IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Getzlaf v. The Owners, Strata Plan VR 159,* 2015 BCSC 452

Date: 20150319
Docket: S148651
Registry: Vancouver

Between:

Michael Daniel Getzlaf

Petitioner

And

The Owners, Strata Plan VR 159

Respondent

Before: The Honourable Mr. Justice Abrioux

Oral Reasons for Judgment

The Petitioner:	Self Represented
Counsel for Respondent:	S. Armstrong
Place and Date of Hearing:	Vancouver, B.C. March 12, 2015
Place and Date of Judgment:	Vancouver, B.C. March 19, 2015

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I: INTRODUCTION

[1] These reasons for judgment shall be issued in written form in due course. When I do so, I reserve the right to make stylistic or grammatical changes. The substance of what follows, however, shall remain the same.

[2] The petitioner owns a strata unit, being unit 104-540 Lonsdale Avenue, North Vancouver, British Columbia (the "Strata Unit").

[3] The respondent strata corporation, amongst other responsibilities, has an obligation to manage and repair common property.

[4] The petitioner seeks the following orders:

- a remedy for the actions of the respondent regarding the replacement of the upper parkade membrane project;
- that the respondent restore the upper parkade to its original design, being a roof top garden;
- that the respondent restore the petitioner's brick wall foundation such that he can then install anchor posts for the installation of a fence;
- that the respondent be enjoined from removing the petitioner's existing privacy screen without his authorization; and
- a reversal of fines levied by the respondent.

[5] For the reasons that follow, the petition is dismissed.

II: BACKGROUND

[6] The facts giving rise to this proceeding are largely not in dispute. What follows is an edited excerpt from the facts set out in the petitioner's affidavit #1, filed November 10, 2014, and the respondent's written summary of argument.

[7] The petitioner is a self-employed licensed contractor who has worked in the home renovation industry since 1991.

[8] In September 2010, he investigated the purchase of the Strata Unit. It was located in a building consisting of four units per floor, totaling 36 units. The Strata Unit was located on the ground floor at the rear of the building, adjacent to a lush and extensive garden located on the roof of the upper parkade.

[9] The Strata Unit was very private, which was the main reason the petitioner was interested in acquiring it. He purchased it and took possession in November 2010. The Strata Unit is the only lot that sits entirely on the garden roof/upper underground parkade roof system. All of its rooms overlooked the garden.

[10] When the Strata Unit was purchased, the patio consisted of a solid concrete aggregate slab over the garden roof membrane with a brick perimeter foundation wall approximately 18"-24" high. This surrounded what the petitioner claims was a limited common property patio.

[11] The parkade membrane at issue in this proceeding covers a large area and a portion of the parkade membrane is below the petitioner's strata lot and patio.

[12] It is not in dispute that the parkade membrane is common property.

[13] It is also not in dispute that, by 2013, the respondent had received advice from three engineering firms that the parkade membrane needed to be replaced. In a report dated December 14, 2012, McGrath Engineering Ltd. stated:

> The roof slab membrane has reached the end of its service life. This is based on the extent of leaks. Continuing leakage through the slab has caused corrosion damage which will continue to increase if leakage is not addressed.
>
> There are various methods to correct the leaks through the slab. The best option is to replace the roof membrane and landscaping.

[14] During investigation of the membrane failure and also during some initial trial application of sealant, it became apparent that roots of plants and trees in the garden area had contributed to the membrane failure. This was conveyed by the

strata council to all owners in a memo entitled "Waterproofing Project Information Update", dated July 28, 2013.

[15] On November 6, 2013, the strata council gave notice to all owners that a question and answer session regarding the proposed parkade roof membrane replacement project would take place on November 19, 2013. The notice confirmed that engineering reports would be available for review at the November 19, 2013 question and answer session.

[16] At the November 19, 2013 meeting, owners were advised that the existing landscaping above the upper parkade roof would be replaced with rock ballast.

[17] Pursuant to the provisions under section 45 of the *Strata Property Act*, S.B.C. 1998, c. 43 (the "*Act*"), a strata corporation is required to give to all unit owners at least two weeks' written notice of an annual general meeting or special general meeting ("SGM") and the notice must include a description of the matters to be voted on at the meeting, including the proposed wording of any resolution requiring a three-quarter vote.

[18] On February 28, 2014, the respondent provided notice to all owners of a SGM to be held on March 24, 2014 to consider a resolution for replacement of the upper parkade roof membrane. Pursuant to section 71 of the *Act*, this resolution required the approval of three quarters of the owners present at the SGM.

[19] The notice indicated that specifications for the membrane replacement work had been prepared by Inter-Provincial Roof Consultants Ltd. ("IPRC").

[20] A copy of IPRC's specifications was available for review at the March 24, 2014 SGM for any owner to look at. These specifications showed the area where the upper parkade membrane replacement work would be performed. The work included the petitioner's patio deck and the patio deck of one other unit owner.

[21] IPRC's specifications indicated that:

- polystyrene insulation and filter cloth was to be installed over the completed membrane;
- new high density, concrete pavers were to be installed over the completed filter cloth at both patio deck locations; and
- clean, washed, river rock was to be installed on the remaining roof surface.

[22] At the March 24, 2014 SGM, all owners were advised that the existing landscaping above the upper parkade roof would be replaced with rock ballast.

[23] The petitioner attended the March 24, 2014 SGM and voted against the resolution. Thirty-two of the 34 owners present at the SGM, that is significantly more than the three quarters required pursuant to section 71 of the *Act*, voted in favour.

[24] The membrane replacement work was then undertaken and completed in the Fall of 2014.

[25] On September 16, 2014, the petitioner wrote to the respondent seeking permission to install a fence to enclose his patio.

[26] On September 22, 2014, the respondent responded through its property manager, advising in part:

> The area outside your unit is still considered to be a construction site and the garage reroofing project is not yet complete. Council further wishes to confirm that council has not granted you permission to install anything on the common property patio area in front of your unit. The … reroofing project has been extensive and careful consideration must be given prior to construction of any such fences or enclosures on common property. All of the outside common areas need to be carefully considered so as to not compromise the design and integrity of the new roof system.
>
> Council further wishes to advise that when the reroofing project has been signed off as complete, the inspection company will provide [its] recommendations for any type of construction for which permission may be requested. Under no circumstances should anything be done on or to the common property of Strata Plan VR-159 prior to final sign off from the inspection company and receipt of formal permission from council.

[27] Notwithstanding this correspondence, the petitioner commenced construction of a fence on the patio adjacent to his unit.

[28] On October 9, 2014, the respondent again wrote to the petitioner and stated:

> We note that you have proceeded without approval to construct a fence around the patio in defiance of previous letters to you advising you not to do so.
>
> We have no other alternative than to start levying fines in accordance with our bylaws.
>
> If you wish, you can submit ***detailed*** plans for approval, however, in the meantime, you are instructed to cease the construction of this fence.
>
> As communicated in the past, Strata Council is prepared to work with you in an amicable manner to resolve this issue.
>
> [Emphasis in the original.]

[29] On October 29, 2014, the petitioner replied to the respondent, indicating that he would not remove his "privacy screen". He also advised of his intention to reinstall a shed on "his" common property. He has since placed a gazebo-type structure and a fire pit on the patio in question.

[30] On October 31, 2014, the respondent invited the petitioner to attend a strata council meeting on November 4, 2014 to discuss the petitioner's October 29, 2014 letter. He chose not to attend.

[31] On January 29, 2015, the respondent received an estimate from Kennedy Construction for the installation of a privacy fence, bench seating, and a garden shed consistent with the appearance of the rest of the strata complex.

[32] The respondent has levied fines on a monthly basis against the Strata Unit for what it says are breaches of its bylaws.

III: LEGAL PRINCIPLES

[33] Section 72 of the *Act* provides:

> **72** (1) Subject to subsection (2), the strata corporation must repair and maintain common property and common assets.

> (2) The strata corporation may, by bylaw, make an owner responsible for the repair and maintenance of
>
> > (a) limited common property that the owner has a right to use, or
> >
> > (b) common property other than limited common property only if identified in the regulations and subject to prescribed restrictions.
>
> (3) The strata corporation may, by bylaw, take responsibility for the repair and maintenance of specified portions of a strata lot.

[34] Section 164 provides:

> **164** (1) On application of an owner or tenant, the Supreme Court may make any interim or final order it considers necessary to prevent or remedy a significantly unfair
>
> > (a) action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant, or
> >
> > (b) exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.
>
> (2) For the purposes of subsection (1), the court may
>
> > (a) direct or prohibit an act of the strata corporation, the council, or the person who holds 50% or more of the votes,
> >
> > (b) vary a transaction or resolution, and
> >
> > (c) regulate the conduct of the strata corporation's future affairs.

[35] Certain of the principles that apply in this proceeding include:

- a strata corporation, in carrying out its mandate, must consider and act in the best interests of all the owners. It must endeavor to accomplish the greatest good for the greatest number. See *Gentis v. Strata Plan VR 368*, 2003 BCSC 120 at para. 24;

- “significantly unfair" encompasses at the very least oppressive conduct and unfairly prejudicial conduct or resolutions. “Oppressive conduct” has been interpreted to mean conduct that is burdensome, harsh, wrongful, lacking in probity or fair dealing, or has been done in bad faith. "Unfairly prejudicial conduct" has been interpreted to mean conduct that is unjust and inequitable. See *Gentis* at para. 27;

- strata corporations must often utilize discretion in making decisions which affect various owners or tenants. At times, the corporation's duty to act in the best interests of all owners is in conflict with the interests of a particular owner, or group of owners. Consequently, the modifying term "significantly" indicates that the court should only interfere with the use of this discretion if it is exercised oppressively, as defined above, or in a fashion that transcends beyond mere prejudice or trifling unfairness. *Gentis* at para. 28; see also *Reid v. Strata Plan LMS* 2503, 2003 BCCA 126 at para. 27; and

- it is no justification for an owner to say that he was unaware or had forgotten that prior permission was required before he could erect a fence on common property. A strata corporation's demand that such a fence be removed does not amount to oppressive conduct. A petitioner who seeks what is essentially injunctive relief should come to court with "clean hands". See *Barnes v. Strata Corp. NW 3160*, [1997] B.C.J. No. 1081, 1997 CanLII 1021 (S.C.) at paras. 6, 10-11.

IV: PARTIES' POSITIONS

[36] The petitioner's position includes:

- the respondent has acted in a "significantly unfair" manner contrary to section 164(1) of the *Act*. In particular, it has not reinstated the landscaping to the situation that existed when he bought the Strata Unit, before the remedial membrane project was undertaken;

- this has resulted in a loss of privacy which affects his day-to-day enjoyment of the Strata Unit and likely reduces its value;

- the respondent has breached section 72(1) of the *Act*. Its obligation to "maintain common property" means that it must restore the area that was affected by the remedial work to substantially the same appearance as was the case prior to the resolution being approved at the March 24, 2014 SGM; and

- he was give verbal permission by Mr. Gerald Macey, the respondent's president, that he could erect a privacy screen in order to regain privacy lost due to the remedial work. Accordingly, he is not in violation of the respondent's bylaws.

[37] The respondent's position includes:

- the petitioner has breached the strata corporation bylaws by:

  (a) making an alteration to common property (the erection of a fence and the installation of a shed) without first obtaining the written approval of the strata corporation;

  (b) positioning an outdoor propane-fueled patio heater underneath the above balcony and adjacent to the petitioner's new combustible structure, thereby increasing the risk of fire; and

  (c) attaching a structure of a combustible construction to the building, in breach of zoning and construction bylaw regulations;

- the structures that the petitioner has erected on his patio pose a risk of damage to the parkade roof membrane that was recently installed. It relies on correspondence from IPRC to the respondent on January 22, 2015 which references potential risk to the remedial work undertaken by the petitioner's unauthorized alterations; and

- although the petitioner asserts that he received verbal approval from Mr. Macey to install a privacy fence, this is denied by Mr. Macey. In any event, under the strata corporation bylaws, any consent must be in writing and is revocable at any time.

V: DISCUSSION

[38] I have some sympathy for the fact that significant changes had to be made to the area adjacent to the petitioner's strata unit after it was purchased which resulted

in a loss of privacy and negatively impacted the aesthetics of his surroundings. The "before and after'' photographs entered into evidence clearly demonstrate this.

[39] However, when I apply the principles to which I have referred to the circumstances of this case, I conclude that the petition should be dismissed. The respondent's conduct was not "significantly unfair". My reasons include:

> (a) the respondent took reasonable steps to inform the unit owners of contemplated repairs that were clearly required for the maintenance and preservation of the common property. In fact, the substantial garden that was removed was a contributing cause to the need for the extensive renovation project;
>
> (b) the respondent also complied with the *Act*'s notice and voting requirements when obtaining authorization to proceed with the membrane replacement;
>
> (c) the petitioner asserts that the patio was limited common property, but there is no evidence that such a designation was ever made to that effect by the respondent, only the petitioner's belief that this is so;
>
> (d) the respondent has not disregarded the petitioner's desire for privacy. It is in the process of obtaining estimates for the installation of privacy screening, fencing, and plants for the benefit of units 103 and 104 (the petitioner's unit) that would be consistent in appearance with the rest of the strata complex;
>
> (e) the respondent has a statutory mandate to care for the common property and ensure its available use for all owners. Accordingly, a strata corporation's order that an owner remove paving stones and potted plants from common property does not amount to a "significantly unfair" act. See *Fenby v. The Owners, Strata Plan NW 228*, 2002 BCSC 936 at paras. 38-39;
>
> (f) there is no basis for reversing the fines that have been levied by the respondent. That is because the petitioner is in breach of the respondent's

bylaws. He also ignored clear warnings that he should not proceed with his expressed intended course of conduct and that the consequences of doing so included the fact that fines would be levied. In addition, he chose not to attend the November 4, 2014 meeting where his concerns were to be discussed. He does not come to court with clean hands;

(g) this also applies to the petitioner's request that the court order that he be permitted to install a privacy screen. The respondent has taken steps to address the petitioner's concerns but the petitioner has chosen not to participate in the process;

(h) I do not need to decide whether to accept the petitioner or Mr. Macey's account as to whether verbal permission was provided for some of the work undertaken by the petitioner. That is because the respondent's bylaws provide that any such approval must be in writing; and

(i) the legal authorities to which I was referred by the petitioner are, with respect, of no assistance to me. They were either decided under statutes from other provinces and/or relate to entirely different circumstances than those that exist in this proceeding.

[40] In reaching my conclusions, I have not considered the respondent's allegations that the petitioner's unauthorized structures may be a cause of damage to the common property and, in particular, the replaced membrane. In my view, those assertions amount to inadmissible opinion evidence.

VI: CONCLUSION

[41] The petition is dismissed.

[42] The respondent is entitled to its costs of this proceeding at Scale B.

[43] I also dispense with the petitioner's approval as to form on the order.

"Abrioux J."