

ONTARIO  
SUPERIOR COURT OF JUSTICE  
OTTAWA SMALL CLAIMS COURT

BETWEEN:

CHRIS KIDNEY

PLAINTIFF

AND

CARLETON CONDOMINIUM CORPORATION NO. 571 AND  
581 AND LARLYN PROPERTY MANAGEMENT

DEFENDANTS

DECISION

FACTS

1. This is a claim by the Plaintiff for damages in the amount of \$7,220.51. The Plaintiff was a condominium owner in a property owned by the Defendant Carleton Condominium Corporation No. 571 and 581 (hereinafter referred to as "Condominium Corp.")
2. The Defendant Larlyn Property Management (hereinafter referred to as "Larlyn") is the property manager of the Condominium Corp.
3. The Plaintiff testified that he moved into the condominium on May 1, 2001 and paid his condominium fees regularly.
4. The Plaintiff's preauthorized payments for his condominium fees in the amount of \$226.85 for July 2002 and September 2002 were returned "Insufficient Funds". The payment for August 2002 was processed.

5. Larlyn sent a letter dated September 9, 2002 to the Plaintiff asking for prompt payment of the outstanding arrears of \$453.76.
6. The Plaintiff admits to being notified to make the payment and stated he wrote a cheque dated September 9/02 which was not sent out until November 2002.
7. A Notice of Lien under cover of a letter dated November 7, 2002 was sent by Nelligan O'Brien Payne (hereinafter referred to "Nelligan") to the Plaintiff.
8. Since the Plaintiff refused to pay the legal fees of \$360.00 plus disbursements and GST associated with forwarding the Notice of Lien, the Defendants proceeded to have the lien registered thereby incurring further legal costs.
9. There is an issue as to whether the Plaintiff mailed the cheque of \$453.70 before he received the Notice of Lien from Nelligan or whether it was sent out after receiving the Notice of Lien. He stated he had sent the cheque with a letter to Larlyn and on December 17, 2002, the cheque was returned to him.
10. The Plaintiff admitted he was in arrears and he admits receiving the November 7, 2002 letter from Nelligan. He admits receiving the September 9, 2002 letter from Larlyn regarding the arrears.
11. The Plaintiff also admits that he owed condo fees of \$453.70 and that he received a demand for legal fees in the November 7, 2002 letter from Nelligan in the amount of \$867.36 (which includes interest).
12. The issue canvassed in cross examination was whether the \$453.70 was paid on November 9, 2002 or on November 13, 2002 as stated in his Amended claim which would have been after receipt of letter from Nelligan.
13. The Plaintiff stated that he communicated with Mr. Morrisette and Elaine Richard (law clerk at Nelligan). He admits to being told that the cheque was insufficient and it would be returned as he had not repaid the legal costs incurred.
14. Robert Morrisette, the property manager, who has been working as a manager since 1976 testified on behalf of the Defendants. He states he received

the November 9, 2002 cheque underneath the management office door.

15. I accept the evidence of the property manager, Mr. Morrissette, that great effort is made to collect outstanding condominium fees from condominium owners before the matter is forwarded to the lawyers.

16. He regularly tries to contact owners to avoid legal proceeding and expense. I accept that he made these efforts in this case. The Plaintiff never called back so he had no choice.

17. I find that payment was received only after the Plaintiff received his notice.

18. Mr. Morrissette stated that his secretary called the Plaintiff to pick up the cheque and messages were left with the Plaintiff.

19. Mr. Morrissette testified that as soon as the Plaintiff received the letter from Nelligan, the Plaintiff called Mr. Morrissette saying he would pay cash and requested the waiver of legal costs.

20. Mr. Morrissette indicated to the Plaintiff that he had no power to do so as in such a case the other condominium owners would have to pay them. (See *Condominium Act* s. 134(5))

21. Under cross examination, Mr. Morrissette stated that his secretary had left messages with the Plaintiff to pick up the cheque but he refused and as a result it was mailed out to him.

22. The Plaintiff denies being at the property and slipping the cheque under the door or receiving calls from Mr. Morrissette's secretary.

23. Mr. Morrissette indicated that the lien route and referral to Nelligan was decided by the Condominium Corp. Board at their meeting on October 22, 2002.

24. The Plaintiff's position is that the Notice of Lien showed that September 2002 and October 2002 were not paid but that was not the case. He says that the legislation provides that the a lien must be filed within 90 days and it was not filed until November 29 /02 and hence it was too late to include the July 1, 2002 missed

payment.

25. The Plaintiff sold his condominium and \$3000.00 was held back by Nelligan as security for this action. The lien was removed at the time of the sale of the condo.

26. The Plaintiff claims the return of the \$3000.00 held by Nelligan plus \$1200 in legal costs plus reimbursement of \$2400 which is the cost of renting an apartment for 8 months. He also claims his disbursements of \$100 to set the matter down and \$50 to issue the claim.

27. The Plaintiff also seeks a letter from the Defendants to Royal Bank to clear his credit as he cannot buy a house because of his outstanding credit rating.

28. After the Plaintiff received a threat of power of sale proceedings in March 2004, he began discussing paying some of the legal costs with the Defendants and Nelligan.

### THE LAW

29. The *Condominium Act* provides specific rights and obligations of the condominium corporation and its owners.

30. Pursuant to the *Condominium Act*, section 85, the Condominium Corporation has a lien interest against the owner's unit and its appurtenant common interest for the unpaid amount together with all interest owing and all reasonable legal costs and reasonable expenses incurred by the corporation in connection with the collection or attempted collection of the unpaid amount.

31. In *John Cox. v. Royal Lepage Real Estate Management and HC #177*, found in the quarterly report for the Association of Condominium Mangers of Ontario, the Court endorsed the first in, first out principle with respect to accounting practices and payments made by owners. That is, the Condominium Corporation can apply an owner's monthly payment to the oldest amount outstanding. This principle creates a new default each month.

32. The *Condominium Act* sections 85 and 119 and the decision of *Oxford Condo corp. no. 16 v. Collins* (2000) O.J. No. 4260, sets out that the Condominium

Corporation can seek legal costs on a full indemnity basis.

33. In the event that the condominium corporation is liable for costs, then all other owners will be required to contribute to the costs incurred by the corporation.

34. I have reviewed the case provided to me by the Plaintiff *Carleton Condominium Corporation No. 555 v. Guy Lagace et. al.* In that case, Justice Aitken found that one tenant (Defendant) had not been provided sufficient notice prior to seeking legal costs against the owner for litigation against the tenant brought to enforce compliance with the condominium's governing documents.

35. This case is not relevant here as I have found that the Plaintiff was provided sufficient notice of the lien and was given opportunity to deal with payment of the debt and legal costs.

## CONCLUSION

36. I find that the notice of lien was properly sent. The Plaintiff only then made the condominium fees arrears payment owed but refused to pay the legal fees incurred by the Condominium Corporation.

37. I find that the payments of condominium fees were applied to the last month owing and hence a new default occurred each month (See *John Cox. v. Royal LePage Real Estate Management and HC #177*). Therefore, the lien was properly registered.


38. The Plaintiff's action is dismissed.

39. Regarding costs, the Condominium Corp. is claiming \$4515.06 plus GST plus \$74.90 (inclusive of GST) on a solicitor and client basis.

40. I have read the decisions provided to me by counsel. There is authority to allow them to claim their costs against the Plaintiff, if successful. I agree that based on the *Condominium Act*, the contract between the Plaintiff and the Defendant that they are not bound by the limitations under the *Small Claims Court Rules and Courts of Justice Act*.

41. Therefore costs are awarded on a solicitor and client basis to the Defendants.

Dated at Ottawa this 24th day of January, 2005.

  
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Deputy Judge A. Doyle

*Released January 25, 2005*