Case Name:

Baliwalla v. York Condominium Corporation No. 438

Between
Viraf and Mary Baliwalla, Plaintiffs, and
York Condominium Corporation No. 438, Defendant

[2006] O.J. No. 3067
Claim No. T96795/04

Ontario Superior Court of Justice
Small Claims Court - Toronto, Ontario
V. Genova J.

May 31, 2006.
(3 paras.)

Counsel:

Plaintiff: Viraf Baliwalla

Defendant: Joseph W. Ryan, Fine and Deo

REASONS

¶ 1 **V. GENOVA J.**:— This action arises as a result of a dispute between the Plaintiff, Mary Baliwalla and the Defendant, York Condominium Corporation No. 438. While I do not intend to restate the facts as set out in the submissions of both parties, suffice it to say that the dispute arose due to a special assessment rendered by the Defendant in the amount of $7,500.00 per unit holder for certain construction repair to the Condominium in question. This assessment was based on an appraisal by an independent third party as to the costs of the restoration and construction of the work required. The appraisal, as it turns out, was inaccurate and considerably lower than what it would have cost to perform the work. As a result, a new appraisal was done that was to consider a more affordable restoration program. Based on the new appraisal and the actual work that was performed thereafter, and as alleged by the Plaintiff herein, the special assessment rendered against unit holders should have been considerably less than the $7,500.00. As such, the Plaintiff has pursued this claim for the difference between the initial and incorrect assessment and what the assessment should have been. I understand from the Plaintiff's evidence that her claim was commenced due to the fact that she no longer owns her unit and as such would not benefit from the remainder of the special assessment funds that were placed in the reserve fund by the Defendant.

¶ 2 I have considered the evidence presented at the two-day trial which proceeded on May 3 and August 5, 2005, together with all of the written submissions by both parties and have come to the following conclusion.

1. The Defendant, in both its submissions at trial together with its written submissions, stressed that the standard of reasonableness, not one of correctness, was to be applied to decisions made by a Board of Directors on behalf of a condominium corporation, and that this standard is enshrined in Section 37 of the Condominium Act, 1998, S.O. 1998, c. 19 (the "Act"). I have two comments in that regard. First, I agree with the submissions made by the Defendant that the Plaintiff conceded stipulations of fact with respect to the actions of the Board as being indisputably reasonable up to and including the issuance of the special assessment in question. However, what I have found to be unreasonable was the transfer of the money collected in the special assessment in the amount of $7,500.00 per unit holder into the designated reserve fund. This transfer of the special assessment money was done regardless of the fact that a conclusion had been reached by the Board and unit holders that the appraisal for the work contemplated to be funded by both the special assessment and money from the existing reserve fund was significantly inaccurate. The sum of $7,500.00 should not have been considered immaterial to unit holders. The money collected in the special assessment should have been, by the Board of Directors on behalf of the Defendant, held in abeyance during the period of indecisiveness with regard to the cost of the repair work required.
2. The Defendant argued at trial and in its submissions that the transfer of the special assessment funds into a reserve fund triggers Section 95 of the Act that specifically sets out that no distribution of any amount of the reserve fund can be made, with the exception of the termination of the corporation, to the owners of the units. In other words, the Defendant is arguing that the collection of an inappropriate or incorrect amount of money in special assessment from unit holders could not be refunded despite any mistake that may have occurred. I take issue with this position since this argument allows the Defendant and others similarly situated to act inappropriately with a purpose to avoid the return of funds to unit holders. While the Plaintiff in this case has alleged in submissions that the transfer of the funds prematurely was done with some kind of malice or premeditation, I do not accept that to be the case by this Defendant. However, I do find that the Defendant's transfer of the funds, as mentioned above, into the reserve fund was unreasonable given the state of flux as to the costs of the construction that would ultimately be incurred. As the written submissions and evidence has indicated in this case, the costs of the repair ultimately was considerably less than what was originally appraised and would have cost the unit holders approximately $2,100.00 in special assessment rather that the collected $7,500.00 per individual owner.
3. The Defendant has also argued that reserve funds as set out in Section 93

of the Act are a form of common expenses collected by a condo corporation from unit owners in the same manner as common expenses are collected. I do not agree with this submission. In fact, the evidence at trial was that common expenses are collected regularly whereas money placed in reserve funds by way of special assessments was collected only under special circumstances and, specifically, used for the purpose of major repair and replacement of the common elements and assets of the corporation (Section 93(2)). As well, the Defendant has argued that a designation that funds collected for the sole purpose of a major repair and replacement of the common elements and assets of the corporation need not be designated as a reserve fund but shall be deemed to be such as set out in Section 93(3) of the Act. While I agree in principle with this particular submission, I refer back to the unreasonable actions of the Defendant in dealing with the collected special assessment funds. In any event, the Defendant relies upon Section 37 of the Act and emphasizes that decisions made by the Board of Directors, regardless of whether they appear to have been incorrect must still be considered as to whether they are reasonable or not. I do not find that the Board exercised care, diligence and skill in the manner in which the special assessment funds were allocated immediately after the determination that the amount of the special assessment was incorrect.

4. Additionally the Defendant has submitted that a director shall not be found liable for a breach of duty if the breach arises as a result of their reliance, in good faith, upon a report or opinion of a lawyer or engineer. It is the opinion of the court that this section of the Act (Section 37(3)) deals specifically with the liability of directors and not the condo corporation which is a separate legal entity.
5. The court finds that the actions of the Defendant were both unfair and unreasonable and, as such, they are liable for the damages incurred by the Plaintiff who was not able to benefit from future repairs to his unit through the use of reserve funds given his sale of his property.
6. I wish to emphasize that while the actions of the Board were reasonable up to and including the issuance of the special assessment (as stipulated by the Plaintiff at trial), its actions thereafter were not. In fact, knowing that the appraisal had been incorrect with regard to the cost of the repair and restoration, it acted unreasonably. While its actions up to and including the issuance of the special assessment were reasonable, they were nonetheless incorrect. As such, the special assessment of $7,500.00 would not have been collected had matters been performed correctly regardless of their reasonableness. In light of the incorrectness, which I find, was known to the Defendant, the Defendant cannot now say that they are protected by Section 93(3) of the Act that the money would be deemed as a reserve fund and therefore could not be returned in whole or in part to the unit owners. I find that this could not be the intent of the legislation and, as such, find in favour of the Plaintiff.

¶ 3 I find in favour of the Plaintiff and award damages in the amount of $5,350.29, together with pre-judgment interest from April 14, 2004 to date, and costs of $242.67.

V. GENOVA J.

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