

CITATION: Durham Standard Condominium Corporation No. 187 v. Morton, 2012 ONSC 5132

DIVISIONAL COURT FILE NO.: 393/12

DATE: 2012/09/14

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

JUSTICES ASTON, AITKEN, AND LEDERER

BETWEEN:

DURHAM STANDARD CONDOMINIUM CORPORATION NO. 187

Applicant (Appellant)

– and –

JAMES A. MORTON

Respondent (Respondent in Appeal)

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)
) *Edmund K. Chan*, for the Applicant
) (Appellant)
)

)
) *Samuel S. Marr*, for the Respondent
) (Respondent in Appeal)
)

) **HEARD:** September 11, 2012
)

2012 ONSC 5132 (CanLII)

REASONS FOR JUDGMENT

AITKEN J.

Nature of the Proceedings

[1] The Appellant, Durham Standard Condominium Corporation No. 187 (“Durham”) appeals the decision of Gilmore J. dated May 18, 2012 in which she ordered that the Respondent, James Morton (“Morton”), pay to Durham \$23,000¹ following which the lien registered by Durham against Morton’s condominium unit under the *Condominium Act*, 1998, S.O. 1998, c. 19 (“the Act”) would be discharged. Durham seeks an order setting aside the order of Gilmore J. and referring to a costs assessment officer the issue of the costs to which Durham is entitled

¹ This was calculated as \$29,000 under s. 134(5) of the Act less \$6,000 in costs awarded against Durham on the motion before Gilmore J.

under s. 134(5) of the Act and, therefore, the amount of the lien for common expenses which Durham is entitled to register against Morton's unit.

[2] Morton cross-appeals, asking that the order of Gilmore J. be set aside and an order made that, upon payment of \$10,000, Durham's lien against Morton's unit would be discharged.

History of the Proceedings

[3] Morton owns one of Durham's condominium units. Durham brought an application in the Superior Court of Justice seeking an order under s. 134(1) of the Act that Morton remove his two dogs from Durham's premises because their presence contravened Durham's by-laws. On January 5, 2012, Glass J. granted the order, with costs against Morton in the amount of \$10,000.

[4] On March 16, 2012, Durham notified Morton that outstanding common expense arrears in regard to his unit amounted to \$73,802.91 – the legal expenses Durham purportedly incurred to obtain the compliance order from Glass J. against Morton. In adding these costs to Morton's common expenses, Durham was relying on s. 134(5) of the Act, which reads:

Addition to Common Expenses

134(5) If a corporation obtains an award of damages or costs in an order made against an owner or occupier of a unit, the damages or costs, *together with any additional actual costs to the corporation in obtaining the order*, shall be added to the common expenses for the unit and the corporation may specify a time for payment by the owner of the unit. [Emphasis added.]

[5] On March 30, 2012, Durham registered on title to Morton's unit a lien in the amount of \$73,802.91 pursuant to s. 85 of the Act, which reads:

Lien upon default

85(1) If an owner defaults in the obligation to contribute to the common expenses, the corporation has a lien 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.

[6] Meanwhile, Morton had entered an Agreement of Purchase and Sale in regard to his condominium unit. As a result of Durham's lien, the sale fell through.

[7] On May 18, 2012, Morton brought a motion before Gilmore J. for an order that Durham's lien in the amount of \$73,802.91 be discharged upon payment by Morton of \$10,000 – the amount of the costs award made by Glass J. In the alternative, Morton asked the Court to fix a reasonable and fair sum to be paid by him to Durham in order to have the lien discharged.

[8] Gilmore J. ordered Morton to pay Durham \$29,000 under s. 134(5) of the Act, inclusive of the \$10,000 costs award already made by Glass J. At the same time, she ordered Durham to pay Morton costs on the motion in the amount of \$6,000. The net result was that, upon payment of \$23,000, the lien was to be discharged.

Appellant's Submissions

[9] Durham submits that Gilmore J. made an error in law in determining that Durham's costs (as ordered by Glass J.) and "additional actual costs to the corporation in obtaining the order" totalled \$29,000, without explaining how she arrived at that figure. Durham relies on the directions of the Court of Appeal in *Toronto Standard Condominium Corp. v. Baghai Development Ltd.*, 2012 ONCA 417 ["*Baghai*"] at paras. 77-85, to the effect that, in determining additional actual costs under s. 134(5) of the Act, the court must explain how it calculates the amount arrived at. It does not suffice for the court to simply pick an amount which it considers "reasonable" in some broad sense. Durham seeks an order referring the matter to an assessment officer, or to Glass J., to determine such costs.

Respondent's Submissions

[10] In response to Durham's appeal, Morton submits that there was some evidence before Gilmore J. that allowed her to conclude that Durham's legal costs and additional actual costs amounted to \$29,000, and her Reasons, when read as a whole, provide an adequate explanation as to how she arrived at this figure. However, Morton's primary and preferred argument is captured on the cross-appeal where he submits that Durham failed to place any evidence before Gilmore J. that Durham *actually incurred* any additional costs above the \$10,000 cost award and, therefore, the amount that Morton should have to pay to have Durham's lien discharged should only be \$10,000. For the reasons that follow, we accept this submission.

Standard of Review

[11] On an appeal from the decision of a judge, the standard of review in regard to a question of law is correctness. (See *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 8.)

Analysis

Meaning of Additional Actual Costs

[12] It is not in dispute that the phrase "additional actual costs to the corporation in obtaining the order" included in s. 134(5) of the Act refers to costs actually incurred by the corporation in obtaining the compliance order over and above any costs that may be awarded in its favour against the opposing party. This was made clear by Doherty J.A. in *Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc.* (2005), 197 O.A.C. 144, 253 D.L.R. (4th) 656 (C.A.) ["*Skyline*"] at para. 38:

[Section 134(5)] declares that the corporation may recover both "an award of costs" and "any additional actual costs". Clearly, the language of s. 134(5) contemplates recovery by the condominium corporation of costs beyond those that are addressed in a court order so long as those costs were actually incurred by the condominium corporation and were incurred in obtaining the compliance order.

[13] Doherty J.A. went on to clarify that “additional actual costs” could include legal and non-legal costs, whether or not such costs are assessable between the parties. They can include legal costs included in a Bill of Costs presented at the time of a costs hearing but not ultimately allowed by the judge making a costs order between the parties. As Doherty J.A. stated at para. 45:

“Additional legal costs” will refer to those legal costs properly owed by [the condominium corporation] to its lawyers above and beyond the amounts awarded for costs by the court or in a court ordered assessment. Those “additional legal costs” are properly added to the common expenses of the unit pursuant to s. 134(5) so long as they were incurred “in obtaining the order”. As actual legal costs refers to those costs properly claimed by a lawyer against his or her own client, the principles governing the assessment of legal bills as between a lawyer and his or her client, should govern any dispute between [the condominium corporation] and [the unit owner] as to the propriety of any part of the legal bills relied on by [the condominium corporation] in support of a claim for “additional legal costs” under s. 134(5) ...

[14] As Doherty J.A. repeatedly stated in *Skyline*, the additional actual costs, whether legal or otherwise, must be *properly* incurred. Consequently, if an assessment of the legal accounts of a lawyer to its condominium corporation client would result in a reduction of such accounts, it is only the reduced amount that can be considered properly incurred and includable under the category of “additional actual costs” under s. 134(5) of the Act. This was reinforced in *Baghai* at para. 77 and at paras. 84-85 where Armstrong J.A. stated:

In remitting the matter back to the application judge, I emphasize that while s. 134(5) of the Act may entitle [the condominium corporation] to more than it would get in an ordinary award of costs, the provision for “additional actual costs” does not automatically lead to whatever amount is claimed. Section 134(5) does not give counsel licence to spend the client’s money with impunity.

As I have just explained, there is a difference between the quantum of costs a losing party is reasonably expected to pay to the successful party, and the quantum of costs the successful party is reasonably expected to pay its own lawyer. But reasonableness remains the touchstone of both analyses.

[15] Consequently, “additional actual costs” in the context of this litigation includes those costs actually, and properly or reasonably, incurred by Durham in obtaining the order from Glass J. against Morton, over and above the \$10,000 costs award made by Glass J. This is how Gilmore J. interpreted this phrase in paras. 14-16 of her Reasons and, in this regard, she made no error of law.

Requirement to Explain Determination of Additional Actual Costs

[16] In the Court of Appeal decision in *Baghai*, released after the decision of Gilmore J. in this case, Armstrong J.A. emphasized that a court determining “additional actual costs” under s.

134(5) of the Act must consider what would be a reasonable amount for the condominium corporation to pay its own lawyer to obtain the compliance order. This assessment is based on the principle of *quantum meruit*. The court must then explain how it arrived at the right amount. It is not sufficient for the court to take a broad-brush approach, refer to a number of factors, and then provide a number – without providing the underlying calculations. (See *Baghai* at paras. 76-77, 81, 83.)

[17] Gilmore J. referred to the scant evidence that had been placed before her. She had the costs outline submitted to Glass J. on January 5, 2012 showing Durham’s costs being \$30,527 on a partial indemnity basis and \$50,878 on a substantial indemnity basis. She had a costs estimate in the range of \$8,000 to \$12,000 provided by Durham to Morton prior to the commencement of litigation. Finally, she had the affidavit of Durham’s lawyer to the effect that \$73,802.91 (and not \$50,878) was being claimed in the lien because, subsequent to January 5, 2012, “his office had determined that there was other legal work which had not – as of January 5, 2012 – been billed to the file.” As Gilmore J. noted in para. 17 of her Reasons, what Durham failed to provide to her was any evidence as to what costs were actually charged to, collected from, or acknowledged by Durham as owing to its lawyer. It would have been easy for Durham to have provided copies of invoices received from its lawyer and noted paid, or copies of invoices regarding disbursements. Durham’s lawyer could have provided dockets to show the time devoted to obtaining the compliance order and the amounts charged in regard thereto. Instead, Durham claimed privilege in regard to this information.

[18] Clearly, Gilmore J. was frustrated with the lack of evidence before her but, at the same time, she was concerned about referring the matter to an assessment officer to determine “additional actual costs” on the basis of further and better evidence. She decided that the case should not drag on. Morton had to be allowed to sell his condominium unit and Durham should be paid for legal fees and actual costs incurred in the matter. In an effort to work with what she had and to provide a just and timely resolution, she arrived at the figure of \$29,000. Unfortunately, how she arrived at that particular amount was not explained.

[19] Regrettably, we find that Gilmore J. erred in law in failing to provide the underlying calculations that led to the conclusion that \$29,000 was the proper amount to attribute to the costs order of Glass J. plus the additional actual costs incurred by Durham to obtain the compliance order against Morton.

Appropriate Order on Appeal

[20] Durham urges the Court to refer the matter back to Glass J. or, alternatively, to an assessment officer to determine “additional actual costs” pursuant to the guidance provided in *Baghai*. Morton urges us to allow the cross-appeal and find that Durham has not proven any additional actual costs under s. 134(5) beyond the cost award of \$10,000 made by Glass J.

[21] It must be noted that Durham was well aware prior to the motion before Gilmore J. that the calculation of its “additional actual costs” was very much in issue. In his Notice of Motion, Morton specifically asked that the lien of \$73,802.91 be discharged upon his paying \$10,000 or, in the alternative, that the court fix a “reasonable and fair sum” to be paid in order to have the

lien discharged. In his affidavit in support of his motion, Morton raised numerous questions relating to how the legal fees purportedly incurred by Durham to obtain the compliance order could possibly have been so high. In the Factum filed on behalf of Morton, his lawyer put Durham on notice that he would be arguing that Durham had failed to produce its lawyer's dockets and that Durham had not provided any details regarding the time purportedly spent on the file. Morton specifically alleged that the amount sought by Durham was unreasonable and unsupported by evidence.

[22] In the face of such direct notice of the issues to be argued before Gilmore J., it was incumbent upon Durham to provide the necessary evidence to support its claim as to the costs it had properly incurred in order to obtain the compliance order. Such evidence should have been available. No reason has been advanced as to why all relevant evidence could not have been tendered on the motion, or as to why a further – costly – reattendance before an assessment officer was, or is, necessary.

[23] Durham made a deliberate decision not to tender relevant and available evidence on the motion before Gilmore J. as to additional actual costs under s. 134(5). The only evidence before Gilmore J. relating to properly claimed costs under s. 134(5) was the costs award of \$10,000 made by Glass J. Consequently, any award made by Gilmore J. must be limited to this amount.

Disposition and Costs

[24] The appeal is dismissed. The cross-appeal is allowed. The substantive portion of the order of Gilmore J. dated May 18, 2012 is set aside and, in its stead, an order is granted that the sum owing from Morton to Durham under s. 134(5) of the Act is \$10,000. The costs order of Gilmore J. remains in effect.

[25] Morton seeks costs on a partial indemnity basis in the amount of \$10,946 in regard to the appeal and cross-appeal, and in regard to responding to a motion to admit fresh evidence that Durham served but did not pursue. Durham does not quarrel with the amount being sought by Morton. Costs are awarded against Durham in the amount of \$10,946 inclusive of disbursements and HST. As a result of the costs order, and the earlier costs order of \$6,000 against Durham made by Gilmore J., Durham now owes Morton the net amount of \$6,946.

[26] The lien in the sum of \$73,802.91 registered by Durham on March 30, 2012 as instrument number DR1074272 shall be discharged.

Aitken J.

Aston J.

Released: September 13, 2012

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JAMES A. MORTON

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REASONS FOR JUDGMENT

Aston J.
Aitken J.
Lederer J.

Released: September 14, 2012