

**Hadani v. Toronto Standard Condominium Corp. No. 2095, [2016] O.J.
No. 3544**

Ontario Judgments

Ontario Superior Court of Justice

S.S. Marr Deputy J.

Heard: February 29, April 15 and June 16, 2016.

Judgment: June 30, 2016.

Court File No.: SC-14-00000644-0000

[2016] O.J. No. 3544

Between Rahim Hadani, Plaintiff, and Toronto Standard Condominium Corporation No. 2095, Defendant

(31 paras.)

Case Summary

Real property law — Condominiums — Condominium corporation — Liability — Unit holders — Liability of — For default on payment of common fees — Lien rights of condominium corporation — Action by Hadani for return of monies spent to discharge a lien registered on his condominium unit by the defendant condominium corporation dismissed — The evidence supported the defendant's claim that the plaintiff's washing machine caused flood damage to a unit directly below his — The condominium registered a lien for \$16,599 for the repairs — The condominium corporation had not acted unreasonably in its investigation of the flooding, and had a statutory right under the Condominium Act to place a lien on the property for its costs of remediating the damage.

Action by Hadani for return of monies spent to discharge a lien registered on his condominium unit by the defendant Toronto Standard Condominium Corporation. In 2013, the condominium corporation registered a lien against the plaintiff's unit for \$16,599, which it claimed as costs of repairing water damage caused by the plaintiff's leaking washing machine. The plaintiff discharged the lien by borrowing money to pay it. The plaintiff claimed for disgorgement and unjust enrichment. The defendant denied that his machine had caused the damage, and that it had been recently inspected and serviced. The parties agreed that the issue was not whether the plaintiff's machine actually caused the flooding, but whether the condominium had acted reasonably in registering the lien.

HELD: Action dismissed.

While the parties had agreed that it was not necessary to determine the cause of the flooding, the Court found as a fact that the defendant's washing machine leaked and caused the damage. The condominium corporation had not acted unreasonably in its investigation into the cause of the flood, and had a statutory right under the Condominium Act to place a lien on the property for its costs of remediating the flood.

Statutes, Regulations and Rules Cited

Condominium Act,

Counsel

C. Tonks (lawyer) for the Plaintiff.

K. Genest (lawyer) for the Defendant.

REASONS FOR JUDGMENT

S.S. MARR DEPUTY J.

THE CLAIM AND DEFENCE

1 The Plaintiff seeks \$16,599.68 in damages. The Plaintiff was the owner of Penthouse Unit No.4. ("PHO4") in the Defendant condominium corporation, which unit the Plaintiff leased to residential tenants. The Defendant registered a lien against the Plaintiff's condominium unit. The letter to the Plaintiff from the Defendant's lawyer (Tab 12 of Exhibit 1), dated October 31, 2013, demands payment of \$16,599.68. It is not disputed in this action that the Plaintiff's bank/mortgagee TD Canada Trust (which was cc'd on the October 31st demand letter) paid the Defendant the \$16,599.68 demanded by the Defendant. The money paid was added to the Plaintiff's line of credit with TD Canada Trust.

2 The Plaintiff's claim seeks the return of the \$16,599.68, (plus the 4% interest paid to TD Canada Trust on the Line of Credit) on the basis of disgorgement and unjust enrichment.

3 In the Statement of Claim, the Plaintiff asserts that the floods which occurred in Lower Penthouse 06 ("LPH06"), the unit below the Plaintiff's unit, were not caused by the washing machine in the Plaintiff's unit and the Defendant had no right to register a lien for the cost of the flood or to charge the Plaintiff the sum of \$16,599.68.

4 In its Defence, the Defendant asserts that the three leaks in LPH06 were caused by a washing machine leak, and asserts that the Plaintiff was responsible for damage to LPH06, and that the lien was proper under the provisions of the Condominium Declaration. Accordingly, the Defendant denies any liability to the Plaintiff.

THE LAW OF UNJUST ENRICHMENT

5 The Supreme Court of Canada set out the essential elements to establish a claim for unjust enrichment in *Garland v. Consumers' Gas Company*. The plaintiff must show that:

- (a) The defendant was enriched;
- (b) There was a corresponding deprivation to the plaintiff; and
- (c) There was no juristic reason for the enrichment.¹

THE CONDOMINIUM DECLARATION

6 The Condominium Declaration is found at Tab 28 of Exhibit 4.

7 Para 6.2 of the Declaration provides:

Each Owner shall be responsible for all damage to his or her Unit and to any and all other Units and to the Common Elements which is caused by the negligence of the Owner, his or her tenants, their

occupants of the Unit or their visitors, or by the failure to so maintain and repair his or her Unit or to so maintain the portions of the Common Elements upon which such Owner has exclusive use.

8 Para 7.1 of the Declaration provides:

Each Owner shall indemnify and same² harmless the Corporation from and against any loss, cost, damage, injury or liability whatsoever which the Corporation may suffer or incur resulting from or caused by an act or omission of such Owner or his or her tenant or any other person(s) occupying the Unit with the Owner's or the tenant's approval (or any of their employees, guests, invitees and visitors, as the case may be) to or with respect to the Common Elements and/or all other Units, except for any loss, costs, damages, injury or liability caused by an insured peril (as defined in any policy or policies of insurance) and insured against by the Corporation. All payments to be made pursuant to this Article are deemed to be the Owners' additional contributions towards the Common Expenses, and shall be recoverable as such.

THE DUTIES OF THE PARTIES TO EACH OTHER

9 In closing submissions, the Plaintiff's counsel conceded that the Plaintiff had a duty to maintain appliances and to keep the washing machine in good working order, and conceded that under the Condominium Declaration the Plaintiff was responsible to pay for damage caused by any water leaking from his washing machine.

10 Both parties took the position in closing submissions that I do not have to determine the source of the leak, but rather that the issue I must determine is whether the Defendant's actions were reasonable.

11 In *Chan v. Toronto Standard Condominium Corp. No. 1834*,³ the Plaintiff commenced a legal proceeding after a lien was registered against the Plaintiff's unit because damage from a flood was determined by the Condominium Corporation to have come from the Plaintiff's unit. A lien was placed for the quantum to repair the damage.

12 In *Chan*, Justice Allen wrote:

Courts have addressed the standard of review on a condominium application. The role of the court hearing an application is not to substitute its own opinion for that of the Board of Directors, but to ensure the Board has acted in good faith and in compliance with the Act, declaration, bylaws and rules. In deference to the rules, the court should not pronounce on the propriety of a rule except where the rule is clearly unreasonable or contrary to the legislative scheme. The court should accept the Board's decision unless it has acted capriciously or unreasonably.⁴

13 S.85 of the *Condominium Act* provides:

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.

THE BURDEN OF PROOF

14 In our system of civil justice, it is the Plaintiff who has the burden of proving its case.⁵ The Plaintiff's burden of proof is to establish its case on the balance of probabilities.⁶

15 I am "required to scrutinize the evidence with care", and for the Plaintiff to succeed, the evidence must be "sufficiently clear, convincing and cogent to satisfy the balance of probabilities test."⁷

THE EVIDENCE ON THE SOURCE OF THE FLOOD

16 There was much trial evidence on the potential source of the floods in unit LPH06. The Plaintiff testified that there was a history of several leaks into his condominium unit. He testified that the leaks had been in the second bedroom, and that there had been leaks on the bedroom wall near the doorway to the laundry room.

17 The Plaintiff further testified that he had a Maytag service repairman attend and inspect the washing machine, and that the Plaintiff was told the machine had no leaks, and this was confirmed by the Maytag Service Report (Exhibit 4 Tab 8) which says:

Service Performed: CHECKED UNIT OVER AND COULD NOT FIND ANY LEAKS - ALSO ADVISED CUSTOMER TO CLEAN INNER DOOR AREA

18 This Maytag report was sent to the Defendant.

19 The Plaintiff also testified that on the recommendation of the Maytag service repairman, he replaced the washing machine's bellow. The Plaintiff reported this matter to his insurer who wrote (see Tab 28 Exhibit 1) to the Defendant and advised that within the Plaintiff's unit there were "no plumbing issues which have caused the damage to the unit below."

20 The Plaintiff filed the expert report of Henry Jansen (Tab 19 Exhibit 2). Mr. Jansen also testified as an expert witness for the Plaintiff. Mr. Jansen's opinion, based on a review of the site and the documentation provided, was that the leaks in the condominium (roof, building envelope and pipes) could have been the cause of the damage to unit LPH06, and that it was too simple to conclude it was from the washing machine. Mr. Jansen and Mario Pizana (the Superintendent at the building) both testified that water leaks can travel many feet across a unit, and then flow to the unit below as water finds the lowest point.

21 On cross-examination, Mr. Jansen admitted that he could not rule out that the washing machine was the source of the damage to unit LPH06.

22 In neither his written report nor his oral testimony did Mr. Jansen state an opinion as to the source of the three floods in Unit LPH06

23 Abid Ali, a plumber, was called to the stand by the defendant, and he testified that after the first leak in Unit LPH06 he attended the Plaintiff's unit and he saw no water at the washing machine, and he then turned on the machine and returned to the unit and found wet wood underneath the machine directly above the water leak in LPH06.

24 There were disputes about access to the Plaintiff's unit and the Defendant did not enter the Plaintiff's unit after the second leak. But the Defendant's witnesses testified that the second water leak in Unit LPH06 was in the same location as the first and third leak. After the third leak, the superintendant Mario Pizana and the plumber retained by the Defendant saw a wet floor near the washing machine (which was directly above the water damage in Unit LPH06) as documented by the written report of the plumber (see Exhibit 4 Tab 7).

CONCLUSION

25 The parties submitted I did not have to make a finding of fact as to the source of the water damage at Unit LPH06. However, given the manner in which the case is pleaded in both the Statement of Claim and Statement of Defence, and given the evidence called by the parties, I think a finding of fact as to the source of the water damage is appropriate.

26 Based on the evidence I heard I find that the source of the water damage at Unit LPH06 was the washing machine. While there were previous water leaks in the building and the Plaintiff's unit, there was no specific

evidence that the water in Unit LPH06 came from these other sources. Given that the water on the floor near the washing machine was directly above the water leak in Unit LPH06, I find applying the balance of probabilities standard, that the cause of the water leak and water damage in Unit LPH06 was the washing machine in the Plaintiff's unit.

27 In order to succeed in this action, the Plaintiff must prove on the balance of probabilities that the Defendant had no right to register a lien, and prove that the monies taken should be disgorged and that the "lien monies" received by the Defendant were an unjust enrichment and therefore the monies must be returned to the Plaintiff.

28 I conclude that the Plaintiff has not established that the Defendant acted unreasonably in its investigation, or by concluding that the water leaking into Unit LPH06 came from the washing machine in the Plaintiff's unit. There was tension between the parties which delayed and hindered the investigation.⁸ The Defendant had qualified and experienced persons investigate the leaks by visiting and inspecting both the premises of the Plaintiff and the flooded unit below. The leaks occurred directly below a machine which had water under it. In the circumstances, given that water was discovered on the floor where the washing machine was located, given the investigation conducted by the Defendant, and given there was no specific evidence that these three floods in Unit LPH06 came from other parts of the condominium, it was in my view reasonable for the Defendant to conclude that the water came from the Plaintiff's washing machine in the absence of specific proof that it came from another source.

29 As Justice Allen put it in *Chan*, my role is not to substitute my "own opinion for that of the Board of Directors, but to ensure the Board has acted in good faith and in compliance with the Act, declaration, bylaws and rules." I conclude that the Defendant did act reasonably and in good faith. It had the right to put on a lien under the *Condominium Act* for its costs of dealing with the flood at unit LPH06⁹. The Defendant's legitimate use of its power to place a lien under the *Condominium Act* is the juristic reason for receiving the monies paid to discharge the lien.

30 Accordingly, the action against the Defendant is dismissed.

COSTS

31 If the parties wish to make submissions on costs, they should serve written submissions upon each other, and file the submissions with the Court (along with proof of service) in accordance with the following:

- (a) On or before July 18, 2016, the Defendant's counsel shall deliver to the Court, and to the Plaintiff's legal representative, written submissions with respect to any request for costs. Submissions shall be filed with the Court in the usual manner, but shall also be sent to me by email to smarr@lmklawyers.com;
- (b) On or before August 2, 2016, the Plaintiff's counsel shall deliver to the Court, and to the Defendant's counsel, responding written submissions. Submissions shall be filed with the Court in the usual manner, but shall also be sent to me by email to smarr@lmklawyers.com;
- (c) On or before August 9, 2016, the Defendant may deliver to the Court and to the Plaintiff's counsel a Reply, if any. Submissions shall be filed with the Court in the usual manner, but shall also be sent to me by email to smarr@lmklawyers.com;
- (d) The submissions on Costs may include any relevant settlement offers made in writing and copies of the offers.

S.S. MARR DEPUTY J.

¹ *Garland v. Consumers' Gas Company* [2004] 1 S.C.R. 629, at para 30.

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- 2 Para 7.1 of the Condominium Declaration appears to have a typographical error as it says, "same harmless", rather than "save harmless"
- 3 *Chan v. Toronto Standard Condominium Corp. No. 1834*, [2011] O.J. No. 90, affirmed on appeal, [2012] O.J. No. 2156 (Ont.CA)
- 4 Para 5, *Cha*, *supra*
- 5 James Morton, *Ontario Litigator's Guide to Evidence (5th Edition)* page 33
- 6 James Morton, *supra*, page 31 citing *C. (R) v. McDougall*, [2008] S.C.J. No. 54, 2008 SCC 53 at para. 40
- 7 James Morton, *supra*, page 32 citing *C. (R) v. McDougall*, *supra*, paras. 45-46
- 8 In my view the blame for this tension lays equally at the feet of both sides. The Defendant was not as responsive to the Plaintiff's complaints about earlier water leaks in his unit, as it should have been, which understandably irritated the Plaintiff. But the Plaintiff was not as cooperative as he should have been as the Defendant sought to investigate these leaks.
- 9 In closing submissions Plaintiff's counsel confirmed the quantum of the lien was not in dispute, the only dispute is whether the Defendant was entitled to a lien.