Case Name:

Buskell v. Linden Real Estate Services Inc.

Between
Richard Buskell, plaintiff (appellant), and
Linden Real Estate Services Inc. and Winnipeg
Condominium Corporation #52, defendant (respondent)

[2003] M.J. No. 328
2003 MBQB 211
Docket: CI 03-01-31182

Manitoba Court of Queen's Bench
Winnipeg Centre
McKelvey J.

September 9, 2003.
(25 paras.)

Counsel:

John C. Brown, for the plaintiff (appellant).
Dennis M. Foerster, for the defendant (respondent).

¶ 1 **McKELVEY J.**:— Mr. Buskell seeks payment of $7,500.00 from Winnipeg Condominium Corporation #52 ("the Corporation"). The claim as against Linden Real Estate Services Inc. was discontinued at trial. The action is brought under The Court of Queen's Bench Small Claims Practices Act, C.C.S.M., c. C285 (The Small Claims Practices Act). The actual amount sought exceeds The Small Claims Practices Act jurisdiction of $7,500.00, however, Mr. Buskell waives any excess in order to facilitate a hearing under this Act. The claim represents an alleged loss of rent, payment of utilities and interest.

Facts

¶ 2 Mr. Buskell became the registered owner of a condominium unit at street address 112-18 Consulate Road, Winnipeg, Manitoba in August, 2001. He inherited that property from his mother, Dorothy Buskell, who passed away September 24, 2000. Linden Real Estate Services Inc. managed the complex at 18 Consulate Road on behalf of Winnipeg Condominium Corporation #52. Unit 112, and other condominium units in the complex, had experienced water seepage damage over a number of years. The damage in unit 112 was to the living room and bathroom areas and was primarily comprised of water staining.

¶ 3 Mr. Buskell maintains that the Corporation is responsible for his loss of ability to rent the unit, along with payment of the utilities during that time. This was on the basis that unit 112 was uninhabitable from September 24, 2000 until its repair in early 2002. The unit was subsequently rented on March 1, 2002. Both Mr. Buskell and his wife Deborrah gave evidence that they endeavoured to rent the unit commencing in September, 2000. Rental efforts over the Internet were made until December of 2000, and again in 2001. Mr. and Mrs. Buskell testified that the unit was not rented because of concerns expressed by potential tenants with respect to water staining on the ceiling and mold in the medicine cabinet.

¶ 4 The property manager, Linden Real Estate, was advised by the Buskells of the seepage problem by letter dated November 14, 2000. This advice included a request to repair. The board minutes of the Corporation

document concerns with water seepage in the entire complex as early as April of 1999. In 1999, caulking, repairs and painting were performed on several units within the complex.

¶ 5 The first mention of unit 112 in the board minutes was September, 1999. At that time, Dorothy Buskell requested that repairs be undertaken to a carpet, as well as rectification of water dripping from the bathroom-ceiling fan. There were two other areas mentioned, which were both deemed to be the owner's responsibility. There had been repairs performed previously to the living room ceiling of unit 112.

¶ 6 The condominium complex began operation in the late 1970's. Ken Foshang, a unit holder and member of the board of directors of the Corporation, testified that there had been seepage problems for an extended period of time. The Corporation had made numerous attempts in unit 112 and other units to find the potential source of the seepage and to effect repairs. This had resulted in expenditures by the Corporation that included the replacement of the roof on the south side of the complex, replacement of furnace doors, other roofing repairs, as well as smaller specific efforts such as caulking and painting in individual units. A roofing consultant was retained to assist in determining the cause of the seepage. Finally, as all efforts to date had failed to resolve the seepage problem, an engineering consultant was retained. The engineering report of Crosier, Kilgour & Partners Ltd., prepared in the fall of 2001, identified the likely cause of water penetration in unit 112.

The Position of the Parties

¶ 7 Mr. and Mrs. Buskell testified that the beam from the bathroom to the living room was extensively water stained in the unit. As well, the bathroom vanity and medicine cabinet were damaged. Deborrah Buskell, as indicated, initiated complaints in the fall of 2000. There were no repairs performed at that time. There was no seepage during the winter months. A hole was cut in unit 112 in August, 2001 by the engineer to facilitate testing. This was done in order to determine the potential cause of the seepage. The hole, as well as the water damage, was not repaired until late 2001 and early 2002.

¶ 8 The Buskells testified that there was nicotine damage to the walls of unit 112 caused by Dorothy Buskell. However, the walls were washed with TSP soon after Mr. Buskell assumed ownership. This was said to have alleviated the problem. The unit itself, although on the rental market, was not empty of furniture or other goods in the fall of 2000, albeit most were packed. The contents were moved slowly over time. The Buskells expressed frustration over the time it took to determine what was causing the seepage as well as the time to effect the repairs. The evidence of the Buskells is that nothing was done in terms of repairing the unit until December, 2001.

¶ 9 The damages sought with respect to loss of rent by Mr. Buskell on unit 112 are $570.00 per month. Mr. Buskell claims rent for sixteen months ($9,120.00), being soon after his assumption of ownership, until actual rental in March 2002. Additionally, the utility services provided for the same period totalling $436.18 for hydro and $1,033.01 for heat (September 2000 - March 2002) is sought.

¶ 10 Mr. Buskell maintains that the Condominium Corporation had a statutory duty of repair and effectively admitted liability in the corporate minutes. At all times, unit 112 had a rentable value upon which he was unable to realize because of negligence on the part of the Corporation. The negligence was argued to include repairs not done in a timely fashion and an inability to locate the cause of the seepage. The damage issue was said to be particularly acute after the hole was placed in the ceiling by the engineer and not repaired for many months.

¶ 11 The Corporation acknowledges the seepage problems within the complex. There were many suspected sources of the leaks in the complex, which necessitated varied approaches and investigation, such as roofing consultants, and, finally, the engineering report. As a consequence, significant repairs were effected, including roof replacement, general repairs, painting, siding repairs, shingles, and door replacement. Ledgers were produced indicating the costs of the Corporation as regards its efforts to solve the seepage problem. It is also the position of the Corporation that part of the difficulty in renting unit 112 related to the yellowing of the walls because of

nicotine damage and the strong smoke odour.

¶ 12 The condominium fees payable by Mr. Buskell to the Corporation were chronically in arrears, with payments being withheld for extended periods of time. The Buskells did not participate in corporation meetings or the annual general meetings of the Corporation. The Corporation at no time threatened not to repair unit 112 because of the non-payment of common element fees.

¶ 13 The Corporation also indicated that the Buskells were the parties who complained to the most significant degree with respect to the seepage. Further, no owners left his or her unit because of similar problems. The Corporation also raises a failure on the part of Mr. Buskell to mitigate his damages. The Corporation alleges that the unit could have been painted and rented at a lesser cost than the $570.00 sought per month. Instead, the unit was permitted to remain empty with no reasonable steps taken to mitigate the loss. The Corporation also contends that there is no admissible evidence with respect to an alleged economic loss.

¶ 14 The Corporation maintains that it at all times took timely, but unsuccessful, steps to alleviate the water seepage difficulties until the cause was finally detected. The Corporation asserts that it is not an insurer, but at all times acted reasonably and attempted to alleviate the difficulties through various sources and repair options.

Analysis

¶ 15 I have considered the testimony, documents and case law provided. The minutes of the directors' meetings were illuminating and certain passages require mention:

1. April and June, 1999

   Some seepage was identified in certain units, albeit not unit 112. There was an identified need to repair, caulk and paint. A roof inspection was undertaken at that time to determine its status and possible need of repair.

2. September 23, 1999

   A letter from Dorothy Buskell was considered which requested certain repairs. The Corporation did those repairs within its responsibility.

3. June 13, 2000

   It was determined that part of the roof and decks required replacement.

4. September 7, 2000

   The Board considered a quotation received to paint the water-damaged walls and ceilings in Dorothy Buskell's unit. The suggestion was that the quotation be split on a 60/40 basis between the Corporation and Dorothy Buskell, as all the walls required painting because of severe nicotine damage. A second quotation was to be secured. A similar notation was contained in the minutes of the November 9, 2000 meeting.

¶ 16 The selected general ledger of the Corporation details a series of roof repairs and roof replacements

undertaken by the Corporation from May of 1998 through to 2002. Additionally, a further selected general ledger outlines other repairs made to the complex, as well as the amounts paid to Crosier Kilgour and Partners Ltd.

¶ 17 The Crosier engineer's report of October 2001 documented the results of flood testing performed in unit 112. The results determined several potential points of water penetration into the furnace room which were thought to have caused the seepage into the unit. The report states:

> Inspection of furnace room detailing revealed several potential points of water penetration into the furnace room. Several openings of approximately 1/4 inch in width in the wood siding were noted. The door rough opening caulking has also failed and gaps were visible. In addition, inspection of the chimney cap flashing could not be performed, however, it is possible that water penetration is coming from this location as well.

As a result of the Corporation's engagement of the engineers to determine the leaking problem, repairs were effected. There has been no seepage since the last set of repairs performed in late 2001 and early 2002. Were these activities towards resolution of the problem sufficient to satisfy the statutory duty to repair?

The Law

¶ 18 The Condominium Act, C.C.S.M. c. C170 imposes obligations on a condominium corporation to look after its property and common elements. Section 18 of the Act stipulates:

> Obligations to repair and to maintain
>
> 18(1) For the purposes of this Act, the obligation to repair after damage and the obligation to maintain are mutually exclusive; and the obligation to repair after damage does not include any obligation to repair improvements made to units after registration of the declaration and plan.
>
> Duty to repair
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> 18(2) Subject to section 19, the corporation shall repair the units and common elements after damage.
>
> Maintenance of common elements
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> 18(3) The corporation shall maintain the common elements.
>
> Maintenance of units
>
> 18(4) Each owner shall maintain his unit.
>
> Declaration of obligations in declaration
>
> 18(5) Notwithstanding subsections (2), (3) and (4), the declaration may provide that
>
> (a) each owner shall, subject to section 19, repair his unit after damage and each

owner of a bare land unit shall repair his unit and improvements on the unit after damage unless a notice of termination is registered under section 20; or

(b) the owners shall maintain the common elements or any part of the common elements; or

(c) the corporation shall maintain the units or any part of the units.

Permission to repair

18(6) The corporation shall make any repairs that an owner is obligated to make and that he does not make, within a reasonable time.

Consent by owner

18(7) An owner shall be deemed to have consented to have repairs done to his unit by the corporation under this section.

¶ 19 The Corporation is obligated to do what is reasonable in carrying out its statutory duty. The Corporation is not burdened with strict liability.

¶ 20 The case of Wright v. Strata Plan No. 205, [1996] B.C.J. No. 381 (B.C.S.C.) affirmed, [1998] B.C.J. No. 105 (B.C.C.A.) involved similar water seepage problems accompanied by fungi growth. In Wright, there were seepage difficulties from 1988 until 1991, which caused the plaintiff to move out of her unit. The evidence indicated that each time the plaintiff complained, the defendants attempted to effect repairs. Those repairs were initially remedial and of only short term benefit. The Corporation then took extensive action in order to rectify the difficulty. The record of proceedings of council indicated that the Corporation was at all times " . . . alive to its repair and maintenance responsibilities; and throughout the period of the plaintiff's ownership of her Strata lot took steps to remedy the defects which she drew to its attention." [1996] B.C.J. No. 381 (B.C.S.C.) (para. 29). Further:

> [paragraph] 30 The defendants are not insurers. Their business, through the Strata Council, is to do all that can reasonably be done in the way of carrying out their statutory duty: and therein lies the test to be applied to their actions. Should it turn out that those they hire to carry out work fail to do so effectively, the defendants cannot be held responsible for such as long as they acted reasonably in the circumstances: and in this instance I have to say that the defendants did just that. They cannot be found to have been negligent.

¶ 21 In Baer v. Condominium Plan 9123697, [2000] A.J. No. 534 (Alta. Q.B.), the Alberta Court of Queen's Bench, considered a problem which involved a sinking floor. There had been a chronological history of problems raised by the plaintiff and other condominium unit owners. The court considered the statutory duty under The Condominium Property Act of Alberta as well as the duties set out by the by-laws of the Condominium Corporation. In essence, those requirements were that the Condominium Corporation was to keep the common property in a good state of repair. In the Baer case, the court was satisfied that the defendant took all the steps that it could to correct the problems over time as they were identified. The plaintiff also moved from her unit. However, no other unit owner moved, despite similar difficulties. There was no negligence found. The defendant was found to have acted

or reacted in a reasonable and timely fashion to the concerns of the condominium owners' problems.

Conclusion

¶ 22 The Wright and Baer cases are instructive with respect to this matter along with consideration of the expectations to be placed upon condominium complexes pursuant to The Condominium Act. There was clearly evidence of seepage damage to unit 112, as well as other units within the complex. I find that at all times the condominium corporation was aware of these difficulties and accepted their responsibilities both seriously and in a reasonable manner. The corporation attempted to investigate, initiate repairs, maintain the common property, and endeavoured to correct any deficiencies which were brought to its attention. The solution to the seepage problems was not determined until the Crosier engineer report of October 2001. Shortly thereafter, repairs were effected.

¶ 23 I find no negligence has been proven on the part of the condominium corporation. At all times, the corporation acted in a reasonable manner in response to the concerns as raised by the condominium owners. As the Wright case stated, the condominium corporation is not an insurer. The obligation is to do what is reasonable in caring out its statutory duty.

¶ 24 I also find that Mr. Buskell has not taken reasonable steps to mitigate any potential loss. The unit was permitted to remain empty. It could have been offered on the rental market at less cost than is currently being charged. While the frustration in the determination of the cause of the seepage, along with its repair, is understandable, there is no standard of strict liability or absolute perfection in these circumstances. At all times, the condominium corporation acted reasonably and without negligence. Further, the evidence of alleged economic loss was weak and unproven.

¶ 25 The action must accordingly be dismissed. The issue of costs may be spoken to if they cannot be agreed.

McKELVEY J.

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