IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: MacDonald v. Halifax County Condominium No. 9, 2008 NSSM 19

Date: 20080424
Claim: SCCH 291902
Registry: Halifax

Between:

Elizabeth MacDonald

Claimant

v.

Halifax County Condominium Corporation No. 9

Defendant

Adjudicator: W. Augustus Richardson, QC

Heard: March 31, 2008 in Halifax, Nova Scotia.

Appearances: Frank Robertson, on behalf of the Claimant
Cheryl Canning, for the Defendant

By the Court:

[1] This is a claim by a condominium unit owner against her condominium corporation for the cost of repairs to the interior of her unit when her hot water tank leaked. The claimant argues that because the defendant has insurance against this type of damage it should be required to pay for the damage. For reasons set out below I have decided to dismiss the claim.

The Facts

[2] The claimant gave evidence. The defendant did not.

[3] The building that is the condominium corporation is roughly 30 years old. The claimant purchased her unit in August 2000. When she moved in the unit's hot water was supplied by a hot water tank. The tank came with the unit. It was not the original tank. It was a Sear's Kenmore and

appeared to the claimant to be fine. She had never had any problems with it. It had never leaked. She thought it was a "top of the line" model.

[4] The tank was located in a small storage closet that ran along the length of the exterior wall of the unit. To one side of the closet was the inside wall; to the other side was the living room (in front) and the kitchen (in back).

[5] In September 2006 the tank leaked. The water damaged the new floor that the claimant had had installed herself in the kitchen and living room. It also damaged the wall that ran between the closet and the living room and kitchen.

[6] Her insurer (Unifund) paid for the cost of the repairs (in the amount of $6,061.66) to the damaged property. It then commenced this subrogated action in her name against the defendant.

The Submissions

[7] For the purposes of what follows I note that it appeared to be accepted by the parties–and I so find on the evidence before me–that:

a. the damage occurred only to two types of property:

   i. the improvements made by Ms MacDonald to the unit (that is, the new floor), and

   ii. the interior wall within the unit that separated the closet area from the kitchen and living room,

b. there was no damage to the common elements of the condominium; and

c. both the claimant and the defendant had insurance that covered the damage in question.

[8] Given these facts the issue in essence was this: which policy of insurance was primarily responsible for covering the repair cost in respect of the damage to the unit property that occurred: the unit owner's policy? or the corporation's policy?

[9] The claimant's submission that it should be the corporation's policy was based on her interpretation of the provisions of the condominium's Declaration.

[10] The claimant relied upon the Declaration (Exhibit D1), made pursuant to the provisions of the then *Condominium Act*, SNS 1970-71, Chap 12, and now RSNS 1989, Chap. 85, as amended (hereinafter "the Act"). The Declaration is one of the documents which governs the relations between condominium unit owners and their condominium corporations. The Declaration is subject to the Act, but is otherwise superior to the corporation's by-laws or rules.

[11] Article 4.18 of the Declaration deals with "Matters Governing The Property." Article 4.18(3) deals with "Insurance." Article 4.18(3)(A) deals with insurance "By the Corporation," and provides that the corporation "shall be required to obtain and maintain ... the following insurance:"

a. "Insurance against damages by fire and extended perils and such other perils as the Board of Directors may from time to time deem advisable insuring:

   i. the Property, excluding the units; and

   ii. personal property owned by the Corporation, but not including furnishings, furniture, or other personal property supplied or installed by the owners,

   in an amount equal to the full replacement cost of such real and personal property without deduction for depreciation which policy may be subject to a loss deductible clause; and

b. "Insurance against damage by fire and extended perils and such other perils as the Board may from time to time deem advisable, ***insuring the units*** including all improvements made to the units by the Declarant ..., notwithstanding that some of such improvements may have been made after registration of the Declaration and the Description, but excluding any improvements made by the owners thereof, in an amount equal to the full replacement costs of such units without deduction for depreciation.

   "Such policy or policies of insurance as required by sub-paragraphs (a) and (b) hereof, shall insure the interests of the Corporation and the owners from time to time as their respective interests may appear...." (emphasis added)

[12] Mr Robertson, on behalf of the claimant, emphasized the fact that the corporation was *required* pursuant to Article 4.18(3)(A)(b) to obtain insurance that would cover damage to the unit. That being the case the corporation's policy should respond.

[13] He then contrasted this provision with Article 4.18(3)(C), which deals with insurance "by the Owner." Sub-paragraph (a) of the Article provides that "[e]ach unit owner *may* obtain and maintain his own insurance on any additions or improvements made by the owner to his unit and for furnishings, fixtures, equipment, decorating and personal property and chattels of the owner contained in his unit ..." (emphasis added). Since the corporation was *required* to obtain unit insurance, but the owner was not (since Article 4.18(3)(C)(a) was only permissive), Mr Robertson argued that that meant that the corporation's policy had to be primary. This added further support to his argument that the corporation's policy should respond first.

[14] (I pause here to make a note to which I will return later. In citing Article 4.18(3)(C)(a) Mr Robertson did not reference the fact that the Article goes on to provide that the owner's insurance referred to therein "shall contain waivers of subrogation against the Corporation ... and against the other owners ... except for arson or fraud.")

[15] Ms Canning's response on behalf of the corporation was twofold:

a. there was no right of action at all–this was a subrogated claim, but there was no evidence that the insured (*i.e.* Ms MacDonald) was out of pocket; and

b. in any event, the question of which policy had to respond had to be determined by who had the duty to repair, and in this circumstance it was the unit owner (and hence the unit owner's own insurance) that should bear the cost of repair.

[16] In my opinion the first submission, as made, must fail. Ms MacDonald is an insured under the Unifund policy. She made a claim under that policy and the insurer paid the cost of repairs. There was no evidence that Ms MacDonald's claim had not been paid to the full extent. In normal course the right of subrogation arises upon such a payment. The insurer has (properly) commenced the action in Ms MacDonald's name, as it must do when pursuing a subrogated claim. However, there is a problem with this subrogated claim, but the problem arises in virtue of the Declaration and not the general principles of the law of subrogation. This will be discussed below.

[17] The second submission relies on the owner's duty to repair a unit as regulated under the regime created by the Act.

[18] Section 35(2) of the Act provides that "[s]ubject to section 36, the corporation shall repair the units ... after damage." (Section 36 is not relevant for our purposes, since it deals only with situations involving significant and substantial damage to the entire condominium property.)

[19] On the face of it then it is the corporation that has the duty to repair damage to units. Support for this conclusion is found in s.34(1), which provides that the corporation "shall insure its liability to repair the units and common elements after damage resulting from fire, and such other risks as may be specified by the declaration or the by-laws ..." However, s.35(5) goes on to provide that notwithstanding s.35(2), the Declaration "may provide that (a) subject to s.36, each owner shall repair that owner's unit after damage."

[20] Turning to the Declaration in this case, Ms Canning noted that Article 4.12 deals with "maintenance and repair of units and parts of common elements–owner's duty." Article 4.12(a) provides that "[e]ach owner ... shall repair his unit ... after damage, all at his own expense." Article 4.12(d) then provides that the corporation "shall do any repairs ... that an owner is obligated to do and which is not done within a reasonable time ... [and charge the cost of such repairs to the owner]."

[21] Ms Canning submits that reading these provisions of the Act and the Declaration together results in the following conclusion:

a. the corporation is primarily responsible to repair damage to a unit;

b. it must insure that responsibility;

c. however, the corporation may (through the declaration) make the owner responsible to repair such damage; and

d. owners who are subjected to such a responsibility via the Declaration are wise to obtain their own insurance because otherwise (if they don't repair) the corporation may effect such repairs and charge the owner for them.

[22] In other words, while the corporation is always *ultimately* responsible to repair a unit (and to insure that liability), it may nevertheless through the Declaration require the owner to effect the repairs first. In such a case the owner must obtain his or her own insurance to cover off that liability–that is, liability to repair the unit which is imposed on the owner by the declaration.

[23] I accept this submission.

[24] In my opinion the obligation imposed on the corporation by Article 4.18(3)(A)(b) of the Declaration to insure the cost of repairing a unit has to be read in the context of who has the primary duty to repair that unit. The Act imposes the primary duty on the corporation, but that duty can be transferred via the Declaration to the owner. And that is what happened here, by virtue of Article 4.12(a).

[25] Support for this conclusion may be found in the fact (referred to above) that any insurance obtained by a unit owner to cover the cost of repairing damage to a unit had to contain a waiver of subrogation clause–in other words, a clause that would prevent the owner's insurer from repairing the damage and then suing the corporation to recover that expense. Permitting subrogation in such a case would frustrate the intent of the Declaration, since it would transfer the cost associated with such repair back to the corporation. By requiring the owner to have a waiver of subrogation in his or her policy the Declaration secures the intent that the obligation to repair remain with the owner, not the corporation.

[26] This conclusion leads me to another reason the within claim must fail. Unifund, which in this subrogated action stands in the shoes of Ms MacDonald, is bound by the provisions of Article 4.18(3)(C)(a), as is Ms MacDonald. Her policy of insurance (that is, the Unifund policy) must contain a waiver of subrogation. If it doesn't, it should. And if it should or if it does, the result remains the same: Unifund is barred from making this subrogated claim against the corporation.

[27] I will accordingly make an order dismissing the claim.

Dated at Halifax, this 24th day of April, 2008

Original: Court File)
Copy: Claimant)
Copy: Defendants)

W. Augustus Richardson, QC
ADJUDICATOR