COURT FILE NO.: 03-CV-24074
DATE: 2004/04/13

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: CARLETON CONDOMINIUM CORPORATION NO. 555 v. GUY LAGACÉ, BARBARA STINSON-SHEA and JOHN BOWMAN SPERO

BEFORE: Madam Justice C. D. Aitken

COUNSEL: James Davidson and Nancy Houle, for the Applicant

Patrick J. Lafrange, for the Respondents, Barbara Stinson-Shea and John Bowman Spero

Guy Lagacé, Unrepresented

E N D O R S E M E N T

Nature of Proceedings

[1] Carleton Condominium Corporation No. 555 ("CCC 555") is seeking its costs of this Application against two of the three Respondents, Barbara Stinson-Shea and John Bowman Spero, who are the registered owners of Unit 11, Level 2, CCC 555 ("6034 Red Willow Drive"). The third Respondent, Guy Lagacé, was the tenant of these premises.

[2] On May 29, 2004, I heard and granted CCC 555's Application for an order requiring Lagacé to cease and desist from conduct contravening the *Condominium Act, 1998*, S.O. 1998, c. 19 and the Applicant's Declaration, By-laws and Rules, and more specifically, to conduct himself in a particular fashion regarding parking spaces. If Lagacé breached the stipulated conditions, his tenancy was to be terminated. Stinson-Shea and Spero consented to this order being made. Subsequently, Lagacé abandoned the premises. The sole issue that I now have to decide is whether Stinson-Shea and Spero, as the owners and landlords of 6034 Red Willow Drive, should be responsible to pay CCC 555's costs in getting an order against their unruly tenant. If so, should those costs be on a partial or substantial indemnity basis?

Legal Framework

[3] CCC 555 relies on the following statutory provisions as establishing its right to have its costs against Stinson-Shea and Spero:

Condominium Act, 1998:

117. No person shall permit a condition to exist or carry on an activity in a unit or in the common elements if the condition or the activity is likely to damage the property or cause injury to an individual.

…

119. (1) A corporation, the directors, officers and employees of a corporation, a declarant, the lessor of a leasehold condominium corporation, an owner, an occupier of a unit and a person having an encumbrance against a unit and its appurtenant common interest shall comply with this Act, the declaration, the by-laws and the rules.

(2) An owner shall take all necessary steps to ensure that an occupier of the owner's unit and all invitees, agents and employees of the owner or occupier comply with this Act, the declaration, the by-laws and the rules.

…

134. (1) Subject to subsection (2), an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of a leasehold condominium corporation or a mortgagee of a unit may make an application to the Ontario Court (General Division) for an order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules or an agreement between two or more corporations for the mutual use, provision or maintenance or the cost-sharing of facilities or services of any of the parties to the agreement.

…

(3) On an application, the court may, subject to subsection (4),

(a) grant the order applied for;

(b) require the persons named in the order to pay,

(i) the damages incurred by the applicant as a result of the acts of non-compliance, and

(ii) the costs incurred by the applicant in obtaining the order; or

(c) grant such other relief as is fair and equitable in the circumstances.

(4) The court shall not, under subsection (3), grant an order terminating a lease of a unit for residential purposes unless the court is satisfied that,

(a) the lessee is in contravention of an order that has been made under subsection (3); or

(b) the lessee has received a notice described in subsection 87 (1) and has not paid the amount required by that subsection.

(5) If a corporation obtains an award of damages or costs in an order made against an owner or occupier of a unit, the damages or costs, together with any additional actual costs to the corporation in obtaining the order, shall be added to the common expenses for the unit and the corporation may specify a time for payment by the owner of the unit.

[4] As well, CCC 555 relies on the following provisions in its Declaration, By-laws and Rules as establishing its rights to costs on a substantial indemnity basis:

Declaration

4. UNITS

4.1 Occupation and Use. The occupation and use of the units shall be in accordance with the following restrictions and stipulations:

…

(c) The owner of each unit shall comply and shall require all residents, occupants and visitors to his or her unit to comply with the Act, this Declaration, and the by-laws, and the rules and regulations passed pursuant thereto.

…

(f) Any owners leasing their unit shall not be relieved from any of their obligations with respect to the unit which shall be joint and several with their tenant.

…

8. INDEMNIFICATION

8.1 Indemnification. Each owner shall indemnity and save harmless the corporation from and against any loss, cost, damage, injury or liability whatsoever which the corporation may suffer or incur resulting from or caused by an act or omission of such owner, the owner's family or any member thereof, any other resident or occupant of that unit or any guests, invitees, licensees or agents of

such owner or resident to or with respect to the common elements and/or all other units, except for any loss, cost, damages, injury or liability caused by an insured (as defined in any policy or policies of insurance) and insured against by the corporation.

All payments pursuant to this clause are deemed to be additional contributions toward the common expenses and recoverable as such or by such other procedure the corporation elects.

9. GENERAL MATTERS AND ADMINISTRATION

…

9.2 Units Subject to the Act, Declaration, By-laws, Rules and Regulations. All present and future owners, tenants and residents of units, their families, guests, invitees, licensees or agents shall be subject to and shall comply with the provisions of the Act, this Declaration, the by-laws, and any other rules and regulations of the corporation.

The acceptance of a transfer/deed of land, or the entering into a lease, or the entering into occupancy of any unit, shall constitute an agreement that the provisions of this Declaration, the by-laws, and any other rules and regulations, as they may be amended from time to time, are accepted by such owner, tenant or resident, and all of such provisions shall be deemed and taken to be covenants running with the unit and shall bind any person having, at any time, any interest or estate in such unit as though such provisions were recited and stipulated in full in each and every such transfer/deed of land or lease or occupancy agreement.

…

9.5 Notice. Except as hereinbefore set forth, any notice, direction or other instrument required or permitted may be given if served personally by delivering same to the party to be served, or to any officer of the party to be served, or may be given by ordinary mail, postage prepaid, addressed to the corporation at its address for service herein, to each owner at his or her respective unit or at such other address as is given by the owner to the Corporation for the purpose of notice, and to each mortgagee who has notified its interest to the corporation at such address as is given by each mortgagee to the corporation for the purpose of notice; and if mailed as aforesaid the same shall be deemed to have been received and to be effective on the first business day following the day on which it was mailed. Any owner or mortgagee may change its address for service by notice given to the corporation in the manner aforesaid.

By-law No. 1

13. RULES AND REGULATIONS

13.1 Rules and Regulations. The rules and regulations attached hereto as Schedule "A" shall be observed by the owners and occupants of the units. The Board may amend such rules or may make such further and other rules as required to promote the safety, security, or welfare of the owners and of the property or for the purpose of preventing unreasonable interference with the use and enjoyment of the common elements and of the units.

Schedule "A" Rules and Regulations

… Any loss, cost or damages incurred by the Corporation by reason of a breach of any rules and regulations in force from time to time by any owner, the owner's family, guests, servants, agents or occupants of that unit, shall be borne by such owner and may be recovered by the Corporation against such owner in the same manner as common expenses.

1. GENERAL

…

(b) Rules as deemed necessary and altered from time to time by the Corporation shall be binding on all unit owners and occupants, their families, guests, visitors, servants or agents.

Background Facts

[5] Commencing in the summer of 1999, Lagacé engaged in various activities in and around 6034 Red Willow Drive that contravened the *Condominium Act, 1998* and the Declaration, By-laws and Rules of CCC 555. These activities included:

- excessive noise past 11 pm,
- littering of the property,
- congregating and smoking in the stairwell at the building,
- violating the parking rules relating to CCC 555,

- using threatening, abusive and offensive language towards other owners, residents and employees of the property management firm of CCC 555,

- engaging in threatening conduct towards other owners, residents and employees of the property management firm of CCC 555,

- engaging in the use of marijuana,

- engaging in conduct which necessitated City of Ottawa by-law officer intervention, and

- engaging in conduct which necessitated police intervention.

[6] The property manager of CCC 555 at the time was Axia Property Management Inc. ("Axia"). The person assigned to CCC 555 was Michael Faulkner. Axia received numerous verbal and written complaints about Lagacé's conduct. Commencing in August 1999, various letters and notices were given to "The Occupants" of 6034 Red Willow Drive, advising them of the complaints and seeking their compliance with CCC 555's Rules and Regulations.

[7] On March 17, 2000, Axia contacted Stinson-Shea and Spero for the first time, advising them of the numerous complaints that had been received concerning their tenants at 6034 Red Willow Drive. This resulted in their being a site meeting on June 6, 2000, at which time Stinson-Shea, Spero, and Faulkner met with Lagacé, reviewed the various complaints with him, and obtained his undertaking to comply with the Condominium's Rules and Regulations.

[8] The evidence submitted on behalf of CCC 555 is that on October 6, 2000, Axia sent a second letter to Stinson-Shea and Spero advising that the problems with their tenants were continuing. Stinson-Shea denies that either she or Spero ever received this letter.

[9] Significantly fewer complaints were received by Axia concerning the occupants of 6034 Red Willow Drive, until October 2001, when Lagacé acquired what was described as a Pit Bull dog. On October 11, 2001, Faulkner sent a letter to Lagacé advising that the dog had to be removed from the property immediately. In December 2000, Stinson-Shea and Spero had retained Axia to act as their property manager in renting 6034 Red Willow Drive, and Shawn Paul was the employee at Axia responsible for their account. Faulkner's October 11 letter indicates that a copy was being provided to Paul. Neither Faulkner nor Paul sent a copy of the letter to Stinson-Shea or Spero.

[10] Further complaints regarding Lagacé resulted in a further letter being sent to him on May 31, 2002. This letter was also copied to Paul. Neither Faulkner nor Paul sent a copy of the letter to Stinson-Shea or Spero.

[11] On January 1, 2003, Megacorp Property Management Inc. ("Megacorp") took over management of CCC 555. Axia remained the property manager for Stinson-Shea and Spero.

[12] In April 2003, there were further problems with the occupants of 6034 Red Willow Drive using visitor parking spaces inappropriately. Tickets were issued against Lagacé. This, in turn, resulted in angry and aggressive confrontations on his part with representatives of Megacorp. Megacorp responded on May 1, 2003 with a letter to Lagacé stating that he could not enter or communicate with Megacorp's office at any time; instead all further communications had to be through his landlord, namely Stinson-Shea and Spero. A copy of this letter was sent to Stinson-Shea and Spero. This was the first time since receipt of the June, 2000 letter (if the evidence of Stinson-Shea is accepted) or the October 6, 2000 letter (if the evidence proffered on behalf of CCC 555 is accepted) that Stinson-Shea and Spero received notification that their tenant, Lagacé, was causing problems at CCC 555.

[13] Stinson-Shea and Spero received a copy of the Application Record for these proceedings in May 2003. They immediately consulted a lawyer. Although they filed an Appearance, they did not contest the Application of CCC 555. Their only concern was the costs which CCC 555 were seeking from them.

Analysis

[14] Counsel for CCC 555 argued that CCC 555 is entitled to its costs on a substantial indemnity basis from Stinson-Shea and Spero as the owners of 6034 Red Willow Drive due to the wording of s. 134(5) of the *Condominium Act, 1998*, which is reproduced above. I do not accept this argument.

[15] Section 134(5) simply provides that *if* a corporation obtains an award of costs in an order made against an owner or occupier of a unit, the costs shall be added to the common expenses for the unit and collected accordingly. This subsection does not speak to the question of whether a costs order should be made in the first instance. Section 134(3)(b) confirms that the court, on an application by the condominium corporation for an order requiring someone to comply with the declaration, by-laws or rules of the corporation, *may* make an order requiring the persons named in the order to pay the costs incurred by the condominium corporation in obtaining the order. It does not require the court to do so.

[16] That being said, the relevant portions of the Declaration, By-laws and Rules of CCC 555, all reproduced above, make it clear that (1) the owner of each unit shall require any tenant of that unit to comply with the *Condominium Act, 1998*, and CCC 555's Declaration, By-laws and Rules; (2) the unit owner continues to have all obligations with respect to the unit, even if the unit is leased to a tenant; (3) the obligations of the owner and those of the tenant are joint and several; (4) the unit owner is responsible to indemnify and save harmless CCC 555 from any cost which CCC 555 may incur resulting from an act or omission of a tenant or the owner with respect to the common elements and/or all other units; and (5) all payments required to be made as a result of that indemnification are to be considered additional contributions toward the common expenses and are recoverable as such by CCC 555.

[17] At first blush, these provisions should result in Stinson-Shea and Spero indemnifying CCC 555 for the costs incurred by the condominium corporation in bringing this Application against Lagacé. Certainly there is precedent for such an order being made (see *York Condominium Corp. No. 71 v. Sullivan*, [1990] O.J. No. 840 (Dist. Ct.)). Stinson-Shea and Spero argue that, despite the provisions of CCC 555's governing documents, they should not have to pay any costs to CCC 555 because they were not given appropriate notice of their tenant's contraventions of the condominium's Rules and Regulations. They argue that had they been given appropriate notice, they would have taken steps to correct the situation, and those steps would have been much cheaper and simpler than the proceedings brought by the corporation. As a supplementary argument, Stinson-Shea and Spero suggest that the corporation should have sought some costs against Lagacé, who was, after all, the person who actually breached the condominium's Rules and Regulations.

[18] Neither the *Condominium Act, 1998*, nor the Declaration or By-laws of CCC 555, explicitly requires CCC 555 to notify unit owners of contraventions of rules by their tenants before CCC 555 seeks to recover from the owners the costs associated with its litigation against tenants. Nevertheless, I find that implied in the Declaration, By-laws and Rules of CCC 555 is a duty on the condominium corporation to provide an owner with notice of a tenant's contraventions before the corporation seeks legal costs against the owner for litigation against the tenant brought to enforce compliance with the condominium's governing documents.

[19] By virtue of the *Condominium Act, 1998* and the governing documents of the condominium corporation, the party with whom the condominium corporation has a legal relationship is the unit owner, not the tenant. The unit owner also has a legal relationship with the tenant, by virtue of landlord and tenant law and the terms of the tenancy agreement between them. By virtue of the owner's legal position between the condominium corporation and the tenant, the owner is responsible for the tenant's behaviour while occupying the condominium unit. The condominium corporation looks to the owner to live up to the terms of the condominium declaration, by-laws, rules and regulations. The owner requires the tenant in the tenancy agreement to agree to comply with those condominium documents. In the case of a breach, the corporation demands compliance from the owner, who in turn, demands compliance from the tenant.

[20] The *Condominium Act, 1998* does not establish the strict liability of unit owners for all infractions of tenants, even if they have had no notice of the infractions. The wording of s. 119(2) to the effect that an owner shall take "all reasonable steps" to ensure that an occupier of the owner's unit complies with the Act, the declaration, the by-laws and the rules, implies that the owner has to know what is going on at the unit so that he or she can take whatever steps would be reasonable to deal with any problems. Put another way, it only stands to reason that the owner has to be notified of any unacceptable conduct on the part of the tenant if it is the owner's responsibility to vouch for that conduct and to take reasonable steps to correct problems. In many, if not most, situations, the unit owner who is renting to a tenant does not live at the condominium complex. If the property manager of the complex does not inform the owner of tenant infractions, how can the owner live up to his or her responsibility to ensure that the tenant

abides by condominium rules? It would be contrary to public policy to expect unit owners to become private investigators checking up on their tenants to see if they are breaching any rules. It makes much more sense for the condominium's property manager to notify the unit owner of any significant or on-going breaches.

[21] The first question to consider is what notice was provided to Stinson-Shea and Spero. There is no dispute that Stinson-Shea and Spero received notice in March 2000 of certain problems being caused by Lagacé and his guests, primarily related to noise and general comportment. To their credit, Stinson-Shea and Spero took steps to deal with the complaints, meeting with Faulker and Lagacé in June 2000. They left the meeting assuming there would be no further contraventions by Lagacé.

[22] There is a letter authored by Faulker and dated October 6, 2000 that purportedly was sent to Stinson-Shea and Spero outlining continuing infractions by Lagacé. The sworn evidence of Stinson-Shea is that she and Spero never received this letter. I note that it was sent to the same address as the letter of March 17, 2000, which was received by Stinson-Shea and Spero. The onus is on Stinson-Shea and Spero to establish that they did not receive notice of Lagacé's contraventions. In regard to the letter of October 6, 2000, they have not met that onus.

[23] There is no dispute that letters to Lagacé dated October 11, 2001 and May 31, 2002 outlining on-going complaints and problems were copied to Paul, the employee at Axia acting as the property manager for Stinson-Shea and Spero. It is uncontroverted that Paul did not bring these letters to the attention of Stinson-Shea and Spero. The fact that Paul did not notify Stinson-Shea and Spero of the October 11, 2001 and May 31, 2002 letters from Faulkner is not an oversight that can be placed at the door of the condominium corporation. Faulkner was acting as the corporation's agent in sending a copy of the letter to Paul. In receiving that letter, Paul was acting as the owners' agent, even though he was working for the same property management company as Faulkner. Paul may have breached his contractual obligations to Stinson-Shea and Spero as their property manager, or he may have breached his duty of care to them. However it is considered, Paul's neglect to bring the continuing problems regarding Lagacé to the attention of Stinson-Shea and Spero does not entail unreasonable conduct on the part of CCC 555. It is not a reason to deny CCC 555 any costs pursuant to the terms of its Declaration, By-laws and Rules.

[24] I find that CCC 555 took adequate steps from March 2000 to May 2002 to notify Stinson-Shea and Spero of Lagacé's continued contravention of condominium Rules and Regulations, and to give Stinson-Shea and Spero the opportunity to do something to rectify the situation. As far as CCC 555 was concerned, aside from the one meeting in June 2000, Stinson-Shea and Spero did not take any steps to deal with Lagacé's breaches. They had known that their tenant had caused significant problems at the condominium complex in 1999 and 2000, yet had simply taken their tenant's word in June 2000 that he would try harder. As far as CCC 555 was aware, on three subsequent occasions, Stinson-Shea and Spero received further information that problems persisted, and they did not intervene. By the time the corporation started the litigation, they had not heard from Stinson-Shea and Spero for almost three years. There is no evidence

that, during this period, Stinson-Shea or Spero called or wrote to the condominium corporation to see if their tenant's behaviour had improved. There is no evidence that they instructed their property manager to keep on top of the problem. There is no evidence that they initiated any inquiries whatever from June 2000 forward.

[25] On the other hand, when Megacorp decided to issue an application on behalf of CCC 555 early in May 2003, it knew that no one on behalf of CCC 555 had contacted the owners of 6034 Red Willow Drive since May 2002. Various incidents had occurred during the year which would have added fuel to any steps taken by the owners to end their tenancy agreement with Lagacé. The corporation did not know whether, once armed with this new evidence, the owners would take immediate steps to terminate the tenancy agreement, a step that could have been taken at far less cost to them than the costs now being sought by the corporation. From the documents available to me, it appears that CCC 555 chose to commence litigation at the same time that it sent a copy of its May 1, 2003 letter to Lagacé.

[26] Should CCC 555 be denied its costs because prior to actually commencing the Application against Lagacé, Stinson-Shea and Spero, it did not notify Stinson-Shea and Spero of the intended litigation? Without hesitation I find that it would have been prudent on the part of Megacorp, acting for CCC 555, to notify the owners directly of the condominium's intention to commence legal proceedings to deal with Lagacé if the owners did not immediately take the necessary steps to terminate Lagacé's tenancy through landlord and tenant proceedings. At the very least, it would have shown good judgment for Megacorp to write to Axia, as the owners' property managers. I contemplate that in certain factual circumstances, this absence of recent notice to the owners of continuing problems and impending litigation will result in the condominium corporation not being allowed to collect its litigation costs from the owners. In the factual circumstances of this case, I am not prepared to deny the corporation any costs based on the lack of recent notice to the owners. What I will do, however, is reduce the costs the corporation can recover.

[27] The evidence of Stinson-Shea is that had she and Spero known of the litany of breaches by Lagacé, they would have taken steps to terminate his tenancy. I accept their evidence that at least from October 2000 forward, they personally had no knowledge of the continuing problems, and presumably that is why they did not do anything about them. I also accept their evidence that, had the corporation contacted them after the events of April 2003, and prior to commencing litigation, they would have taken legal steps to rectify the situation. They did consult a lawyer as soon as this litigation was commenced. Therefore, had CCC 555 provided reasonable notice to Stinson-Shea and Spero in advance of commencing this litigation, the legal fees associated with this litigation may have been avoided altogether, or could have been significantly reduced. In these circumstances, I cannot conclude that all of the fees and disbursements charged to CCC 555 by Nelligan O'Brien Payne are "costs … incurred by the Corporation by reason of a breach of any rules and regulations in force from time to time by any owner, … or occupants of that unit …"

[28] In this respect, I differentiate this case from those such as *Peel Condominium Corp. No. 338 v. Young*, [1996] O.J. No. 1478 (Gen.Div.); *Peel Condominium Corporation No. 449 v. Amy Elizabeth Frances Hogg*, a decision of Carnwath J. dated March 13, 1997; *Frontenac Condominium Corporation No. 7 v. Jim Gallant and Connie Armstrong*, a decision of Ratushny J. dated September 27, 2001; and *Carleton Condominium Corporation No. 66 v. Helena Brown*, a decision of Polowin J. dated September 7, 2001. In all of those cases, costs were awarded on a solicitor-client or substantial indemnity scale. It is to be noted, however, that in each case, the judge stated that the person against whom the costs order was being made had been given specific notice of the problem that eventually necessitated the court application and had been given the opportunity of addressing the problem before the litigation was started.

Quantum of Costs

[29] The Bill of Costs presented by Nelligan O'Brien Payne is in the amount of $7,137.02 inclusive of GST and disbursements. Of this sum $3,000 represents legal fees for the original application seeking an order for compliance against the tenant, $2,701.25 represents costs attributable to preparation for the costs argument, and $500 represents counsel fees when submissions on costs were heard. Disbursements totaled $884.82.

[30] The hourly rates of the lawyers involved on the file are reasonable.

[31] I find the time, and therefore fees, attributable to the issue of costs to be excessive: it is greater than the time and costs associated with the Application itself.

[32] I also find the disbursements excessive. For example, I have difficulty understanding why $178.35 would be incurred for courier expenses on such a simple file. Also I do not allow costs for such items as tabs and bindings, in that I consider these included in normal office overhead. The way the Bill of Costs is prepared lumps these disbursements in with photocopying charges, which I would allow.

[33] This was a relatively simple matter, with the Application being a chronology of events, largely documented with letters and notices. Minimal argument was required at the initial hearing. The Bill of Costs was easy to prepare and is only two pages in length. The case law was easy to assemble, being largely cases argued by Nelligan O'Brien Payne.

[34] In all of the circumstances, I conclude that the legal costs incurred by CCC 555 that can reasonably be considered "costs … incurred by [CCC 555] by reason of a breach of any rules and regulations in force from time to time by [Stinson-Shea and Spero], … or [Lagacé] …" amount to $3,600 inclusive of disbursements and GST. This sum shall be added to the common expenses of Unit 11, Level 2, CCC 555 in the amount of $300 per month, until paid.

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C. Aitken J.

Released: April 13, 2004

COURT FILE NO.: 03-CV-24074
DATE: 2004/04/13

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Guy Lagacé, Unrepresented

ENDORSEMENT

C. Aitken J.

Released: April 13, 2004