Durham Condominium Corp. No. 56 v. Stryk

RE: Durham Condominium Corporation No. 56, Plaintiff/Defendant by Counterclaim, and Joanna Stryk, Defendant/Plaintiff by Counterclaim

[2013] O.J. No. 2784

2013 ONSC 2196

Court File No. CV-12-110450-00

Ontario Superior Court of Justice

C. Gilmore J.

Heard: February 27, 2013.
Judgment: April 12, 2013.

(60 paras.)

Counsel:

Antoni Casalinuovo, for the Plaintiff/Defendant by Counterclaim.

Peter Carlisi, for the Defendant/Plaintiff by Counterclaim.

ENDORSEMENT:

C. GILMORE J.:--

Overview

1 This is a motion for summary judgment by the plaintiff corporation for possession of the defendant's condominium unit. The defendant opposes the motion on the grounds that there are material facts in dispute which require a trial.

Background Facts

2 The plaintiff, Durham Condominium Corporation No. 56 ("DCC 56"), is a non-profit condominium corporation created pursuant to the Condominium Act, R.S.0. 1970, c.77 and registered as a condominium corporation on April 4, 1975. DCC 56 was created for the purpose of managing and administering the assets and property of the subject condominium development, which is comprised of 274 residential units, 24 retail units and the common elements described as Durham Condominium Plan No. 56. The residents of DCC 56 are mostly seniors.

3 The defendant, Joanna Stryk, was born on July 5, 1927, and is in somewhat frail health. The defendant's spouse is Shahpuer Mohsini.

4 The defendant is the registered owner of Unit 1201 in DCC 56, which she purchased in 2000. The current monthly common expenses due and payable in respect of unit 1201 are $370.32, The defendant set up a pre-authorized payment plan fox her common expense payments. She did not authorize DCC 56 to take anything other than payments for common expenses from her account.

5 The property manager for DCC 56 is John Cvetkovic. The former property manager of DCC 56 is Andrew Sliz. Carol Bothwell is the administrator of DCC 56.

6 On September 30, 2011, DCC 56 registered a certificate of lien against the subject property for $1,901,46, This amount was made up of unpaid common expenses of $1,475.11 and interest on those expenses of $15,97 plus legal costs of $419.38. Notice of the lien was sent to the defendant, as was a prior courtesy letter advising the defendant of the registration of the lien. Power of sale proceedings were commenced by DCC 56 on September 28, 2011, and served on the defendant.

7 On November 7, 2011, correspondence was sent to the defendant by DCC 56 indicating that the lien had been registered and that the balance owing had increased to $3,810.90. A similar letter was sent on December 19, 2011, indicating that no payment had been received and that the balance of outstanding common expenses, plus interest and legal fees, totalled $4,689.32.

8 As the lien was not paid, DCC 56 instructed its counsel to issue a notice of sale on February 14, 2012, The chargeback set out in the notice of sale is incorrect and should have reflected that $1,037.04 of that amount was unpaid common expenses for July to September 2011 and $220.36 was for the invoice from Renmar Services related to plumbing services for the subject unit. As there was still no payment of the amounts outstanding in the lien, DCC 56 issued a second notice of sale on May 3, 2012, detailing amounts owing to June 1, 2012. Again, the chargeback amount is incorrectly reflected as it was in the February 14, 2012 notice of sale.

9 The defendant initially became indebted to DCC 56 in October 2008. A chargeback of $1,254.75 was made in relation to the repair of a parking garage door which DCC 56 alleges was damaged by the defendant. Due to her non-designation of common expense payments, DCC 56 was entitled to apply the defendant's common expense payments to this debt. However, for accounting purposes this did not much matter as DCC 56 was not authorized to take more than the common expense payment from the defendant's account each month. The net effect, was that the chargeback for the garage door became an outstanding common expense amount on which interest began to accumulate. A further charge back was made in July 2011 in the amount of $220,36, in relation to a plumbing invoice which DCC 56 alleges was necessary because the defendant failed to properly maintain her unit. The balance owing to DCC 56 continued to increase and by February 2013 the interest charges (not including any legal fees or other costs) were mounting at the rate of $79.34 per month.

10 On July 25, 2012, DCC 56 commenced an action against the defendant for vacant possession of the subject unit.

11 The most recent statement of common expense arrears is dated February 26, 2013, and is found as exhibit D to the supplementary affidavit of John Cvetkovic, sworn February 26, 2013. It sets out the common expenses and chargebacks owing, as well as legal costs and expenses relating to the preparation and issuance of the notice of sale, the certificate of lien, the power of sale proceedings, the action for possession and late payment interest. The total owing is $42,894.26 as of February 25, 2013.

12 The defendant denies that she owes any money to DCC 56 and in fact takes the position that money is owed to her.

The Issues

13 There are six issues in this motion as follows:

1. Is DCC 56 statute barred from pursuing its lien on the basis that the original chargeback dates back to 2008?
2. Has the defendant received a copy of DCC 56 bylaws, rules and declarations?
3. Is the defendant responsible for a chargeback related to allegedly damaging the condominium garage door, located at DCC 56?
4. Is the defendant responsible for the chargeback relating to a plumbing invoice for water leakage in 1201?
5. Can DCC 56 refuse to accept the defendant's common expense payments and then charge interest on them?
6. How should costs be dealt with in the circumstances?

Issue One: Is DCC 56 Entitled to Register the Notice of Lien where the Default is More Than Three Months Old?

14 This issue related to the chargeback from 2008 for the garage door damage.

15 The defendant argues that the time to claim a lien for this amount has expired as DCC 56 only has three months to register a condominium lien pursuant to section 85(2) of the Condominium Act. Further, cases relied upon by DCC 56 such as York Condominium Corporation No. 482 v. Ken Christiansen et al. (2003), 64 O.R. (3d) 65 (Ont. S.C.) can be distinguished because there was no dispute with respect to the amounts owed by the unit owner to the condominium corporation and no issue with respect to any limitation period in those cases.

16 DCC 56 argues that the Christiansen case applies because an owner may not complain that it did not have the opportunity to allocate the funds as best suited the owner. In that case, the moving parties asserted that certain attached sums should be allocated first to the liened arrears and not to the oldest arrears, This would have been to their advantage because it would be the basis for the liens (limited to three months in many cases) being paid off quickly. The court did not agree with that submission and indicated that there was

> ... no reason in the Act why the existence of a lien on a unit should affect how the corporation allocates the funds it receives. There is no restriction on the age of debts for which the corporation can attach rents, whereas the lien expires after three months unless a certificate is registered. It would be contrary to the scheme of the Act to prefer the interests of the owner in ridding itself of the lien to the interest of the corporation in getting paid, The corporation is free to allocate these funds in its interest, not in the debtor/owner's interest. (Christiansen, paragraph 44)

17 Specifically, counsel for DCC 56 argues that payments are applied to the oldest debt so that the three month time to register a lien keeps moving ahead. Therefore each time a payment was received, the default date is moved ahead a further thirty days. This applies to the chargeback for both the garage damage and the plumbing invoice.

Ruling on the Limitation Period Issue

18 Pursuant to section 84(1) of the Condominium Act, all owners must contribute to common expenses in a proportion specified in the declaration. If they default in doing so, the corporation has a lien against the owner's unit (section 85(1)).

19 Section 92 requires the following

> (1) where a declaration provides that an owner has an obligation to repair after damage and the owner fails to carry out the obligation within a reasonable time after damage occurs, the corporation shall do the work necessary to carry out the obligation.
> (3) If an owner has an obligation under this act to maintain the owner's unit and fails to carry out the obligation within a reasonable time, and if the failure presents a potential risk of damage to the property or the assets of the corporation, or a potential risk of personal injury to persons on the property, the corporation may do the work necessary to carry out the obligation.
> (4) An owner shall be deemed to have consented to the work done by a corporation under this section and the cost of the work shall be added to the owner's contribution to the common expenses.

20 Article XI of the bylaw 14, enacted as a bylaw of DCC 56, states at paragraph 11.04,

> Each owner shall be obligated to pay to the corporation the amount of common expenses assessed against such owner in equal monthly payments on the first day of each and every month for the twelve month period or other period of time to which that assessment is applicable until such time as a new assessment is given to such owner ... in addition to the foregoing, any losses, costs or damages incurred by the corporation by reason of any breach of any rules and regulations of the corporation in force from time to time by any unit owner or by members of his family and either invitees or licensees shall be borne or paid for by such owner and may be recovered by the corporation against such owner in the same manner as common expenses.

21 Also, pursuant to Section 18 of DCC 56's Declaration:

> Each owner shall indemnify the Corporation against loss, costs, damage or injury caused to the common elements because of willful or unlawful act or omission of such owner or any occupant or invitee of his unit.

22 It is this court's view therefore, that DCC 56 is entitled to collect from unit owners amounts owing for damage or work done in relation to the maintenance of a unit pursuant to the Condominium Act, the bylaws of DCC 56 and its declaration.

23 Both paragraph 11.04 of DCC 56 bylaw 14 and section 92 entitle the corporation to add to the common expenses the cost of work done by a corporation to repair damage or maintain a unit. Therefore chargebacks for the garage door and the plumbing invoice can be collected by the corporation as a common expense. As such, the common expenses were in arrears as of the date that the chargeback for the garage door damage was made to the defendant's account. As payments came in from the defendant each month for her common expenses, the default rolled forward every thirty days. Doing otherwise would fetter the corporation's ability to apply funds to outstanding debts owed to them as they see fit, as per the Christiansen case.

24 Based on the above, I find that DCC 56 is not statute barred from the registration of its lien.

Issue Two: Did the Defendant Receive a Copy of the DCC 56 By-laws, Rules and Declarations?

25 The defendant takes the position that any bylaws or rules that authorize a condominium to unilaterally claim chargeback expenses, interest and legal costs without the consent of the defendant are unreasonable, pursuant to section 56 and section 58 of the Condominium Act, 1998, S.O. 1998, c.19, as amended. The defendant alleges she has never received a copy of DCC 56's bylaws, rules and declarations and was therefore unaware that such chargebacks could be charged as common expenses and that she would be responsible for interest and costs on any outstanding unpaid amounts.

26 DCC 56 submits that in addition to receiving a status certificate, (which contained a copy of DCC 56's bylaws, rules and declarations) when she purchased the unit in October 2000, the defendant was also provided with an updated copy of the bylaws, rules and declarations an or about December 7, 2009, in the form of a handbook. At that time, she executed a form confirming receipt of the handbook.

Ruling on the receipt of a Copy of the By-laws, Rules and Declarations

27 Exhibit K to the Affidavit of John Cvetkovic contains a signed acknowledgement of the welcome handbook of DCC 56 by the defendant. Contained in the documents received in the handbook is bylaw 14. Article 11 of the bylaw sets out the provisions in relation to the assessment in collection of common expenses. Section 11.04 dealing with owners' obligations requires as follows:

> (a) In addition to the foregoing (monthly common expenses) any losses, costs or damages incurred by the corporation by reason of a breach of any rules and regulations of the corporation in force from time to time by a unit owner or by members of his family, and whether invitees or licensees, shall be borne and or paid for by such owner and may be recovered by the corporation against such an owner in the sane manner as common expenses.

28 Based on the acknowledgment signed by the defendant and dated December 7, 2009, she received an updated copy of the bylaws, rules and regulations. The affidavit of Mr. Cvetkovic confirms that the defendant received those bylaws and regulations. It is therefore clear from article 11 that the defendant had documentation which provided her with notice that charges and associated costs for damages and unit maintenance could be collected as common expenses.

Issue Three: Should the Defendant be Responsible for the Chargeback Relating to the Garage Door Damage?

29 There was considerable argument and evidence on this point at the hearing. DCC 56 alleges that the defendant's vehicle came into contact with DCC 56's underground parking garage door in July 2008.

30 An affidavit sworn by Ms. Sylvia Sisler-Boc on February 15, 2013, sets out as follows. Ms. Sisler-Boc is a unit owner at DCC 56. On July 11, 2008, she was returning to the south parking garage and entered the ramp to the garage where she saw the defendant on the ramp and close to the garage door. Ms. Sisler-Boc deposed that she heard the defendant say that she could not use the key to open the garage, and witnessed her opening her ear door and picking up her keys off the ramp floor. At that point, the defendant was too far down the ramp to use her key through her cal window, as the box to open the parking garage door was located further up the ramp. Ms. Sister-Boc offered to open the garage door for the defendant with her key. The garage door was then opened and as the defendant proceeded to go into the parking garage, the garage door came down on the hood of her vehicle. When the garage door made contact with the defendant's vehicle, it bounced up.

31 Ms. Sisler-Boc deposed that an adult male whom she believes resides with the defendant, proceeded to accuse her of closing the garage door on the defendant's vehicle. At no time did Ms. Sisler-Boc intend or try to close the garage door on the defendant's vehicle, according to her affidavit.

32 An affidavit was also provided by Mr. Andrew Sliz, the former property manager for DCC 56 at the relevant time. Mr. Sliz now resides in West Kelowna, British Columbia, and swore his affidavit on February 26, 2013. In his affidavit, Mr Sliz deposes that he was the property manager for DCC 56 in July 2008, but has not been the property manager there for several years, and as such has no financial or personal interest in the matter.

33 On July 11, 2008, he witnessed an incident whereby a vehicle driven by the defendant struck the overhead garage door in the south parking garage at DCC 56. The only other witness that was there was Ms. Sylvia Sisler-Boc. When he arrived at the scene, the defendant's vehicle was damaged from the door closing on her vehicle, and there was damage to the garage door panels. Mr. Sliz asked how the incident had occurred and was informed by the defendant that she had dropped her keys on the ramp, stopped to pick them up before entering the parking garage, and continued driving into the garage, At that point the garage door closed on the hood of her motor vehicle.

34 The defendant admitted to being the driver of the vehicle. Her spouse, Mr. Mohsini, then attended after the incident and proceeded to accuse Ms. Sisler-Boc of closing the garage door on the defendant's vehicle. Mr. Sliz advised the defendant and Mr, Mohsini that the key to the garage door only opened the garage door, and did not close it. As a result of this incident, DCC 56 installed security cameras around the premises a year later.

35 After this incident, Mr. Sliz retained Dodds Capitals Garage Door Systems Inc. ("Dodds") to address the damage, Dodds was required to perform repairs and rendered an invoice, dated October 20, 2008, in the amount of $1,254.75, inclusive of GST. DCC 56 paid the invoice and charged the cost back to the defendant as common expenses.

36 The defendant's position is that she did not cause any damage to the garage door. The affidavit of Mr. Mohsini sworn February 27, 2013, points out inconsistencies in the affidavits of Mr. Sliz and Ms. Sisler-Boc, He denies having any discussion with or making any statements to either of those parties on the date of the incident. Specifically, Mr. Mohsini states that Mr. Sliz's email, dated November 16, 2012, is inconsistent with his affidavit in that he states that the door closed on the defendant's vehicle, and in another part of the email he states that the defendant struck the garage door. Further, if, as Mr. Sliz says, the closing of the garage door cannot be done with a key, how could the defendant he responsible for damage to the door if it closed on her vehicle and she could not control the closing? Mr. Mohsini speculates in his affidavit that the garage door system was defective.

37 The defendant seeks to have a trial on this issue, given what she characterizes as triable issues related to credibility and differing evidence on how the garage door incident came about.

38 Counsel for DCC 56 argues that it had a duty to repair damage and restore units and common elements in accordance with the provisions of the Condominium Ad, the declaration and the bylaws. This is set out in article 5 of bylaw 14.

39 Clearly the purpose of a condominium corporation is to ensure not only the collection of common expenses for insurance repairs and maintenance, but also to ensure that the cost of repair damage caused by an individual owner is not passed on to the collective owners where the damage was clearly caused by an individual owner. There is clear evidence km both Mr. Sliz and Ms. Sisler-Boc that the damage to the garage door was caused by the defendant and DCC 56 quite properly, and according to its own by-laws, charged the invoiced amount back to the owner.

Ruling on Garage Door Invoice

40 While there are some minor contradictions I find that a 'full appreciation" of the issue is available based on the affidavit evidence.

41 With respect to Mr. Mohsini's affidavit evidence, I am not persuaded that whether or not he had discussions with Mr. Sliz or Ms. Sisler-Boc at the time of the incident is of sufficient importance to require a trial. Further, Mr. Mohsini speculates the door may have been defective but provides no further evidence on that point.

42 While it may be unclear exactly how the damage was caused by the defendant I find that the evidence of the Mr. Sliz and Ms. Sisler-Boc cannot be ignored and the totality of their evidence demonstrates that the defendant should be responsible for the garage door chargeback.

Issue Four: Should the Defendant be Responsible for a Chargeback for the Plumbing Invoice?

43 Ms. Carol Bothwell, the administrator for DCC 56, swore an affidavit on February 12, 2013, on this issue. She advised that she had been the administrator of DCC 56 and an employee of DCC 56 since 2008.

44 She deposed that she received a complaint from the unit owner immediately below that of the defendant, namely Mr. Jurais of unit 1101, that there was water leaking from the ceiling of his bathroom.

45 Ms. Bothwell requested that maintenance and repair personnel, namely Mr. Jim Bothwell and Mr. Kevin Thompson, who were employed by DCC 56, enter unit 1101 and inspect the leak. When Mr. Bothwell and Mr. Thompson attended, they saw water entering from the ceiling, at which point they contacted Renmar Service Limited ("Renmar"), a plumbing contractor, to investigate and make repairs.

46 When Renmar entered unit 1101, they cut a hole in the ceiling and inserted a camera to determine the extent and origins of the leak. They then proceeded to attend unit 1201 to inspect the plumbing in the bathroom located in the defendant's unit directly above unit 1101. As no one was home, they returned a few days later and were able to enter unit 1201, Renmar determined that the hot and cold water diverter in the bathtub was leaking into the wall and that the overflow valve was loose, Renmar's conclusion was that the origin and source of the water leakage in unit 1101 was from the defendant's bathroom.

47 Renmar was advised by an adult male residing at the defendant's unit that he would be getting his own plumber to fix the bathroom and stop the leak. On February 14, 2011, Ms. Bothwell spoke with an adult male at the defendant's unit and advised that DCC 56 would be charging the defendant's unit for the cost associated in retaining Renmar to determine the source of the leak, as it was the defendant's responsibility to properly maintain the pipes located in her unit. As a result of her failure to do so, she caused damage to the common elements and to the ceiling of unit 1141., The male resident in unit 1201 advised that he would be making the repairs to the unit himself and did not require the services of Renmar.

48 Renmar rendered two invoices in relation to their inspection of the ceiling of unit 1101 and attending and returning to unit 1101 and 1201. The invoices totalled $220.00, inclusive of HST. In her affidavit, Ms. Bothwell deposed that the invoices were paid by DCC 56 and forwarded to the defendant in April 2011 and she attempted over the next several months to discuss an amicable payment arrangement for the invoices. As the defendant failed to address or acknowledge the invoices from Renmar, DCC 56 had no alternative but to notify the defendant in July 2011, that it would be back charging the defendant for the costs associated with retaining Renmar, and that the charges would be deemed unpaid common expenses. At that time, Ms. Bothwell advised the defendant that she was already in arrears as a result of non-payment of common expenses related to the garage door repairs.

49 A letter was sent to the defendant on July 18, 2011, advising of various charges in relation to damages to common elements, resulting from charges in October 2008 and April 2011. Payment was demanded from the defendant and she was advised that the items are lienable and that if payment of $1,804.43 was not received by July 29, 2011, that DCC 56 would be taking legal action.

50 DCC 56 takes the position that the plumbing invoices were caused directly by the failure of the defendant to properly maintain pipes and taps in her unit, and as such she has incurred damage to the common elements.

51 The defendant denies any responsibility for the plumbing back charges. The defendant takes the position that the leaking was from unit 1216 and not from unit 1201. The defendant maintains that the leak into unit 1101 was five to six feet away from the bathroom tap in the defendant's condominium unit and that she should not be required to pay an invoice for damage which was not of her doing.

Ruling on Plumbing Invoices

52 The evidence on this issue is contradictory and in the normal course would require a trial; however, I find that the maxims of de minimus non curat lex ("the law does not concern itself with trifles") and de minimis non curat praetor ("claims will be entertained only if they are important enough to warrant the expenditure of public resources") apply.

53 In Plant Estate v. Royal Bank, 1996 CarswellAlta 630, 41 Alta. L.R. (3d) 209 (A.B.Q.B.), the estate of the deceased brought an action against two banks. The estate alleged that one of the banks knew that the deceased suffered severe mental health problems, and by paying account credits to the other bank it had caused the deceased to become depressed and commit suicide. One of the banks applied for summary dismissal of the action against it. Master Funduk allowed the application and dismissed the action. In dismissing the relevancy of one of the Plaintiff's arguments, Master Funduk found that an amount of $157.95 was de minimis;

> 41 The argument based on the scope of the assignment given by the deceased to Royal is also without merit. It encompasses what Toronto-Dominion owed to the deceased: Bank of Nova Scotia v. Royal Bank (1975), 49 D.L.R. (3d) 594 (Alta. T.D.), varied (1975), 59 D.L.R. (3d) 107 (Alta. C.A.). The argument is also irrelevant except possibly for $157.95. De minimus non curat lex. [Emphasis added.]

54 In Whaley v. Whaley et al., [1981] O.J. No. 3316 (Ont. S.C.), affirmed [1982] O.J. No. 1469 (Ont. C.A.), a wife brought an action for divorce against her husband. The wife was ordered to return certain amounts of money to her husband, but the sum of $240 was found to be de minimis and no order was made in that regard.

> 43 The wife agrees that she took with her when she left the matrimonial home the sum of $5,000 in old bills which belonged to the husband. I order that these bills be returned to the husband together with the sum of $648 in American money. The sum of $240 falls in the category of de minimis no cruet lex and no order will be made in that regard. [Emphasis added.]

55 The amount in question in the case at bar (approximately $220) is not an amount that is significant enough to warrant the expenditure of public resources for a trial, In. the circumstances, DCC 56 shall absorb the cost of both plumbing invokes and the Certificate of Lien shall be amended accordingly.

Issue No. Five: What is the Effect of DCC 56 Refusing to Accept Common Expense Payments After September 2011?

56 The defendant submits that she has always been willing to make her common expense payments throughout. Those payments have been refused since October 1, 2011, and interest has been charged on the outstanding amounts.

57 DCC 56 argues that they stopped accepting payments to ensure that no settlement was construed and to limit administrative costs (which benefits the defendant).

58 In Metropolitan Toronto Condominium Corp. No. 744 v. Bazilinsky, 2012 ONSC 1187, [2012] O.J. No. 731, during a dispute over compliance with a "no pets" policy, the unit owners attempted to make their monthly common expense payments, These payments were refused and the condo corporation charged interest on the payments. The judge ordered that the Certificate of Lien registered against the condo unit be vacated and the status certificate be corrected upon the unit owners paying the outstanding common expenses without interest. Justice Backhouse ordered as follows:

> 23 An order will issue that the Certificate of Lien registered against the Bazilinskys' condominium unit shall be vacated and their status certificate corrected to remove any claim for legal costs forthwith upon the Bazilinskys paying the outstanding common expenses (without interest because the Bazilinskys sought but were refused the right to pay them) less the net balance owed by the corporation for costs ($5000 less $3169.53=$1830.47). [Emphasis added.]

Ruling on Common Expense Payments

59 I find that DCC 56 did not have the right to refuse common expense payments when tendered. As such, they did not have the right to charge interest on those payments.

Issue Six: Costs

Given that the amounts owed by the defendant will be different from those calculated by DCC 56 based on this judgment, I will receive oral submissions on costs. This issue is dealt with more fully in the summary set out below.

Summary

60 I find that DCC 56's lien is this matter is a valid one. The real issue to be determined is the amount owing. The statement of common Expense arrears in the notice of sale must therefore be amended to reflect the following;

(a) Based on my findings, the chargeback owing by the defendant would relate only to the garage door damage and not the plumbing invoice, Interest on the chargebacks must therefore be amended to reflect only the garage door chargeback.
(b) The defendant shall have 60 days to pay the outstanding common expense charges which have accumulated since July 1, 2011. If she pays the outstanding amount, all interest calculated on those outstanding amounts is to be vacated. DCC 56 shall not refuse any com-

mon expense payments from the defendant which are due and owing after the date of this judgment.

(c) DCC seeks its full costs pursuant to Section 85 of the Condominium Act. Costs must be proportional and DCC's original position may be different once the changes resulting from this judgment are incorporated into the notice of sale. The parties shall attend before me once the 60 day period has elapsed and an amended statement of common expense arrears has been prepared. Both patties may then may then make oral submissions on costs supported by any Bill of Costs or Offers to Settle they may wish to present. The hearing shall be scheduled for one hour and shall be scheduled through the civil trial coordinator.

C. GILMORE J.

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