Court File Number 03-SC-082662

SUPERIOR COURT OF JUSTICE
(SMALL CLAIMS COURT)

BETWEEN:

EVA OSVATH

Plaintiff

-and-

CARLETON CONDOMINIUM CORPORATION 237, BOARD OF DIRECTORS
CONDOMINIUM MANAGEMENT GROUP, SCOTT SMITH

Defendant

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REASONS FOR DECISION

DELIVERED BY THE HONOURABLE DEPUTY JUDGE R. HOULAHAN
On the 11th day of January, 2005, at OTTAWA.

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APPEARANCES:

Ms. E. Osvath — In Person

Ms. Nancy Houle — for the Defendants

Eva Osvath – vs – Carleton Condominium Corporation 237, Board of Directors, Condominium Management Group, Scott Smith

Tuesday,
January 11th, 2005

REASONS FOR DECISION

HOULAHAN, R., S.C.J. (S.C.C.):

The Plaintiff in this action is the owner of Unit 81G, Level 1, Sandcastle Drive in the City of Ottawa. It is a ground oriented condominium dwelling unit, legally described as Carleton Condominium Corporation, Number 237. She purchased this unit as her home in the year 2001 and took possession of it in March of 2002.

The Defendant, Carleton Condominium Corporation 237 is a registered condominium corporation under the Condominium Act of the Province of Ontario. The affairs of the corporation are overseen by a volunteer Board of Directors who are owners of units in the condominium development. The routine affairs of the corporation are handled by the Defendant, Condominium Management Group pursuant to a written agreement with the Condominium Corporation. The Defendant, Scott Smith is the property manager of Management Group, a position he has held for the last three years. It was Mr. Smith's responsibility to deal with the day-to-day affairs of the Condominium such as ensuring that the common elements of the Corporation were maintained and repaired as required and to carry out such other duties as directed by the Board of Directors.

In this action, Ms. Osvath is suing the Defendants for $10,000.00 in special and general damages pursuant to a wide ranging Statement of Claim. It appears from the breakdown of her damages annexed to Exhibit Number One, this sum was reduced from $18,961.20. I pause here to note that Exhibit Number One, which is the Plaintiff's book of documents was filed as an Exhibit at the beginning of the Trial with the consent of the parties.

Ms. Osvath gave lengthy evidence at trial. After a careful review of her evidence, her claims can be distilled into three general categories. These are firstly, failure by the Defendants to properly maintain the common elements of the Corporation, particularly as they related to her unit. Secondly, discrimination against her by the Defendants in the provision of maintenance to the common elements on her property and, thirdly, for harassment of her by the Defendants which made her use and enjoyment of her home difficult and un-enjoyable.

Ms. Osvath directed much of her testimony toward the claim for damages resulting from the Defendants' failure to maintain the common elements.

This branch of her claim involved several specific matters with which I will deal individually in these reasons.

1. <u>The eaves trough on her unit:</u>

   Ms. Osvath testified that the defendant Corporation and the property manager did not clean the eave troughs on her home. As a result, water backed up under the shingles

causing damage to the interior of her unit. She testified she asked the Condominium Corporation to install leaf guards in the eaves, which it refused to do.

Ms. Osvath led no evidence to show any damage to the interior of the her unit and she did not introduce any estimate of the cost of repairing the alleged damage. She testified she intended to rely on her own estimate of the damage which she placed at $75.00.

Mr. Smith who gave evidence on behalf of the Defendants detailed how the eaves were cleared twice a year. He also indicated the Board of Directors of the Corporation has resolved not to provide leaf guards as requested by the Plaintiff.

2. **Parging of her foundation:**

Ms. Osvath testified she requested the Defendants to repairs the parging on her foundation. Cracks were appearing in the foundation wall of her unit which the Defendants refused to repair. On this point, Mr. Smith testified that an inspection by himself revealed that some parging was necessary and it was provided. More importantly, he pointed out that the foundation is a common element of the Condominium Corporation and not solely owned by the Plaintiff, a conclusion which the Court accepts.

3. **Failure to correct the grade of the yard abutting her unit and remove certain bushes at corner of her yard:**

Ms. Osvath testified that the grade of the yard abutting her unit sloped toward the foundation so that run off water flowed toward the foundation rather than away from it. She also stated that a clump of lilac bush should be removed from the corner of her property to enhance its appearance. Ms. Smith testified that he inspected the yard and found no problem with it. He went on to state that the Corporation had been monitoring the terrain of the Condominium's lands generally with a view to addressing problems which arose from a general dehydrating of the soil which caused it to sink in several locations.

According to Mr. Smith, several engineering works were undertaken to address this situation, including the installation of a watering system immediately abutting Ms. Osvath's unit.

Mr. Morris testified that the lilac bushes were on the common elements of the Corporation and were not the source of any difficulty for the Plaintiff. The Board resolved that they would not be removed pursuant to the Plaintiff's demand.

Again, Ms. Osvath lead no independent or technical evidence to support her complaints resulting from the soil conditions or the presence of the lilac bushes.

4. **Failure to repair the soffits on the front of her unit:**

Ms. Osvath testified that loose soffits on the front her unit rattled in wind, thereby depriving her of sleep and interfering with her enjoyment of her home. I find that the soffits were

loose for a period of time. It was her evidence that the Defendants initially denied there was any problem with them. While this may have been the case, Mr. Smith testified that once the problem was located, it was repaired and there has been no problem with it since.

5. **Loose window screens:**

Ms. Osvath testified that several of the screens in the windows of her unit were loose. She drew this problem to the attention of the Board and it refused to address it.

Mr. Smith, for the defence, testified that screens and similar amenities attached to a unit are the unit owner's responsibility to repair and maintain. Ms. Osvath disputes this suggestion and argues that the screens in question are a common element and therefore the responsibility of the Corporation to maintain. I do not agree with this proposition and conclude that it was Ms. Osvath's personal responsibility to repair the screens and other attachments to them.

6. **Refusal to repair the weather stripping and hardware on the window of her master bedroom:**

On this matter, Ms. Osvath testified that the weather stripping on her master bedroom window was defective and needed to be replaced. The hardware on the window was broken and the Corporation refused to repair or replace it.

Mr. Smith testified that weather stripping on the window did not need repair and again the hardware on the window was the unit owner's responsibility and not that of the Condominium Corporation, a proposition I accept.

The Plaintiff lead no evidence as to support her complaint about the weather stripping and no evidence was introduced to suggest that it was the source of any problem with her use and enjoyment of the unit or the cause of any damage to it.

7. <u>Loose aluminum siding on her unit:</u>

Ms. Osvath testified that there is loose aluminum siding on her unit which she requested the Corporation repair, which it has refused to do.

Mr. Smith testified he investigated this complaint and found all the siding to be properly secure and concluded this complaint to be without merit.

8. <u>Defective window sills in the dining room and powder room:</u>

Ms. Osvath testified that the sills of the windows in the dining room and powder room of her unit are rotten and must be replaced to avoid consequential damage to her unit. It was her evidence that the Condominium Corporation denied her request that this problem be addressed.

Mr. Morris testified that the Board of Directors of the Corporation is aware of this deterioration of the windows in the Plaintiff's unit and several other units. It was his evidence that the windows in several units in the condominium complex are deteriorating due to age as a result of which the Board has commissioned a study with a view to having them all replaced when the extent of the replacements and costs thereof are available to the Condominium Corporation.

9. **Neighborhood dogs trespassing onto the property:**

Ms. Osvath testified that as a result of neighborhood dogs trespassing over her yard, she requested that the Corporation erect a fence. This request was considered and denied by the Board.

Mr. Smith testified that it was not the policy of the Board to erect fences to accommodate the private purposes of individual owners. He pointed out that the By-laws of the Condominium enable owners to erect fences to enclose or enhance their units, provided they are approved by the Board. Ms. Osvath has not availed herself of this right and maintains that the Board is mistreating her by its failure to provide her with a fence. I completely reject this suggestion.

The Plaintiff gave evidence on several other problems and complaints she drew to the attention of the Board, all of which it denied. I do not propose to deal further in these reasons with these complaints except to say that they were generally minor in nature

and often involved the common elements of the Corporation and not the Plaintiff's exclusive use area.

As I have indicated, Ms. Osvath testified that the cost of remedying all the complaints she has with her unit is over $10,000.00. She candidly admits that this estimate is hers alone. She has not seen fit to bring any evidence before the Court to support the cost of repairing the items complained about.

Turning to the second aspect of Ms. Osvath's claim that the Defendant's discriminated against her by consciously and deliberately refusing to address her complaints and requests for repairs and service on and about her unit.

In support of this claim, Ms. Osvath asks the Court to conclude from the fact that the majority of her complaints and requests for service were denied by the Board, they were discriminating against her. She pointed to instances in the condominium complex where the Corporation had erected a fence for a unit owner or permitted an owner to affix a structure to the common elements or place landscaping on the common elements. In each of the instances raised by Ms. Osvath, Mr. Morris, on behalf of the Defendant, demonstrated that the particular fence was legally erected by the unit owner. He further stated no structure was annexed to the common elements as alleged by the Plaintiff, and the landscaping she referred to was not on the common elements.

On all of the evidence adduced by the Plaintiff in support of this claim, I cannot find the slightest hint of discrimination by the Corporation against the Plaintiff. The Board of Directors of the

Corporation is charged with complying with the Declaration and By-laws of the Corporation and ensuring that all unit owners do the same. Indeed, Ms. Osvath's complaints were extensive, persistent and burdensome to the Board, the property manager, and Mr. Smith. I find that all the Defendants dealt with her at all times in a fair, business-like and courteous manner.

Thus, her claim for unspecified damages for discrimination will be dismissed.

The last aspect of Ms. Osvath's claim is for damages for harassment of her by the Defendants. Ms. Osvath testified that on several occasions the Board and Mr. Smith, in particular, required her to remove plants and other material she had placed at the rear of her property to beautify it and demark it from the balance of the condominium property. She described how she placed large barrels on the boundary between her unit and the common area of the Corporation where she perceived it to be. In each case, the property manager contacted Ms. Osvath and requested that she remove the offending items from the common elements. This correspondence has been filed as Exhibits 7, 8, 9, 11, 12, 13 and 14 at Trial.

The Condominium Corporation was compelled to advise Ms. Osvath that if she did not remove certain pots and the barrels from the common elements, it would do so and charge her for such removal. I find as a fact that these items were placed on the common area of the Corporation by the Plaintiff without regard to their location and without ensuring they were on her exclusive use area. Ultimately, the Corporation removed the barrels.

In reviewing all the correspondence which passed between the Condominium Corporation and the Plaintiff and the evidence of Mr. Morris and Ms. Rotterman, I find there is absolutely no basis for the claim of harassment.

I find as a fact the Defendants dealt with Ms. Osvath at all times in a reasonable and civil manner in the discharge of their duties as managers of the condominium on behalf of all owners.

In assessing generally the evidence of Ms. Osvath in support of her claims, I find it does not support any of the allegations she has made against the Defendants. I accept the evidence of Mr. Morris and Ms. Rotterman over that of Ms. Osvath on all points. I observed Ms. Osvath's demeanor in the witness box as well as her attitude toward the Defendants' witnesses, Counsel for the Defendants and indeed the Court itself and conclude that she is an unco-operative and argumentative person who made no effort whatsoever to comply with the Rules and Regulations of the Condominium Corporation and refused to co-operate with the reasonable requests of the property manager. In fact, she consciously set about obstructing them on every occasion.

As to costs, I have given this matter anxious consideration. The defence of an unfounded law suit by an owner in a condominium against the Corporation creates a financial burden which must be borne by all other owners in the development. In the instant case, I have concluded this litigation was completely and utterly without merit.

In these circumstances and with an attempt to obtain partial indemnification to the Condominium Corporation for its Counsel's costs which will undoubtedly be passed onto all owners, I would award the Defendants a counsel fee of $1,500.00 in addition to all necessary disbursements incurred by the Defendants. If there is any difficulty in assessing the disbursements, Counsel may contact me. The costs award will bear interest at five (5) per cent per annum from the date of these Reasons for Decision.

The Honourable Deputy Judge R. Houlahan
Superior Court – Small Claims Court

Released:
Jan. 11/05

(1)

EVA OSVATH

APPELLANT

CARLETON CONDOMINIUM CORPORATION 237 et al.

RESPONDENT

Court File No. 05-DV-001102

July 19, 2005

The sole issue before me is whether or not an extension of time to file a Notice of Appeal is required by the strength of the merits on which the appeal is grounded in order for justice to be served. The A. has not persuaded me that these are valid issues to be heard at appeal.

The A. puts forward numerous grounds for the appeal.

1. Deputy Judge Houlahan demonstrated a reasonable apprehension of bias towards the A.

"The apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information." (Committee for Justice and Liberty v. Canada (National Energy

ONTARIO
DIVISIONAL COURT

PROCEEDING COMMENCED AT OTTAWA

SUPPLEMENTARY MOTION MATERIAL OF THE APPELLANT

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Board per de Grandpré J.): "... the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case". (per Cory J.). The grounds for an apprehension of bias must be substantial. The issue must be considered in the context of judges swearing to uphold the duty of impartiality

I have read the Transcript of proceedings before Deputy Judge Houlahan. He conducted the case in what could be described as a no-nonsense, direct, to the point fashion. At times, his statements may have seemed brusque. Nevertheless, a reasonable person looking at the entire proceedings would not reasonably come to the conclusion that Deputy Judge Houlahan had been partial to the Rs or had been biased in their favour, nor would such a reasonable person have had any apprehension in this regard. The transcript simply does not support the A's first ground of appeal that there is a reasonable apprehension of bias on the part of Deputy Judge Houlahan.

2. Deputy Judge Houlahan ignored or refused to accept evidence brought forward by Ms. Oswath.

Deputy Judge Houlahan systematically went through each of the A's complaints, listening to her oral evidence and asking her to identify any documentary evidence, including photographs, that related to the issue in question. He quite properly would not let the A. become repetitive in her evidence, purport to give expert evidence herself, repeat hearsay or otherwise adduce

inadmissible evidence. In that regard, the A. was held to the same rules of evidence as other litigants. Throughout the trial, Deputy Judge Houlahan took many opportunities to explain to the A. what she could and could not do in rendering evidence. In that way he attempted to be helpful to her and to the process, but without crossing the line by assuming responsibility for the presentation of her case. I am not persuaded that there is any valid issue for appeal regarding Deputy Judge Houlahan's ignoring or refusing to consider admissible evidence favourable to the A. He was entitled to make findings of credibility, which he did, and to assign weight to the evidence accordingly

3. Deputy Judge Houlahan relied on the testimony of a "phantom witness".

On five occasions in his Reasons for Judgment, Deputy Judge Houlahan referred to a Ms. Morris as having given certain evidence. It was clear from the summary of evidence attributed to "Ms Morris" and from the transcript of the proceedings that Deputy Judge Houlahan was referring to the evidence of Scott Smith when he inadvertently used the name Morris. Deputy Judge Houlahan confirmed this in an Addendum to Reasons released June 15, 2005. He was entitled to do so (See Ricketts v Ricketts). This inadvertent use of the name Morris in the Reasons for Judgment does not create any

substantial ground of appeal.

4. Deputy Judge Haulahan erred in determining whether Ms. Oswald was entitled to damages for costs of repairs, based upon the evidence submitted, as opposed to determining whether Ms. Oswald was entitled to a Writ of Mandamus.

The A. in her pleadings and at the hearing in the Small Claims Court was seeking damages by compensation, not relief by way of mandamus. The Small Claims Court, in any event, does not have the jurisdiction to grant relief by way of a writ of mandamus. This potential ground of appeal is totally without merit.

5. Conclusion

I have not been persuaded that an extension of time to allow the filing of a notice of appeal is required to ensure that justice is done, because the grounds of appeal put forward do not show any prospect of success.

Leave to extend the time for filing a notice of appeal is denied. The parties may make written submissions on costs limited to no more than 5 pages each within 2 weeks of today's date.

Aitken J.

Eva Oswath v. C.O.C. No. 237, Board of Directors, Condominium Management Group, and Scott Smith

Costs Endorsement

Aug. 4, 2005.

The Rs are seeking their costs on a substantial indemnity basis in the amount of $10,312.98. The A. takes the position that each party should bear its own costs.

The A's motion for an extension of time for serving and filing a Notice of Appeal from the judgment of Deputy Judge Houlahan was denied. I found that the A. had failed to satisfy her burden of establishing that the grounds of appeal demonstrated any prospect of success.

The Rs were put to significant expense to respond to the A's motion, and more particularly, to respond to the various alleged grounds of appeal. That expense will be passed on to the unit owners at the condominium to the extent that it is not paid by the A. Litigants have a responsibility to make sure their claims in the context of litigation have some semblance of merit before putting others to considerable expense responding to the claims.

On two occasions, the R. offered to let the A withdraw her motion on a without costs basis - a resolution that

would have been better for the A. than the eventual court order, assuming I make some order for costs against the A.

Two court appearances - with attendant preparation - were involved.

The rates charged by the R's lawyers are within an appropriate range, considering their years of call to the Bar and their specialization.

The A. shall pay the R's costs fixed in the amount of $7,500 and payable within 30 days.

Ritchie J