Case Name:

Binichakis v. Smitherman

Between
Issidoros Binichakis, Appellant, and
Ronald Smitherman, Carol Porter and The Owners, Strata Plan NW 1676, Respondents

[2010] B.C.J. No. 754

2010 BCSC 577

Docket: S120394

Registry: New Westminster

British Columbia Supreme Court
New Westminster, British Columbia

J.W. Williams J.

Heard: February 26, 2010.
Judgment: April 28, 2010.

(31 paras.)

Appeal From:

On Appeal from the Provincial Court of British Columbia, dated April 20, 2009, Provincial Court Registry Number S63240

Counsel:

Appellant Issidoros Binichakis: Appearing in person.

Counsel for Respondents: V.P. Franco.

Reasons for Judgment

1 **J.W. WILLIAMS J.**:-- Mr. Binichakis (the "appellant") appeals from a decision of the Provincial Court of British Columbia (Small Claims Division) made on April 20, 2009. In that decision, the trial judge dismissed the appellant's claim against the defendant respondent, Strata Plan NW 1676 (the "**Strata Corporation**"), for payment for cleaning services rendered. The judge allowed part of the appellant's claim for compensation for attendance as a strata councillor at council meetings. Both components of the decision are disputed.

Background

2 The appellant is a retired businessman. At the relevant times, he resided in a unit he owned in a residential condominium development in Surrey. The **Strata Corporation** governed the operation of the development. Between July 1, 2005 and June or July of 2007, he served as a member of the strata council.

3 The circumstances giving rise to the cleaning claim are quite succinctly set out by the trial judge in his reasons, and I quote them here:

> [15] He [Mr. Binichakis] became very concerned that the parking lot for the building in which he lived was in a shameful state. It had not been cleaned for years. Although he complained about the issue to the maintenance man or caretaker, he got no response and no action. No-one cleaned the lot. Eventually, Mr. Binichakis brought the matter to the attention of the property manager. Still, there was no response and no action. Finally he told the property manager that if the lot was not cleaned that he would do it himself.
>
> [16] After waiting a couple of months, Mr. Binichakis realized that unless he cleaned the parking lot, it would never be cleaned, Accordingly, in July 2005 he obtained some equipment, some chemicals for cleaning and cleaned out the whole lot including all of the parking stalls. It took him about 4 days of very hard work to clean the lot.
>
> [17] A year later, in July 2006 he cleaned the lot again, in the face of further apathy from the caretaker/maintenance man. On both occasions when he did the cleaning, Mr. Binichakis said that many strata owners from his building saw him doing the work and expressed their gratitude for him doing it.

4 The appellant was never compensated for the work he did. Although he advanced a claim, the strata council refused to pay it.

5 As a consequence, he filed a claim in the Provincial Court, suing the **Strata Corporation** and two persons who were members of the strata council for payment of $11,700 for the services in cleaning the underground parking lot, and he also sought judgment in the amount of $675 as compensation for attending strata council meetings as a council member.

Proceedings at Trial

6 The appellant conceded that he did not have a contract with the **Strata Corporation** to perform the cleaning services, and that he did not raise the issue with the council or seek approval in advance of doing the work. He accepted as well that he did not have the approval of the council.

7 In support of his claim, the appellant relied upon another situation that had occurred sometime earlier. Evidently, a resident had made a number of repairs around the complex. He then, after the fact, submitted a bill to strata council and council voted to pay the bill, even though the individual in question had not received prior approval from council to do the work.

8 The trial judge concluded that appellant had not proven that he was entitled to be paid for the cleaning services and dismissed the claim.

9 There was a second part to the appellant's claim. He sought to be paid a sum of money as compensation for attending strata council meetings as a council member. In dealing with that claim, the trial judge had before him certain evidence and records. There was a discrepancy between the evidence of the appellant and that of the representative of the **Strata Corporation.** In the face of that conflict, the trial judge indicated that he preferred the evidence of the representative of the **Strata Corporation.** He awarded the appellant the sum of $275 for meeting attendance.

10 With respect to the three defendants named in his claim, the court found that there was never a cause of action against the two individuals who were members of the council and dismissed the action against them.

Grounds of Appeal and the Respondent's Position

11 The Notice of Appeal is concise; it simply alleges that the trial judge erred on the facts and the law regarding the claim. The appellant's filed statement of argument is extensive to the point of prolixity. Many of the grounds advanced are improper, including a claim that the trial judge was (or had been) counsel for one of the named defendants. There is extensive reference to evidence that was not before the court at trial.

12 Based upon the oral submissions of the appellant, I understand him to say that the trial judge either did not understand the issues or he erred in his appreciation of the evidence. He is convinced that the decision constitutes a fundamental unfairness, and accordingly asks that it be set aside.

13 With specific reference to the claim for attendance at meetings, the appellant says that the trial judge is in error in his interpretation of the evidence as it concerns that issue, and that the resulting determination of entitlement is wrong.

14 The respondent **Strata Corporation** takes the position that the trial judge was correct in his disposition of the claim, and that the grounds and arguments advanced by the appellant are irrelevant or wrong. The respondent says that no error has been shown that would warrant appellate intervention.

Standard of Review

15 The appropriate standard of review for appeals of this kind was discussed by Arnold-Bailey J. in *Joubarne v. Loodu et al.*, 2005 BCSC 1340 at paras 6-7:

> [6] Appeals from the Small Claims Division of the Provincial Court of British Columbia are authorized by s. 5(1) of the *Small Claims Act*, R.S.B.C. 1996, c. 430 (*SCA*):
>
> > Any party to a proceeding under this Act may appeal to the Supreme Court an order to allow or dismiss a claim if that order was made by a Provincial Court judge after a trial.

The scope of appellate review is set out in s. 12 of the *SCA*:

> An appeal to the Supreme Court under this Act
>
> (a) may be brought to review the order under appeal on questions of fact and on questions of law, and
> (b) must not be heard as a new trial unless the Supreme Court orders that the appeal be heard in that court as a new trial.

This appeal was not heard as a new trial; it was an appeal on the record.

[7] A discussion of the standard of review applicable to a small claims appeal is found in *IBI Group v. LeFevre & Co. Property Agents Ltd.*, 2004 BCSC 298, at [para.] 16:

> The test to be applied on an appeal from Provincial Court pursuant to s. 12 of the Small Claims Act is whether the trial judge was "clearly wrong" on the facts or law. It is akin to the standard applied by the Court of Appeal, which provides that findings of fact made at trial, though not immutable, are not to be reversed unless it can be established that the trial judge made some palpable and overriding error which affected his or her assessment of the facts. Accordingly, my duty is to re-examine the evidence in order to be satisfied that no such error occurred, but not to substitute my own assessment on the balance of probabilities.

Analysis

16 The trial judge approached the claim for the cleaning services as one that was based on the doctrine of unjust enrichment. He commenced by comprehensively instructing himself with respect to the relevant legal principles; they are set out in his reasons for judgment. In my view, it is clear that the doctrinal approach that he took to the matter was sound and that he properly understood the relevant considerations.

17 In his subsequent analysis of the facts of the case, the trial judge found that the **Strata Corporation** had been enriched when the appellant cleaned the parking lot and they did not have to pay for the service. He also accepted that the appellant suffered a deprivation because he was not paid for the work. Furthermore, the trial judge concluded that the there was no juristic reason for the enrichment in that the appellant was not under any legal obligation to clean the lot, there was no contract and he did not provide the service as a gift; rather, in the words of the trial judge, "he cleaned the lot because he thought it was work that had to be done and that no one else seemed willing to do".

18 The trial judge then turned to the issue of whether the enrichment of the **Strata Corporation** in the circumstances of this case was unjust. He took into account a number of circumstances, including that the appellant had not asked the council if they wanted him to clean the lot, that the appellant knew that council had to approve all expenditures, and that council had not asked the appellant to do the work and in fact had an employee who was responsible for such tasks.

Furthermore, it was not a situation where the council had been aware that he was doing the work and let him proceed anyways. The trial judge found, quite reasonably in my view, that the council members simply did not know that he had done the work until long after it was done. In the circumstances, the trial judge concluded that there was little that the strata owners could do after the fact, other than use the lot in its clean condition.

19 Having made those findings, in the final analysis, the trial judge dismissed the cleaning claim on the basis that the appellant had not proven that "the retention of the benefit would be unjust in the circumstances".

20 The trial judge specifically turned his mind to the fact that the other person's bill had been paid without prior approval (see para. 7, above). He concluded that did not justify the appellant's action or entitle him to claim and be paid *ex post facto* for his efforts. He considered that the earlier situation had been materially different.

21 In disposing of the claim, the trial judge offered certain observations:

> I do not doubt that Mr. Binichakis honestly believed that the parking lot had to be cleaned and cleaned properly. He appeared to me to be a strong-willed person used to "just getting things done". He was no doubt very frustrated by the inaction or incompetence of the caretaker. He acted in good faith and what he thought was the best interests of all the strata owners. That however does not entitle him to any compensation for something he did of his own accord and without the knowledge or acquiescence of the strata council.

22 All of that seems entirely apt.

23 In my view, the learned trial judge identified and applied the correct principles of law in his adjudication of the cleaning claim. Furthermore, I find his application of the law to the facts of the case to be correct.

24 There is no basis to disturb his decision on the appellant's claim for cleaning the parking lot.

25 There is the matter of the second branch to the appellant's claim, compensation for attending strata council meetings as a council member.

26 The appellant submits that the bookkeeping entries relied upon by the trial judge were in error, and, as a consequence, he erred in his calculation that the amount due to the appellant was $275.

27 On the basis of the submissions that the appellant has made, I am satisfied that the trial judge did in fact err in his appreciation of the relevant evidence. He correctly concluded that the appellant had attended a total of 16 meetings and that he was entitled to be paid $25 for each attendance, so that the total amount to be paid to him was $400. However, he found that the appellant had received $125 in partial satisfaction of that amount. In fact, the evidence establishes that the appellant received only $75, and so he is entitled to an order that the **Strata Corporation** pays him the sum of $325 for his attendance at meetings, rather than the $275 ordered by the trial judge.

28 It should be noted that counsel for the respondent **Strata Corporation** does not dispute the proposition that the trial judge erred in this respect and concurs in the conclusion that the proper award should be increased.

29 In the circumstances, I find the trial judge did fall into error with respect to this factual matter. The appeal is allowed to that extent. The order should be set aside, and an award in the amount of $325 in favour of the appellant should be made in its stead. Payment to the appellant is subject of course to whatever the respondent **Strata Corporation** may have already paid in satisfaction of the trial judgment.

Conclusion

30 The appeal against the decision of the learned trial judge with respect to the claim for cleaning is dismissed. No error has been found.

31 The appellant's claim with respect to the payment of council fees is allowed to the extent that the order is varied from $275 to $325. Given that the appellant was successful on one branch of his appeal, each party should bear their own costs.

J.W. WILLIAMS J.

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