvador.

[14] On August 16, 2019, Ms. Nelson, the next door neighbor living at 694 Devonian Ave, Kelowna, B.C. called to the City of Kelowna to complain about the noise that was coming from the subject property. Ms. Nelson said this noise was from the back yard and back porch. Even with her windows closed, Ms. Nelson could hear the noise. She said she was not sensitive to noise. Historically the noise has been so loud that it has woken her up. Historically, Ms. Nelson did not call to complain as soon as any noise was heard but rather, she would wait to call when the noise would get so loud that she could not hear her TV, or that she could not sleep, or there were people on the deck swearing.

[15] As a result of Ms. Nelson's complaint, Officer Leonard, a bylaw officer with the City of Kelowna, attended to the subject property on August 16, 2019 at 10:15 p.m. When he arrived, Officer Leonard had the windows of his vehicle down. Officer Leonard heard noise coming from the subject property. He described that when he was 30 meters from the subject property that he could hear the noise quite clearly and that the noise was liable to disturb neighbors. He stated that he heard noise from the subject property when he was at the front of the house. On cross examination, Officer Leonard described the noise he heard as being people and music.

[16] Officer Leonard in his evidence indicated that on August 16, 2019 that there was no business licence for the subject property. The officer described that a short term Airbnb rental required a business licence. Officer Leonard was familiar with the subject property and Mr. Ackerman as he has previously issued tickets regarding the subject property.

[17] Officer Leonard was asked on cross examination whether he had met Mr. Ackerman previously and his response was "No." In further cross examination Officer Leonard did remember that indeed he had previously met Mr. Ackerman at an adjudication process. Despite this incorrect evidence about Officer Leonard not having met Mr. Ackerman previously, I find that Officer Leonard is a credible witness as he answered all questions as straightforward and directly as possible. When it was pointed out to him that he was incorrect that he had not met Mr. Ackerman previously, he corrected himself and acknowledged his error.

[18] Ms. Salvador acknowledged in her testimony that when she first met Officer Leonard on August 16, 2019, that she attempted to mislead him. She set out that Mr. Ackerman, in anticipation of a bylaw officer attending to the subject property during the weekend of Ms. Salvador's rental, had coached her in what to say to any attending bylaw officer. She was candid in admitting that when Officer Leonard attended and spoke with her that she forgot the story Mr. Ackerman had advised her to use and told Officer Leonard a different lie. When confronted by Officer Leonard about the untruth she was telling him, Ms. Salvador came clean to Officer Leonard. She admitted that in

her follow up communication with Mr. Ackerman that she told untruths to Mr. Ackerman as she found herself in an awkward situation. Despite these admitted untruths that she provided to Officer Leonard and Mr. Ackerman, I find that Ms. Salvador was credible in her evidence. She admitted to those untruths and did not attempt to cover up her prior mistruths.

[19] Of interest is a document in a binder that Mr. Ackerman had marked as "A," in this proceeding, in particular the document at the first tab, which is a purported contract between himself and Ms. Salvador for a 30 day rental of the subject property for the period August 1, 2019 to August 31, 2019. Mr. Ackerman did not put this document to Ms. Salvador on cross examination nor did he ask her any questions about her rental of the subject property being for a 30 day lease and not for two nights. There was no evidence before the court as to the origin or authenticity of this document and I completely disregard this document in coming to my conclusions.

[20] For the record, I note that I have not looked at any of the other documents in the binder marked as "A" which is a white binder with "Employment Search Planner" on the spine. No witness gave any evidence regarding the contents of this binder.

[21] Based on the evidence that is before the court, I am satisfied that the noise coming from the subject property did cause disturb to a person, that being Ms. Pamela Nelson.

[22] The City of Kelowna Bylaw 11500 Section 7.2 states:

No owner or occupier of real property shall allow or permit such real property to be used so that noise or sound which emanates therefrom is liable to disturb the quiet, peace, rest, enjoyment, comfort, or convenience of individuals or the public.

[23] Mr. Ackerman is the registered owner of the subject property. Given the history of his rentals of the property and the history of complaints about noise as a result of him engaging in rentals of the subject property, Mr. Ackerman knew or ought to have known that his rental for the weekend of August 16 – 18, 2019 could result in noise or sound being produced which would be liable to disturb individuals or the public.

[24] There was no evidence before the court that Mr. Ackerman had exercised due diligence regarding this rental to ensure that the renter, Ms. Salvador, was advised regarding the bylaw and to prevent noise from taking place.

[25] I therefore find Mr. Ackerman guilty of count one.

[26] Regarding count two, the evidence before the court is that the rental facilitated between Ms. Salvador and Mr. Ackerman was a short term two night rental. There was no evidence from Mr. Ackerman that the rental was other than a short term rental. Mr. Ackerman, on cross examination of Leslie Ballen, a bylaw officer, put the document at the first tab in Binder "A" to Officer Ballen. This document purports to be a rental agreement between Ms. Salvador and Mr. Ackerman for the month of August, 2019. Mr. Ackerman argued, without any evidentiary basis, that the rental between himself and Ms. Salvador was not a short term rental with the result being that he was not required to have a business licence.

[27] I find that the rental between Mr. Ackerman and Ms. Salvador was a short term rental. I conclude that the rental was not for the month of August, 2019 as argued by Mr. Ackerman. Ms. Salvador located the subject property on "Airbnb", a website for short term rentals. Ms. Salvador's intention was to rent the subject property for two nights only. Ms. Nelson's evidence was that the subject property was being rented for weekends only. Mr. Ackerman presented no evidence regarding the rental between himself and Ms. Salvador. I must base my findings of fact on the evidence before me, not implications, argument or suggestions.

[28] Mr. Ackerman argued that the rental was a 30 day rental. He provided no evidence to prove his argument. As stated, the only evidence before the court about this rental was that it was a two night rental. A two night rental is a short term rental.

[29] Mr. Ackerman in his submissions argued that he had proven that the rental between himself and Ms. Salvador was a 30 day lease and that the group only stayed two or three days. Of note, Mr. Ackerman stated in his submissions, "Now I have been

trying to circumvent the law... My lawyer, ... told me to make sure every tenant signs a 30 day lease. That circumvents the law and the short-term rental."

[30] As I have stated, there was no evidence that the rental between Mr. Ackerman and Ms. Salvador was a 30 day lease. The only evidence is that the rental was a two night rental agreement.

[31] The City of Kelowna Business Bylaw 7878 Section 4.4 states:

No person shall carry on a business for which a licence is required by this bylaw within the City without holding a valid and subsisting licence for the carrying on of such business.

[32] The same Bylaw in section 2 defines business as follows:

"Business" means carrying on a commercial or industrial undertaking of any kind or nature or the providing of professional, personal or other services for the purpose of gain or profit, but does not include an activity carried on by the government, its agencies or government owned corporations.

[33] The rental between Mr. Ackerman and Ms. Salvador was a short term rental. In order for Mr. Ackerman to rent the subject property for a short term rental, he required a business licence issued by the City of Kelowna. Mr. Ackerman did not have such a business licence on August 16, 2019. I therefore find Mr. Ackerman guilty of count two.

[34] The Registry will be directed to set a date for sentencing.



B. Burgess
Judicial Justice