Court of Queen's Bench of Alberta

Citation: Shivji v. Owners: Condominium Plan No. 012 2336, 2007 ABQB 572

Date: 20070920
Docket: 0703 05210
Registry: Edmonton

2007 ABQB 572 (CanLII)

Between:

Zulfikar Shivji and Nilufar Shivji

Appellants

- and -

The Owners: Condominium Plan No. 012 2336

Respondent

- and -

Jeffrey Banks, Bradley Abbott and Kayla Funk

Not Parties to the Appeal
(Defendants)

Reasons for Judgment
of the
Honourable Mr. Justice Donald Lee

Background

[1] The Appellants (Respondents), Zulfikar Shivji and Nilufar Shivji, were the registered owners of unit 238 in a condominium complex located at 200 Richard Street in Fort McMurray, Alberta (hereinafter "Unit 238"). The Respondent (Plaintiff), the Owners: Condominium Plan No. 012 2336, is a condominium corporation incorporated pursuant to the provisions of the *Condominium Property Act*, RSA 2000, c. C-22, and is comprised of the owners of condominium complexes located at 100 and 200 Richard Street in Fort McMurray, Alberta.

[2] Pursuant to the terms of a residential tenancy agreement with the Appellants, Jeffrey Banks, Bradley Abbott and Kayla Funk (the "Tenants"), who were named as Defendants but never served with the Civil Claim, rented Unit 238 from the Appellants and were the sole occupants of Unit 238 at all material times.

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[3] On or about December 26, 2004, a pipe located in the exterior wall of Unit 238 burst causing flooding and water damage to Unit 238 as well as the unit located directly below Unit 238 ("Unit 138"). The apparent cause of the flooding and water damage was that the thermostat in Unit 238 had been set to zero by the Tenants, causing the pipe in question to freeze and burst. As the result of the pipe bursting, the Respondent paid $11,005.65 for repairs to Unit 238 and $12,461.70 for repairs to Unit 138.

[4] The Respondent had a policy of insurance that insured 200 Richard Street against loss caused by the sudden escape of water from a plumbing system (the "Policy"), but the value of the loss was less than the Policy's $25,000.00 deductible for water damage.

[5] Pursuant to an agreement between the Appellants and the Respondent, there was no actual trial of this matter. The Appellants and Respondents submitted written submissions to the Provincial Court Trial Judge who issued written reasons on the basis of those written

[6] In his written Reasons for Judgment, the Provincial Court Judge awarded the Respondent in the sum of $11,005.65 representing the cost of the repairs to the Appellants' Unit 238. He dismissed the Respondents' claim for the repairs to Unit 138 concluding that:–

> Save for a covenant to insure which is not present in the circumstances there is nothing in the By-laws exempting the respective unit holders from the initial responsibility for the repair and maintenance of their units irrespective of the cause of the damage. This would include a leaking water pipe even if the pipe were "common property".

[7] In reaching his conclusion that there was no covenant to insure in the circumstances, the Trial Judge held that he was bound by Justice Sulatycky's unreported decision in ***Three Sisters Place Corporation v. Ernest David Dover***, Action 8901 12889 issued April 20, 1990. The Trial Judge decided that the ***Three Sisters*** case concluded that a condominium association is not a insurer for the deductible and that the deductible does not form part of the covenant to insure.

Grounds of Appeal

[8] The grounds of Appeal are that:–

(a) The Trial Judge erred in law by finding that there was no covenant to insure obligating the Respondent to indemnify the Appellants for the loss that occurred on December 26, 2004.

(b) The Trial Judge erred in law by finding that there was nothing preventing the Respondents from recovering the repair costs of the December 26, 2004 loss from the Appellants.

(c) The Trial Judge erred in law by applying the wrong law to the issue of whether or not a covenant to insure requires the covenantor to indemnify the convenantee for the deductible or any loss less than the deductible.

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Analysis

[9] This appeal arises from a Provincial Court Judgment dated January 10, 2007 in which the Appellants were held liable for the sum of $11,005.65 for repairs to the interior of the unit they owned in Condominium Plan No. 012 2336, necessitated as a result of flooding within the unit. The Provincial Court Trial Judge held that unit owner in a condominium corporation has a duty to repair and maintain the interior of their unit irrespective of the cause of the damage, and further held that the Respondent is not an insurer for the uninsured portion of a loss and that the deductible does not form part of the covenant to insure.

[10] The clearly defined issue to be resolved in this appeal is whether the Respondent is an insurer for the deductible, and does the Respondent's covenant to insure extend to the uninsured portion of a loss? There is also a question regarding whether the loss in this appeal is a loss for which the Respondent has an obligation to insure.

[11] This matter is an appeal from a Provincial Court Judgment pursuant to the *Provincial Court Act*. The *Provincial Court Act* provides that an appeal is on the record unless the Court of Queen's Bench grants the application of either party for the appeal to be heard as a trial *de novo*. No such application or order has been granted in this action, therefore this appeal is based on the record.

[12] For the purposes of this appeal, the following are the relevant and undisputed facts:–

(a) At all material times, the Appellants were the owners of unit 238, 200 Richard Street, Fort McMurray, Alberta.

(b) On December 26, 2004 a pipe in unit 238 burst, causing flooding and water damage to unit 238 as well as unit 138, located directly below unit 238.

(c) The water escape was the result of someone within unit 238 turning off the heat, causing the pipe to freeze and burst.

(d) The damages paid by the Respondent as a result of this loss total $23,467.62 which is comprised of damages to unit 238 in the amount of $11,005.65 and damages to unit 138 in the amount of $12,461.77.

(e) The Respondent has obtained the insurance required under the Condominium Property Act (the "Act"), the Condominium Property Regulation (the "Regulation"), and the bylaws of Condominium Corporation No. 012 2336 (the "Bylaws").

(f) The Respondent has agreed to a reasonable deductible with its insurer.

[13] The decision of the Trial Judge was based on brief oral submissions which were made on October 25, 2006, the written submissions of the Respondent (Plaintiff) dated November 24, 2006, the written submissions of the Appellants (Defendants) undated, and the response to the written submissions of the Appellants (Defendants) dated December 18, 2006.

[14] Based on this material and evidence, the Trial Judge granted judgment to the Respondent (Plaintiff) in the amount of $11,005.65 for the costs of the repairs to unit 238 owned by the Appellants (Defendants).

[15] In coming to his decision, the Trial judge stated:–

> If one accepts (and I am bound to accept) Mr. Justice Sulatycky's rational that the association is not an insurer for the deductible or to take it one step further the deductible does not form part of the covenant to insure then an action by the corporation to recover the deductible is only restricted to the contents of the by-laws . . . The association has an obligation to insure — it did. The association through its board agreed to a deductible of $25,000 — that is contemplated in the Regulations. If one takes the position that the deductible is not an insurable obligation then that portion does not constitute an an [sic] obligation or promise to insure...

[16] The Trial Judge then goes on to review the obligations found in the Bylaws and finds:–

> The corporations obligation to repair does not include the interior of a particular unit. The responsibility to repair and maintain the interior of a unit is only mentioned in s. 27(e) of the Bylaws — the unit holder or Occupant (by definition this includes owner) 'shall keep the interior of unit in a good state of repair' . Save for a covenant to insure which is not present in these circumstances there is nothing in the By-laws exempting the respective unit holders from the initial responsibility for the repair and maintenance of their units irrespective of the cause of damage. This would include a leaking water pipe even if the pipe were 'common property'.

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[17] In coming to his decision, the Trial Judge reviewed and relied on the statement of law found in both the ***Three Sisters Place*** case, and ***Lesyk v. Owners Condominium Plan 8220184***, an unreported Alberta Provincial Court decision issued on March 15, 2002 in Action No. P0190305154, that a condominium corporation is not an insurer for the deductible on its policy of insurance.

[18] It is the Respondent's position on the grounds of appeal that:–

A. The trial judge was correct in law in finding that there was no covenant to insure obligating the Respondent to indemnify the Appellants for the loss that occurred on December 26, 2004.

B. The trial judge was correct in law by finding that there was nothing preventing the Respondent from recovering the repair costs of the December 26, 2004 loss from the Appellants.

C. The trial judge did not apply the wrong law to the issue of whether or not a covenant to insure requires the covenantor to indemnify the covenantee for the deductible or any loss less than the deductible.

[19] Contrary to what the Appellants argue, the Respondent submits that the Trial Judge did not find that there was no covenant to insure, but rather he found that the covenant to insure did not extend to the deductible. It is submitted that this is a loss to which the Respondent's insurer would not respond to, and therefore it is an uninsured loss. This is not a situation where the Respondent has chosen to not make an insurance claim as the insurer has been informed of the loss and has indicated that the policy will not cover the loss.

[20] One of the obligations imposed on the Respondent under the Act is the requirement to obtain insurance in accordance with the Act, the Regulations and the Bylaws. It is submitted that the Respondent has met these obligations, it has complied with Section 47 of the Act by obtaining insurance, Section 61 of the Regulations by obtaining insurance for the perils listed, and in doing so has complied with section 3.1(b) of the Bylaws. It is submitted that the Respondent has also complied with Section 62 of the Regulations, and has through its board agreed to a reasonable deductible with the insurer.

[21] As the Respondent has fulfilled its statutory duties with respect to insurance, it is submitted that the Appellants are now attempting to impose an obligation on the Respondent in excess of the requirements of the Act and the Bylaws — i.e. the obligation to indemnify unit owners for the uninsured portion of a loss.

The Appellants' Conduct

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[22] Pursuant to Section 27.1(e) of the Bylaws, the obligation to maintain and repair the interior of an individual unit rests with the owner of that unit. Pursuant to Section 32(6) of the Act, the Bylaws bind the unit owners and the corporation to the same extent as if they had been signed and sealed by the corporation and by each unit owner.

[23] Therefore, while the Act and Bylaws place certain obligations on the Respondent, they also place obligations on the Appellants. The Respondent has fulfilled its obligations, including the obligation to place insurance in accordance with the Act, the Regulations and the Bylaws.

[24] In contrast, the Appellants have failed in several of their obligations including the duty to repair and maintain the interior of their unit and failing to comply with Section 53 of the Act.

[25] It must also be noted that, at all times while they were owners, the Appellants had the ability to review the Respondent's insurance policy, and had the ability and opportunity to obtain their own personal insurance to cover the value of the Respondent's deductible. It appears they chose not to do so.

No Bar to the Action

[26] The Respondents argue that there is nothing in the Bylaws, the Act or the Regulations barring this action. The Trial Judge allowed the claim against the Appellants based on the fact that the Bylaws imposed the responsibility on the Appellants as unit owners for the repair and maintenance of their unit. He concludes:–

> Save for a covenant to insure which is not present in these circumstances there is nothing in the By-laws exempting the respective unit holders from the initial responsibility for the repair and maintenance of their units irrespective of the cause of the damage. This would include a leaking water pipe even if the pipe were 'common property'.

[27] Therefore it is submitted that the Appellants had a contractual and statutory duty to pay for the repairs to their on unit and should be responsible for this portion of the loss.

[28] Even assuming that covenant to insure includes the uninsured portion of the loss, the Respondent argue that the loss in question is not one for which they had a duty to insure. Section 47(1)(a) of the Act requires the Respondent to place and maintain insurance on the units "other than improvements made to the units by the owners". Section 47(1)(c) provides that improvements made to the units by owners may be insured if required by the Bylaws, and no such requirements exist in the Bylaws. Improvement is not defined in the Act, however the Act does provide a definition to delineate common property from that of the unit. Section 9 of the Act establishes the boundaries of units.

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[29] Further it is submitted that this loss is not one which falls within the perils listed in Section 61 of the Regulations. Pursuant to Section 61(1)(i), the corporation must place and maintain insurance against the following perils:–

> (i) water damage caused by. . .the sudden and accidental escape of water or steam...

[30] The phrase 'sudden and accidental' means an 'unexpected or unforeseen event'. The loss in this appeal was not caused by the sudden and accidental escape of water, but rather as a result of a deliberate and negligent act on behalf of the Appellants' tenants. Accordingly, it is not a loss for which the Respondent was obligated to obtain coverage.

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The Respondent is Not an Insurer

[31] Justice Sulatycky in ***Three Sisters Place*** and Judge Skitsko in ***Lesyk*** have previously held that unit owners are responsible to pay for deductibles. As both of these decisions relate specifically to condominium corporations and the responsibility to pay for the uninsured portion of a loss, it is submitted that the clear statement of law that can be taken from these cases is that a condominium corporation is not an insurer with respect to the uninsured portion of a loss.

[32] In ***Lesyk***, the issue before the Court was whether a unit owner was responsible to pay the deductible on the condominium corporation's insurance policy. In coming to the conclusion that it is the unit owner's responsibility to obtain its own personal insurance for the amount of the deductible, and that the condominium corporation is not the insurer for each individual unit owner, Judge Skitsko said:–

> . . . I am of the view that the deductible carried by the condominium association does not require the condo board and the condominium owners to pay that deductible.

[33] In coming to his decision in ***Lesyk***, Judge Skitsko relies on the decision in ***Three Sisters Place*** where a very similar circumstance was engaged. In ***Three Sisters Place*** the issue before the Court related to the responsibility for the deductible on the condominium corporation's insurance policy. Mr. Justice Sulatycky found that:–

> . . .the Board does not become an insurer to the extent of the deductible if a loss should occur.

[34] It is also submitted that the Appellants rely on cases which are not on point to argue that the deductible forms part of the covenant to insure, and it is submitted that uninsured portion of a loss should not be 'lumped in' with the insured portion of a loss as the Appellants suggest as to do so would defeat the purpose of deductibles.

Conclusion

[35] In his written Reasons the Trial Judge held that he as bound by the decision in the ***Three Sisters Place*** case that a condominium association is not an insurer for the deductible.

[36] The conclusion in the ***Three Sisters Place*** case that the condominium board was not an insurer to the extent of the deductible was based on the fact that neither the legislation at that time, nor the condominium by-laws required the condominium board to obtain insurance for water damage. There was no obligation on the condominium corporation to insure against water damage, and the condominium corporation was entitled to make a unit owner who was allowed to file a claim under the condominium corporation's optional insurance policy pay for the deductible. The ***Three Sisters Place*** case concluded:–

> The board is not required to insure for anything other than fire and if it chooses to insure for other perils and to obtain coverage subject to deductible for those perils, the board does not become an insurer to the extent of the deductible if a loss should occur. That is essentially what is being sought in this case, that is to make the board and insurer for the deductible, for the water damage and that simply does not follow from the By-laws of the Corporation.

[37] However this rationale from the ***Three Sisters Place*** case is not applicable to the present appeal because both the Act and the By-laws required the Respondent to insure the units and the common property of the condominium complex against water damaged caused by the sudden escape of water from a heating or plumbing system.

[38] Section 3.1(b) of the Respondent's By-laws requires the Respondent to place and maintain a Condominium Insurance Policy on all of the units and the Common Property as required by the Act.

[39] Section 27 of the Act requires the Respondent to place and maintain insurance on the units, other than improvements made to the units by the owners, and the common property against loss resulting from destruction or damage caused by any peril prescribed by or otherwise required by the regulations to be insured against.

[40] Section 61 of the *Condominium Property Act Regulation* provides that for the purpose of Section 47 of the Act, a condominium corporation must place and maintain insurance against perils including the sudden and accidental escape of water or steam from within a plumbing, heating, sprinkler or air conditioning system or a domestic appliance that is located within an insured building.

[41] By virtue of Section 32(6) of the Act the By-laws bind the corporation and unit holders to the same extent as if they had been signed and sealed by the corporation and by each owner, and as though they contain covenants on the part of each owner with every other owner and with the corporation to observe and perform all of the provisions of the By-laws.

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[42] The combined effect of these provisions of the Act and its supporting regulations and the By-laws is that the Respondent has covenanted with the Appellants to place and maintain insurance against the risk of water damage caused by the sudden escape of water or steam from a heating system located within an insured building.

[43] Since the Trial Judge issued his reasons, the Alberta Court of Appeal has confirmed that the combined operation of Subsection 32 and 47 of the Act, Section 61 of the Regulations, and a By-law requiring a condominium corporation to obtain insurance create a covenant to insure for the perils listed in the Regulation and the By-law: ***Condominium Corp. No. 9813678 v. Statesman Corp.***, 2007 ABCA 216.

[44] The fact that this particular loss was less than the water damage deductible of the Policy is irrelevant to the issue of whether or not there was a covenant to insure, as noted by the Supreme Court of Canada in ***Cummer-Yonge Investments Ltd. V. Agnew -Surpass Shoe Stores Ltd.***, [1976] 2 S.C.R. 221 at 6:–

> The scope of the indemnity as it arises in this case is not dependent on the policy but, rather, so far as the lessor and lessee are concerned, on the terms of the lease.

[45] Based on the reasoning in ***Cummer-Yonge***, it is arguable that one does not look to the Policy to determine whether there is a covenant to insure, rather one looks to the terms of the covenant. The fact that the Respondent made an economic decision to obtain insurance with a water damage deductible of $25,000.00 is not determinate of whether the Respondent covenanted to place and maintain insurance against water damage.

[46] Where one party to a contract covenants to obtain insurance against damage to the premises due to specific perils, that party cannot then sue the other party to the contract where damage is caused to the building by a specified peril caused by the other party's negligence. The covenantor assumed the risk of loss or damage caused by the peril to be insured against. By assuming the risk of that specified peril, the party promising to obtain the insurance is then contractually barred from attempting to recover damages as a result of that specified peril from the other party to the contract.

[47] The state of the law on this issue is summarized by the Ontario Court of Appeal in ***Madison Developments Ltd. v. Plan Electric Co.***, [1997] O.J. No. 4249, (Ont. C.A.) as follows:–

> A contractual undertaking by the one party to secure property insurance operates in effect as an assumption by that party of the risk of loss or damage caused by the peril to be insured against. This is so notwithstanding a covenant by the tenant to repair which, without the landlord's covenant to insure, would obligate the tenant to indemnify for such a loss. This is a matter of contractual law, not insurance law...

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[48] Likewise, the Supreme Court of Canada has concluded that, where two landlords covenant to insure a premises against fire, the effect of the covenant to insure is to protect the tenant against the risk of fire caused by its negligence: ***T. Eaton Co. v. Smith***, [1978] 2 S.C.R. 749, (Q.L.) at pg. 4.

[49] In ***Statesman Corp.***, which was decided after the Trial Judge issued his written Reasons in this matter, the Alberta Court of Appeal relied on the decisions in the ***Madison Developments*** case and in the ***T. Eaton*** case. The Alberta Court of Appeal concluded that where a condominium corporation covenanted with a unit holder to insure the building against fire, the condominium corporation had no cause of action against the Appellant unit owner and manager for a loss caused by fire.

[50] As discussed above, the Court of Appeal concluded the covenant to insure was created by the combined operation of the Act, the Regulation and the condominium corporation's by-laws. The Court of Appeal then concluded at paragraph 73 that the condominium corporation was obligated to provide the unit holders with the benefit of no-fault insurance and that:–

> If the Respondent condominium corporation sues the Appellant for the loss, that is a breach of those covenants.

[51] The Trial Judge erred in concluding that there was no covenant to insure. As seen by the Alberta Court of Appeal in ***Statesman Corp.***, the effect of the provisions of the Act and By-laws requiring the condominium corporation to insure against a specified peril is a covenant to insure.

[52] As a covenant to insure against water damage caused by the sudden escape of water from a plumbing or heating system existed, the Respondent assumed the risk of such damage, and is barred from suing the Appellants in these circumstances.

[53] The Appellants appeal is granted, the Judgment in favour of the Respondent is set aside, and the claim of the Respondent is dismissed. The Appellants shall be awarded their costs for this appeal and the Trial below.

Heard on the 14th day of September, 2007.
Dated at the City of Edmonton, Alberta this 19th day of September, 2007.

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Donald Lee
J.C.Q.B.A.

Appearances:

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