CITATION: Elena Balland v. York Condominium Corporation No. 201, 2016 ONSC 2405
DIVISIONAL COURT FILE NO.: 51/16
DATE: 20160408

ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)

DAMBROT, STEWART, THORBURN JJ.

BETWEEN:	)	
	)	
ELENA BALLAND	)	*Self-Represented* Appellant
	)	
	)	
Appellant	)	
– and –	)	
YORK CONDOMINIUM CORPORATION NO. 201		*Benjamin Rutherford* for the Respondent
Respondent		
	)	
	)	**HEARD at Toronto:** April 5, 2016

BY THE COURT

REASONS FOR DECISION

THE ISSUE

[1] This is an appeal of a costs endorsement of K. Wright J., dated December 1, 2015. In her order, she awarded York Condominium Corporation No. 201 (YCC) costs in the amount of $9,344 which includes the cost of a plumber's attendance on March 3rd 2015 in the amount of $344 and legal costs in the amount of $9,000.

OVERVIEW OF EVIDENCE

[2] The Appellant is the owner of a condominium unit located at 205 Hilda Avenue, Unit 907. She represented herself before Wright J. and on this appeal.

[3] In May 2014, the Respondent, YCC's management notified the Appellant that access to her unit was required to inspect plumbing in the common area of the condominium building and

requested access to her unit to carry out plumbing repairs in her neighbour's unit by gaining access via the ceiling in her bathroom. The Appellant says she did not receive a satisfactory guarantee to cover damages so access was refused.

[4] On October 16, 2014, counsel for the Respondent wrote the Appellant a letter to advise her that representatives of the condominium corporation would attend with an engineer to inspect and evaluate the integrity of the fire separations and plumbing between her unit and the unit above her. This meant that they would be required to cut a hole in the ceiling of her bathroom.

[5] On October 21st, 2014, she advised that she did not grant permission to allow entry to her unit to repair damage to her neighbour's unit.

[6] On October 23rd, 2014 representatives came to her unit to conduct the inspection but she was at work so no inspection was carried out.

[7] Instead of communicating further with the Appellant to explain why access was required, the Respondent filed a Notice of Application on November 18, 2014, to obtain a court order giving them permission to enter the Appellant's unit.

[8] All further communication regarding routine details respecting the inspections was undertaken by the Respondent's legal counsel.

[9] On January 12, 2015 the Appellant wrote to the counsel for the Respondent to say that,

> Once I understood the matter of inspection I was never opposed to it … So you can go ahead with this inspection. I appreciate if you can schedule it after 12:30 when I have to take only ½ a day off or even better at 3 p.m.

[10] The Appellant thereby made it clear that she would permit access but wished to be present during any inspection and repair work.

[11] On January 13th, 2015, counsel for the Respondent confirmed the unit inspection would proceed on January 21st 2015 as follows:

> Further to our email correspondence …I confirm that the inspection of your unit will proceed on January 21, 2015, at approximately 12:30 p.m. You requested that the inspection take place after 12:30. You have been accommodated in this regard. Please be advised that it is likely that an attendance by YCC's 201's retained personnel will be necessary the next day to complete the remedial work to your bathroom following the inspection. As per my earlier correspondence to you the scope of work to be carried out is as follows:
>
> 1. All of your loose belongings will be removed from the washroom, put in a box and stored away for the duration of the inspection and remedial work following the inspection.

2. A tarp will be placed on the floor, wash hand basin, cabinets and toilet;
3. An opening will be made in the ceiling using a drywall knife. The size will depend on how close we can get to the area of inspection (There are wall mounted cabinets which may be a bit of a hindrance, the opening will be about 12-18 inches;
4. Once the conditions are reviewed, the drywall ceiling will be replaced. It is likely that the plasterwork will be completed the same day but the sanding and paint may have to be completed when dry the following day so you are asked to use the other washroom in the unit;
5. The bathroom with be vacuumed when work is complete;
6. To ensure that the dust in controlled, the bathroom fan will be operational at all times to ensure the dust does not get into the unit;
7. All personnel involved in this investigation will have shoe covers to ensure dust is controlled.

[12] On January 22, 2015 the Appellant permitted access and an inspection was carried out. During the inspection, the engineer cut a hole in the Appellant's ceiling to inspect a pipe. The Respondent did not repair the hole because the engineer was concerned that the piping installed did not meet *Building Code* and further work might be required.

[13] The portion of the ceiling that was cut out was simply replaced with Scotch tape. The Appellant had just completed renovations to her bathroom and was concerned about damage to the marble floor and wallpaper she imported from Europe.

[14] Several weeks went by without repairs to the bathroom ceiling.

[15] On February 19, 2015 the Respondent sought access in early March, 2015 to repair the damage to the Appellant's bathroom ceiling. In or about that time, the Appellant engaged legal counsel.

[16] As early as February 20th, the Appellant's counsel made attempts to resolve the issue by providing details as to the harm suffered by the Appellant as a result of the failure to repair:

> In an effort to resolve the issue of costs, please find attached photographs of the washroom as it was left by YCC No. 201. My client's past experience with 201 has been less than satisfactory. When approached with the most recent request, she expressed her concern about possible damage and was not provided with a satisfactory response until after the application was commenced. Following my client's cooperation, her fears materialized.
>
> Your client sent an attendant to her unit who was ill-equipped to carry out the task at hand. This attendant showed up without proper tools such as "shop vacs" and left my client's washroom in disarray.

> The attached photographs show a significant amount of debris that was left for my client to clean up.
>
> The drywall that was removed from the ceiling was reattached with what is apparently "Scotch tape." Your client's attendant stated that he did not know how to repair drywall. The damage to my client's ceiling remains. To date, your client has made no arrangements to repair the dry wall, prime and repaint the ceiling. Furthermore, your client's attendant damaged the washroom door with his ladder.
>
> …

[17] The Respondent did not address any of these specific concerns.

[18] On February 25th, 2015, the Appellant's counsel again wrote to Respondent's counsel as follows:

> Although your client has a legal right of entry to complete repairs and maintenance, they do not have the legal right to enter a unit for any reason whatsoever. The unit owner has the right to know the reason for condo management's need to enter. Both you and your client failed to disclose the reasons for entry despite my client's request that you do so.
>
> The reason for entry was not disclosed until you forwarded an email to my client after having served her with application materials. I've reviewed the application materials and have confirmed that proper disclosure was not provided. As a result, your client's application was premature.
>
> Furthermore, your client's costs are excessive especially in light of the fact that a paralegal performed the bulk of the work. Such materials are not complete in nature and should not cost more than $1,500.00. You will have to provide a bill of costs to the court. Kindly forward same to me at your earliest opportunity.
>
> Finally, your client's work has not been completed. Given my client's past experience with condo management, any issue of costs should be left until the work has been completed. Apparently, your client has a habit of failing to properly completely restore my client's unit to its former state. If costs are to be dealt with prior to completion of your client's work, we are potentially looking at multiplicity of actions.
>
> It is my suggestion that the application and the issue of costs be adjourned to a later date following the completion of your client's work. At that time, you will have completed your bill of costs, your client will have completed its remedial work and we can better assess the situation.

[19] Instead of providing a bill of costs or agreeing to postpone the costs matter until after the

remedial work was done, the Respondent's counsel advised that, "further materials will have to be exchanged."

[20] The exchange of communication in February 2015 makes it evident that the only issues requiring resolution were costs claimed by the Respondent for launching the Application and repairs to the Appellant's bathroom occasioned by the hole cut in her ceiling.

[21] The return of the Application was scheduled by the Respondent for March 3, 2015 the same day that the Respondent insisted the plumber attend the Appellant's unit to conduct repairs. This was understandably unsatisfactory to the Appellant who wished to be present while her premises (that had already been damaged), were being repaired.

[22] Despite having been advised that the attendance should be rescheduled because she could not be there, the Respondent ordered a plumber to attend the Appellant's unit on March 3rd. He could not gain access as the Appellant was not home and had changed the locks months before, following what she believed was an unauthorized entry by the Respondent to her unit.

[23] It is the cost of this attendance by the plumber that the Respondent sought to have included in its claim for costs before the Application judge.

[24] The Appellant granted access to her unit on March 18, 19 and 20 to change the pipe and fix the damage caused by cutting a hole in the ceiling.

[25] Since the Appellant had already provided access to the unit and all of the necessary work was carried out, the only issue before the court on December 1, 2015 was entitlement to and apportionment of costs.

[26] However, between March 3 and December 1, 2015, the Respondent proceeded to schedule further court attendances, and a cross-examination of the Appellant who was by then, self-represented.

[27] At the costs hearing before the K. Wright J., the Respondent presented a Bill of Costs in the amount of $27,942.72 (full indemnity) or $19,449.80 (partial indemnity).

STANDARD OF REVIEW

[28] The standard of review for alleged errors of fact or mixed fact and law is whether the judge made a palpable and overriding error (*Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 1-5 and 37*; Waxman v. Waxman,* 186 O.A.C. 201 at paras. 296-7).

[29] An award of costs should only be set aside if the application judge made an error in principle or if the costs award is plainly wrong (*Boucher v. Public Accountants Council (Ontario)*, 166 O.A.C. 281, at paras. 19 and 20).

COURT'S JURISDICTION:

[30] The Divisional Court has jurisdiction to hear this matter pursuant to ss. 19(1) and 19(1.2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The section reads as follows:

> 19(1) An appeal lies to the Divisional Court from,
>
> (a) a final order of a judge of the Superior Court of Justice, as described in subsections (1.1) and (1.2);
>
> …
>
> (1.2) If the notice of appeal is filed on or after October 1, 2007, clause (1) (a) applies in respect of a final order,
>
> (a) for a single payment of not more than $50,000, exclusive of costs.

THE ISSUE

[31] The only issue is whether the judge of first instance made an error in principle in her award of costs or an award that is plainly wrong.

ANALYSIS AND CONCLUSION

[32] In her reasons on the Costs Application, the judge held that, "I find that the respondent is responsible for the cost of the plumber's attendance on March 3rd, when he was locked out in the amount of $344… I do find that the respondent must be responsible for some portion of the legal costs incurred by the applicant. After taking into account the unique circumstances that attach to this case, I find costs in the amount of $9,000 to be fair and reasonable."

[33] The Court has the discretion to fix costs. Rule 57 of the *Rules of Civil Procedure* lists the factors to be considered when exercising the court's discretion under section 131 of the *Courts of Justice Act*.

[34] The list of factors set out in Rule 57 includes:

a) the amount of costs an unsuccessful party could reasonably expect to pay;
b) the complexity of the proceeding;
c) the importance of the issues;
d) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
e) whether any step in the proceeding was improper, vexatious, or unnecessary; and
f) the principle of proportionality: Rule 1.04(1).

[35] Furthermore, as set forth by the Court of Appeal in *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 2004 CanLII 14579 (ON CA), 71 O.R. (3rd) 291 (Ont. C.A.), the Court must bear in mind that the overall objective of fixing costs is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular

circumstances.

[36] In this case, the Applications judge failed to consider the following important facts in this case:

i. this was a very simple matter that involved obtaining access to the Appellant's unit which was obtained in January of 2015 for which minimal costs are warranted;
ii. after a preliminary exchange between the parties, instead of having building management clearly explain why access was required and attempt to resolve the matter with the Appellant, there was a precipitous and premature resort to legal action (and thus legal fees) on the part of the Respondent;
iii. the Appellant granted access to her unit at a very early stage (January 2015) after reasons were explained to her, with the proviso that the Applicant would make arrangements to take time off to be there;
iv. the Respondent did not contest the Applicant's wish to attend in January and she did;
v. notwithstanding that access had been agreed to, that the Applicant had notified the Respondent in advance that she wished to be in attendance, and alternative dates had been provided, the Respondent scheduled a court attendance in this matter on March 3rd, the same day that it sought access to her unit a second time (knowing that she would be in court). The Respondent knew or ought to have known the Appellant would not be available because they scheduled the court date;
vi. the Respondent sent a plumber to the unit on March 3rd knowing that the Appellant would not be home and knowing nonetheless that costs would be incurred for his attendance;
vii. reasonable overtures were made in February 2015 by Appellant's counsel (when she was represented by counsel) to try and resolve matters;
viii. this Application has only been about costs since March, 2015; and
ix. since March 2015, the Respondent has taken wholly unnecessary steps including several further court attendances and costly cross examinations which greatly lengthened the proceeding and added exponentially to the costs.

[37] In failing to consider the above factors, the Applications judge made a costs order that was wholly disproportionate to the facts and circumstances of this case and thereby made an error in principle.

[38] For these reasons, we conclude that the costs Order must be set aside.

[39] It therefore falls to this Court to consider what is fair and reasonable as between the parties.

[40] The Respondent advises that the actual costs incurred by the Respondent in this simple

matter that involves no important matters of principle, exceed $20,000. We do not believe these costs are reasonable. Moreover, these costs result largely from the fact that the Respondent engaged in protracted litigation by commencing legal proceedings prematurely, using legal counsel to address daily practical issues that could and should have been dealt with by management, and thereafter, prolonging the proceeding by adding many unnecessary steps. This matter could and should have been dealt with differently.

[41] For these reasons, we set aside the costs Order of the judge of first instance and substitute an Order granting no costs to either party on the costs motion before the judge of first instance or on this appeal.

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DAMBROT J.

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STEWART J.

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THORBURN J.

RELEASED: April 8th, 2016