Court file No.: SC-12-121278

ONTARIO
SUPERIOR COURT OF JUSTICE
SMALL CLAIMS COURT AT OTTAWA

BETWEEN:

NORMA WEXLER

Plaintiff

AND:

CARLETON CONDOMINIUM CORPORATION #28

Defendant

REASONS FOR DECISION

RAYMOND H. GOUIN, Deputy Judge

Trial held on
April 20th and 22nd, and October 8th, 2015.

For the plaintiff: self-represented
For the defendant: Antoni Casalinuovo

NATURE OF THE ACTION

1. The plaintiff ("Norma") claims (1) $255.00 for "*the wrongful charge and payment ... made for pigeon dropping cleanup*" (2) $270.14 for "*the cost of a lawyer to prevent further wrongful charges related to this matter*", and (3) $2,000.00 "*for harassment by Reid Management Board*".

2. Although Norma wrote that her claim based on harassment is against "Reid Management Board", I accept that her claim is really against Carleton Condominium Corporation No. 28 ("the Corporation"), the named defendant.

FACTS

3. Norma owns the condominium apartment described as Unit 2106 of CCC #28 (the "Unit") which she inherited from her father. Her son resided in the Unit at certain times between 2010 and 2012, but Norma did not reside there.

4. There were pigeon droppings on her balcony as well as feathers.

5. The Corporation sent letters to Norma advising her to keep the balcony clean.

6. Norma alleges that the Corporation harassed her in regards to this matter. She also alleges that the Corporation threatened to bust down her Unit door and change the lock on the door. She therefore consulted a lawyer to know what she could do.

7. The Corporation takes the position that it did not harass Norma but rather acted in accordance with the Condominium Act ("the Act"), the Declaration, the by-laws and the rules and regulations of the Corporation.

8. On March 1st, 2010, Norma wrote a note to the Corporation which read as follows:

> *N. Wexler A...*
> *1081 Ambleside Dr*
> *Ottawa K2B 8C8*
>
> *To whom it concerns,*
> *This condo will have new owners who will be cleaning the balcony.*
>
> *Thank you*

9. The note was received by the Corporation on March 11th, 2010. The Corporation then wrote a letter to Norma and her father on May 28th, 2010, which provided as follows:

> *Re: 2106-1081 Ambleside Drive*
>
> *Dear Owners:*

The Board of Directors of C.C.C. No. 28 has instructed me to write to you in regards to the following matter;

Please be advised that it has been reported that there are pigeons nesting on your balcony. No one is cleaning up the mess left by these pigeons. This is a health and safety issue and must be done immediately. In addition, it must be done on a regular basis.

Please note that should action not be taken within 10 days (June 7, 2010), the Corporation will undertake the required work and collect charges in the same manner as common charges.

Should you have any questions or comments on this matter, please do not hesitate to contact me.

Yours truly,

Paul Warmington
Agent for C.C.C. No. 28

c.c. Board of Directors

10. The Corporation wrote another letter to Norma and her father on June 8th, 2010, which read as follows:

Dear Owners:

The Board of Directors of C.C.C. No. 28 has instructed me to write to you in regards to the following matter;

Please be advised that it has been reported that there are pigeons nesting on your balcony. No one is cleaning up the mess left by these pigeons. This is a health and safety issue and must be done immediately.

In addition, it must be done on a regular basis. A ten day written warning was provided and no action has taken place to correct this health hazard, therefore the Corporation will undertake the required work and collect the charges in the same manner as common charges.

Should you have any questions or comments on this matter, please do not hesitate to contact me.

Yours truly,

Paul Warmington
Agent for C.C.C. No. 28

c.c. Board of Directors

11. The Corporation wrote a third letter to Norma and her father on June 16th, 2010, which read as follows:

Re: 24 Hours Notice to Enter Unit 2106-1081 Ambleside Drive

Dear Owners:

Pigeon nesting and faeces remains a problem on your balcony. This is a health and safety issue and must be taken care of immediately. The ten day written warning was provided and no action has taken place to correct this health hazard, therefore the Corporation will enter your unit and undertake the required work. Any charges in regards to cleanup and entry of your unit will be charged back in the same manner as common charges.

Should you have any questions or comments on this matter, please do not hesitate to contact me.

Yours truly,

Carlo Zarattini, CPM
Agent for C.C.C. No. 28

c.c. Board of Directors

12. The Corporation wrote a fourth letter to Norma and her father on July 7th, 2010, which read as follows:

Re: 2106-1081 Ambleside Drive

Dear Mr. Lobel & Mrs. Wexler

The Board of Directors of C.C.C. No. 28 has instructed me to write to you in regards to the following which has been an outstanding issue for some time now. The pigeon problem on your balcony has been accelerating now causing problems with the other owner's use of their balconies.

On November 23, 2009 a letter was sent to you regarding this matter asking that the balcony be cleaned and maintained on a regular basis.

On May 28, 2010 a 2nd letter was sent stating that we have received complaints regarding the mess on the balcony and informed you that this was a Health and Safety issue. A 10 day written warning was then issued to have this problem rectified or the Corporation will carry out the work necessary.

On June 8, 2010 another letter was sent that the ten day written warning to have the balcony cleaned to correct this health hazard has expired and the Corporation would now undertake the required work of cleaning and installing netting to deter pigeons. On June 16th an additional letter

was sent as consideration.

During the week beginning June 21 you did inform me that you had attempted some clean up but could not help it if the pigeons returned after the fact. I was informed at that point that not all of the mess had been cleaned up by surrounding owners.

On Monday, July 5th 2010 you requested me to email contractor information for the installation of netting on the balcony and I emailed you the information Tuesday July 6th 2010 so you could have the problem rectified as soon as possible.

Even though we appreciate that you did however attempt to clean up a portion of this mess, please consider this a five (5) day warning that unless the balcony has been totally cleaned and disinfected plus a netting installed to alleviate this ongoing problem, the Corporation will contact a locksmith and have proper netting installed and then collect the charges in the same manner as common charges. Again this must be resolved by 5:00 pm on Thursday July 15th, 2010.

Should you require any more information in getting this problem rectified, please do not hesitate to contact me.

Yours truly

Barb Perkins
Agent for C.C.C. No. 28

c.c. Board of Directors

13. Following those four letters was an exchange of emails between Norma and a representative of the Corporation. Norma wrote her email on July 13th, 2010, to Barb Perkins, and it read in part as follows:

Subject: RE Ambleside 2106

We swept, disinfected & watered down our balcony... not our problem if the balconies are falling apart with big cracks. I've seen many other balconies dirtier than mine & with inadequate netting, I told you I never received previous mail & you know I don't live there. Stop threatening me. NW

14. To this email, the Corporation answered on July 13th, 2010, as follows:

Norma for your info, I never depend on hearsay. I have received written and verbal complaints regarding the state of the balcony in 2106 from surrounding owners. I myself have visited the units which have registered the complaints to ensure that this is a legitimate complaint. But when a situation has been going on for approximately a year with nothing accomplished as the surrounding owners have said, it is obvious that something has to be done and quicky. I have regular office hours at 1081 Ambleside which is every Monday from 3:00 to 5:00 and every Thursday from 2:00 to 5:00 PM. This is indeed for any owner who has a complaint to deal directly with the Property Manager for resolution. Also for your info Norma I was at the building yesterday when you called Carl and started yelling a him. Carl and myself had already inspected the balconies surrounding and have taken pictures of the damage which I will forward to you and then we attempted to knock on your door at 2106. You did not answer. You have caused significant damage to the balconies below when attempting to clean your balcony. Large amount of bird faeces, feathers, water etc. have fallen below to surrounding owners balconies, again I will forward the pictures. This particular unit with the majority of damage needs cleaning. It already has proper netting installed but the dirt from your balcony has found its way through. I have entered the unit beside yours and the netting you have attempted to install is definitely not acceptable. We actually seen

> *pigeons enter your balcony from the side of the netting adjacent to the adjoining balcony. Although you have done an acceptable job at cleaning your balcony there is still the issue of proper netting installation and also the cleaning of units below. Norma I need a date of either one of those two contractors I gave you by closing this evening at 5:00 pm.*
>
> *As discussed with the Board of Directors of C.C.C. 28 yesterday if I do not receive by this evening a date, then come the opening of business tomorrow I will be issuing a work order for the locksmith and also the contractor to install proper netting on your balcony in 2106 and also I will be issuing the cleaning of the balconies below and will be charged back to your unit. This Norma is a serious health issue.*

ISSUES

15. The issues are:

    a) whether the Corporation harassed Norma;

    b) whether Norma is entitled to be reimbursed the amount of $255.00 that was paid for the balcony clean-up; and

    c) whether Norma is entitled to be reimbursed the amount of $270.14 that she paid to a lawyer to obtain advice with respect to this matter.

ANALYSIS

16. In *Lynch v. Westario Power Inc. [2009] O.J. No. 2927*, Daley J. wrote that it was unclear whether harassment had been established as a civil tort in Canadian law. He wrote that while several decisions had found that there was no such tort, he noted that other decisions had been decided on the assumption that the tort of harassment did exist, but without setting out its elements; he referred to *Jaremko v. Moro [2003] O.J. No.2028* (S.C.J.) and *Robertson v. Jones [2003] O.J. No. 3316* (S.C.J.). He further noted that the cause of action in Canadian law that seemed tantamount to harassment, and which had

conceptual similarities to it, was the tort of intentional infliction of mental suffering. He wrote that the elements of that tort are: (a) flagrant or outrageous conduct on the part of the defendant (b) calculated to produce harm in circumstances where it is known that harm will ensue and (c) resulting in a visible and provable illness or injury to the plaintiff: *Prinzo v. Baycrest Centre for Geriatric Care [2002] O.J. No. 2712 (C.A.)*. He concluded that the "*main distinction between the tort of intentional infliction of mental suffering, as recognized in Canadian law, and the tort of harassment, as proposed in Mainland Sawmills, is that the former requires proof of a visible and provable illness, such as visible harm or psychiatric illness, whereas for the latter proof of severe or extreme emotional distress, short of physical or psychiatric illness is sufficient.*" He cited *Mainland Sawmills Limited v. IWA-Canada Local 1-3567 Society [2006] B.C.J. No. 1814.*

17. In *Asgedom v. Ontario (Minister of Community and Social Services) [2014] O.J. No. 6463*, Sanderson J. referred to the decision of the Ontario Court of Appeal in *Prinzo v. Baycrest Centre for Geriatric Care* (*supra*) where the elements of the tort of intentional infliction of mental suffering were set out, and it was further noted that where the tort of harassment is alleged, it was held to be analogous to the tort of intentional infliction of mental suffering. Hence, the elements of both torts are similar.

18. In *John v. Cusak [2015] O.J. No. 4182*, Woolcombe J. noted that the debate is alive as to whether there exists a tort of harassment. In referring to *Savino v. Shelestowsky 2013 ONSC 4394*, he noted that while the tort of harassment is "not largely accepted, the door is not completely closed on the possibility of the tort's existence." He added that other courts have since appeared to accept that the tort exists; he referred to *P.M. Evangelista Estate 2015 ONSC 1419; McHale v. Ontario 2014 ONSC 5179*. Woollcombe J. stated that *Savino* identified the four elements of the tort of harassment that were set out in *Mainland Sawmills* (*supra*); they are:

a) outrageous conduct by the defendant;

b) the defendant's intention of causing or reckless

disregard of causing emotional distress;

c) the plaintiff's suffering of severe or extreme emotional distress; and

d) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.

19. In the action before me, and for the purposes of this action, I am prepared to assume that the tort of harassment exists. However, based on the evidence presented to me, and for the reasons given below, the Corporation did not commit such tort.

20. When the Corporation sent its letter dated May 28th, 2010, it was advising Norma that (1) there were reports of pigeons nesting on her balcony (2) that no one was cleaning up the mess left by the birds (3) that this matter constituted a health and safety issue, and (4) this matter was to be attended to immediately. The letter also specified that such cleaning was to be performed on a regular basis. The letter went on to say that if no action was taken within ten days (June 7th, 2010), the Corporation would undertake the required work and the cost thereof would be charged and collected in the same manner as common charges.

21. In its letter dated June 8th, 2010, the Corporation wrote that, as it had no reply to its May 28th letter, it would undertake the required work and collect the charges in the same manner as common charges.

22. In its letter dated June 16th, 2010, the Corporation reminded Norma that it had given her a ten-day warning to remedy the matter and that it would now enter her Unit to access the balcony and have the matter remedied. A 24 hours notice was given of such intent to enter her Unit. It was reiterated that any charges with respect to the clean-up would be charged in the same manner as common charges.

23. In its letter dated July 7th, 2010, the Corporation advised that the pigeon issue was causing problems with other owners' use of their balconies. The Corporation noted that Norma had informed it that she had attempted to clean the balcony but she could not prevent the pigeons from returning. The letter said that Norma had

requested information about contractors to install netting and it was provided. The Corporation indicated that it appreciated Norma's efforts to clean up the mess but it was not completed. Hence, the Corporation gave a five-day warning to the effect that if the balcony was not completely cleaned and disinfected plus a netting installed, it would contact a locksmith to enter her Unit and have the proper netting installed and then collect the charges in the same manner as common charges. The deadline given was 5:00 p.m. on July 15th, 2010.

24. Norma stated that she never received the previous letters. Yet, they were sent to the address provided by her to the Corporation. This procedure was in compliance with the condominium rules and regulations. I find that she received the letters. Further, her son occupied the Unit.

25. Counsel for the Corporation submits that there was no harassment. He argues that the Corporation was exercising its statutory duties, as well as its duties under the Declaration and the by-laws.

26. Article VI(1) of the Declaration provides as follows:

MAINTENANCE AND REPAIRS

(a) Each owner shall maintain his unit, and, subject to the provisions of this declaration, each owner shall repair his unit after damage, all at his own expense.

(b) Each owner shall be responsible for all damages to any and all other units and to the common elements, which are caused by the failures of the owner to so maintain and repair his unit, save and except for any such damages to the common elements for which the costs of repairing same may be recovered under any policy or policies of insurance held by the corporation.

(c) The corporation shall make any repairs that an owner is obligated to make and that he does not make within a reasonable time; and in such an event, an owner shall be deemed to have

consented to having repairs done to his unit by the corporation; and an owner shall reimburse the corporation in full for the costs of such repairs, including any legal or collection costs incurred by the corporation in order to collect the costs of such repairs, and all such sums of money shall bear interest at the rate of twelve per cent (12%) per annum. The corporation may collect all such sums of money in such instalments as the board may decide upon, which instalments shall be added to the monthly contributions towards the common expenses of such owner, after receipt of a notice from the corporation thereof. All such payments are deemed to be additional contributions towards the common expenses and recoverable as such.

(e) Balconies, patios and the inner surfaces of windows and doors of which any owner has exclusive use shall be maintained by the owner having exclusive use thereof.

(g) Each owner who has the exclusive use of an indoor storage space or parking space shall be responsible for keeping it clean and free of ay condition on contents that might constitute a nuisance or cause the rate of fire insurance to be increased.

27. Article X of the Declaration further provides as follows:

INDEMNIFICATION

Each owner shall indemnify and save harmless the corporation from and against any loss, costs, damage, injury or liability whatsoever which the corporation may suffer or incur resulting from or caused by an act or omission of such owner, his family or any member thereof, at other resident of his unit or man guests, invitees or licencees of such owner or resident 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 (as defined in any policy or policies of insurance) and insured against by the

corporation.

All payments pursuant to this clause are deemed to be additional contributions towards the common expenses and recoverable as such.

28. Article XI of the Declaration provides as follows:

GENERAL MATTERS AND ADMINISTRATION

1.

(a) The corporation, or any insurer of the property or any part thereof, their respective agents, or any other person authorized by the board, shall be entitled to enter any unit or any part of the common elements over which any owner has the exclusive use, at all reasonable times and upon giving reasonable notice for the purpose of making inspections, adjusting losses, making repairs, correcting any condition which violates the provisions of ay insurance policy or policies, remedying any condition which might result in damage to the property, or carrying out any duty imposed upon correction.

(b) In case of an emergency, an agent of the corporation may enter a unit at any time and without notice, for the purpose of repairing the unit, common element or part of the common elements over which any owner has the exclusive use, or for the purpose of correcting an condition which might result in damage or loss to the property. The corporation or anyone authorized by it may determine whether an emergency exists.

(c) If an owner shall not personally present to grant entry to his unit, the corporation, or its agents, may enter upon such unit without rendering it, or them, liable to any claim or cause of action for damages by reason thereof; provided they exercise reasonable care.

(d) The rights and authority hereby reserved to the corporation, its agents, or any insurer or its agents, do not impose any responsibility or liability whatever for the care or supervision of any unit except as specifically provided in this declaration or the by-laws.

29. Section 17 of the Act provides as follows:

Objects

17. (1) The objects of the corporation are to manage the property and the assets, if any, of the corporation on behalf of the owners.

Duties

(2) The corporation has a duty to control, manage and administer the common elements and the assets of the corporation.

Ensuring compliance

(3) The corporation has a duty to take all reasonable steps to ensure that the owners, the occupiers of units, the lessees of the common elements and the agents and employees of the corporation comply with this Act, the declaration, the by-laws ad the rules.

30. Section 19 of the Act provides as follows:

Right of entry

19. On giving reasonable notice, the corporation or a person authorized by the corporation may enter a unit or a part of the common elements of which an owner has exclusive use at any reasonable time to perform the objects and duties of the corporation or to exercise the powers of the corporation.

31. Section 117 of the Act provides as follows:

Dangerous activities

117. No person shall permit a condition to exist or carry an activity in a unit or in the common elements if the condition or the activity is likely to damage the property or cause injury to an individual.

32. Section 119 of the Act provides as follows:

Compliance with Act

119. (1) A corporation, the directors, officers and employees of a corporation, a declarant, the lessor of a leasehold condominium corporation, an owner, an occupier of a unit and a person having an encumbrance against a unit ad its appurtenant common interest shall comply with this Act, the declaration, the by-laws and the rules.

Responsibility for occupier

(2) An owner shall take all reasonable steps to ensure that an occupier of the owner's unit and all invitees, agents and employees of the owner or occupier comply with this Act, the declaration, the by-laws and the rules.

33. The Rules of the Corporation provided that carpets were not permitted on balconies as they accelerated the deterioration of the concrete. Further, the Rules provided that when watering plants or cleaning the balcony, an owner was to ensure that water was not to flow over the lower edge of the balcony so as to fall on lower balconies. Further, bird netting was permitted provided certain exigencies were observed.

34. Under cross-examination, Norma admitted that she had a carpet on the balcony, but insisted that she had a right because she enjoyed a "grandfather clause". No evidence was presented by her of such clause. Further, she understood that she would be liable if she caused damage to other units or their balconies. She became evasive, even argumentative at times, when pressed for answers on whether she would be liable if she caused damage to other balconies, but she eventually agreed that she would be liable. When pressed for an answer as to whether the Corporation was entitled to enter her Unit in certain instances, she finally agreed, but only after some dodging and repeated futile arguments that it had no such right. She eventually admitted that she watered down her balcony, which is in contravention of the Rules, but said that nothing fell down onto the lower balconies. Then she said that whatever fell on the lower balconies was due to cracks in her balcony floor and she was not responsible for those cracks. Her testimony was inconsistent on several points, including this one. Because she was argumentative, evasive and inconsistent in several of her answers, and because she refused to admit some obvious facts at times, I find that Norma cannot be believed on the essential facts of this case. She even interrupted counsel for the Corporation on several occasions and at

times was defensive; sometimes, she debated with him. The factors enumerated in *Kay v. Caverson* [2011] O.J. No. 3639 have been considered in assessing her credibility. I am further guided by *Faryna v. Chorny* [1951] B.C.J. No. 152; [1952] 2 D.L.R. 354, a decision of the British Columbia Court of Appeal, and by *Harakh v. D'Andrade* [2010] O.J. No. 1893, in assessing credibility.

35. She presented no evidence of any of the elements of the presumed tort of harassment. The Corporation's conduct was not outrageous; the Corporation was enforcing the provisions of the Act, the Declaration, the By-laws and the Rules. It was exercising its statutory duties. The Corporation had no intention of causing emotional distress to Norma, nor did it act with a reckless disregard which could have caused emotional distress to her. There is no evidence that Norma suffered severe or extreme emotional distress. Finally, as there is no evidence of distress, it is not necessary to consider whether any distress was linked to the Corporation's conduct.

36. Norma is seeking the reimbursement of the sum of $255.00 for the clean-up of the balcony. She admitted that her husband paid that amount, but she now wants that money back. There is no basis in law for the Corporation to reimburse that amount: the Corporation was in its right to have the clean-up performed by a third party and to charge the amount thereof to the unit owner. Hence, that part of the claims fails.

37. Norma also seeks the reimbursement of the sum of $270.14 which she paid to a lawyer whom she consulted "*to prevent further wrongful charges related to this matter.*" On the evidence, there were no wrongful charges made by the Corporation. Hence, that claim also fails.

JUDGEMENT

38. The action is dismissed with costs.

COSTS

39. The defendant shall have 10 days from the date of release of this decision to make written submissions as to costs. The plaintiff shall then have 10 days to reply. The submissions shall be limited to three pages.

40. If offers to settle made pursuant to the Rules of the Small Claims Court were delivered to opposing counsel/party, those offers are to be sent to me in addition to the maximum three-page submissions. I also want to know when those offers were served on opposing counsel/party.

Date: December 18th, 2015.

RAYMOND H. GOUIN

Decision released: December 18th, 2015

2016 CarswellOnt 6003
Ontario Superior Court of Justice

Wexler v. Carleton Condominium Corp. No. 28

2016 CarswellOnt 6003

Norma Wexler, Plaintiff and Carleton Condominium Corporation #28, Defendant

Raymond H. Gouin D.J.

Heard: April 20, 2015; April 22, 2015; October 8, 2015
Judgment: February 19, 2016
Docket: Ottawa SC-12-121278

Proceedings: Additional reasons, 2015 CarswellOnt 20652, 264 A.C.W.S. (3d) 248 (Ont. S.C.J.)

Counsel: Plaintiff, for herself
Antoni Casalinuovo, for Defendant

Subject: Civil Practice and Procedure; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Real property

X Condominiums
X.14 Miscellaneous

Headnote

Civil practice and procedure

Real property

Raymond H. Gouin D.J.:

1 Following a three day trial, the plaintiff's action was dismissed, The plaintiff's claim was for $2,525.14, inclusive of the amount of $2,000.00 for harassment.

2 Section 29 of the *Courts of Justice Act*, R.S.O. 1990, chapter 43 provides as follows:

> An award of costs in the Small Claims Court; other than disbursements, shall not exceed 15 per cent of the amount claimed or the value of the property sought to be recovered unless the court considers it necessary in the interests of justice to penalize a party or a party's representative for unreasonable behaviour in the proceeding.

3 Rule 19.01(1) of the Rules of the Small Claims Court provides as follows;

> A successful party is entitled to have the party's reasonable disbursements, including any costs of effecting service and expenses for travel, accommodation, photocopying and experts' reports, paid by the unsuccessful party, unless the court orders otherwise.

4 Rule 19.02 of the Rules of the Small Claims Court provides as follows;

> Any power under this rule to award costs is subject to section 29 of the Courts of Justice Act, which limits the amount of costs that may be awarded.

5 Rule 19.06 of the Rules of the Small Claims Court provides as follows:

> If the Court is satisfied that a party has unduly complicated or prolonged an action or has otherwise acted unreasonably, the court may order the party to pay an amount as compensation to another party.

6 Counsel for the defendant claims costs above 15% of the total amount claimed by the plaintiff. He submits that the defendant is entitled to costs on a full indemnity basis in the amount of $35,495.82. In the alternative, he claims the amount of $28,503.38; in the further alternative, he claims the amount of $14,424.94 on a partial indemnity basis.

7 The plaintiff is the owner of a residential condominium unit. Counsel for the defendant submits that, according to Article X of the Corporation's Declaration, any unit owner shall indemnify the condominium corporation from any loss, costs, damages, injuries or liabilities which may occur as a result of an act or omission of that unit owner. It is further submitted that Article X provides that those costs shall be deemed to be common expenses.

8 In Peel Condominium Corporation No. 108 v. Young, 2011 CarswellOnt 1849, Gray J. wrote: *"Once registered, the Declaration has the force of law, at least as far as the unit holders are concerned. It is a sort of Constitution* that *binds them all, and which the Board of Directors is legally obliged to enforce. There is an interest, in the collective, in having the Declaration enforced ...*" He added: "*... the collective interest in having the Declaration enforced must prevail over the private interest of the [unit owner]".* Based on *Peel Condominium Corporation No, 108 v. Young*, I accept that, when enforcing its Declaration, a condominium corporation must consider the collective interests of all unit owners as opposed to only the private interests of the unit owner who is alleged to be in default of the Declaration.

9 Relying on a decision of the Court of Appeal of Ontario in York Condominium Corporation No. 382 v. Dvorchik, 1997 CarswellOnt 219, counsel for the defendant submits that in asking for costs above the 15% limit, he is simply seeking that the indemnification provision of the Declaration be enforced, considering also that the defendant is statutorily required to adhere to the Declaration and is entitled to ask that it be enforced, Hence, he is asking that I allow costs over 15% in the range of the aforesaid amounts.

10 Counsel for the defendant also relies on *Carleton Condominium Corporation No. 396 v. Burdet, 2015, ONSC 1361* where Kane J. set out section 131(1) of the Courts of Justice Act which provides:

> Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

11 *The Condominium Act, 1998* ("Act"), contains specific provisions as to what levels of legal Costs are recoverable by a condominium corporation. Cost entitlement under the Act is not limited to the cost provisions under s. 131 of the CJA. As such, counsel for the defendants submits that the defendants is therefore entitled to costs above 15%, and for an amount in the aforesaid range. I accept that the rationale behind *Carleton Condominium Corporation No. 396 v. Burdet* and other similar decisions is that if the condominium corporation is not awarded full indemnity as to costs when defending an action successfully, the costs of defending that action is actually to the detriment of all other unit owners. That is where an injustice lies if the condominium corporation cannot obtain full indemnity for the costs of successfully defending an action.

12 Counsel for the defendant submits that *Carleton Condominium Corporation No, 396 v. Burdet* also decided that where accusations of bad faith and/or misconduct have been raised but not proven, a higher scale of costs can be awarded.

13 Counsel for the defendant submits that the plaintiff presented several documents at trial that had not been produced before trial. I allowed the plaintiff to produce those documents as I wanted to ensure that all the facts were before me; she was not assisted by a lawyer and did not know the rules of the court. I could not know whether the facts that those documents were supposed to disclose were relevant or not to the claim unless they were before me. However, as it turned out, those documents did not support her claim.

14 Counsel for the defendant submits that, as the plaintiff was not organized in her presentation at trial, the trial was unduly prolonged. For these reasons, counsel for the defendant submits that costs should be in excess of the 15% allowable pursuant to the *Courts of Justice Act.*

15 Counsel for the defendant submits that I can declare that the plaintiff's action was vexatious therefore permitting me to award costs on a higher scale than what is contemplated in the *Courts of Justice Act.* He submits further that the plaintiff's action had no merit and a message should therefore be sent that the burden of public's resources should have consequences which the plaintiff should bear.

16 The fact that the plaintiff did not prove her case despite given ample opportunity to do so, and considering that she was also allowed to introduce several documents which she claimed were necessary to her claim, is not conclusive in itself of a vexatious claim. The fact that the plaintiff has two other claims against this defendant is not evidence that she is a vexatious litigant as I do not know the facts of those two other actions.

17 The award of costs is a discretionary matter under section 131 of the *Courts of Justice Act.* There are factors to be considered in exercising discretion in awarding costs. I am required to consider what is fair and reasonable in fixing costs; *Boucher v. Public Accountants Council (Ontario) (2004), 71 O.R. (3d) (C.A.).*

18 While I have no doubt that counsel for the defendant prepared extensively for trial, I hesitate to award costs in the amount of $35,495.82 or even $28,503.38 as submitted by him. I recognize that the plaintiff was not prepared for trial and that she was disorganized; this directly contributed to unnecessarily prolonging the trial. As such, and because her action was dismissed and because the condominium corporation has a Declaration, By-Laws and Rules providing for full indemnity, and especially because it would be unfair that the unit owners should bear all the costs of this litigation when the condominium corporation is unnecessarily sued, I allow costs in the amount of $20,000.00, inclusive of HST and disbursements, In arriving at this conclusion, I have also considered the principle of proportionality.

19 I do not know what the plaintiff originally thought the cost consequences could be if she failed to prove her case, but she must have known that there were consequences. In fact, she should have known that costs payable by an unsuccessful party to the successful party are a feature of litigation. She could not have expected the costs to be zero if she lost.

20 The plaintiff shall therefore pay costs to the defendant in the amount of $20,000.00.

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Wexler V Carleton Condominium Corporation #28, 2016 ONSC 4162 (CanLII)

Date: 2016-06-22
Docket: 178; 2016 ONSC 4162; 28; 16-2191
Citation: Wexler V Carleton Condominium Corporation #28, 2016 ONSC 4162 (CanLII), <http://canlii.ca/t/gs6g1>, retrieved on 2016-06-24

CITATION: *WEXLER V CARLETON CONDOMINIUM CORPORATION #28*, 2016 ONSC 4162

COURT FILE NO.16-2191

DATE: 2016/06/22

SUPERIOR COURT OF JUSTICE – ONTARIO

BETWEEN

NORMA WEXLER

AND

CARLETON CONDIMINIUM CORPORATION NO. 28

BEFORE: Justice P. Roger

COUNSEL: Self Represented Plaintiff

Antoni Casalinuovo, counsel for the Defendants

HEARD: In Writing

ENDORSEMENT

[1] This is a motion for leave to appeal to the Divisional Court from the order of Deputy Judge Raymond H. Gouin, of the Small Claims Court at Ottawa, dated February 18, 2016.

[2] Section 133 (b) of the *Courts of Justice Act*, R.S.O. 1990, C. C.43 ("CJA") provides that no appeal only as to costs that are in the discretion of the court that made the order for costs lies without leave of the court to which the appeal is to be taken.

[3] Rule 62.02(4) of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194, provides that leave to appeal shall not be granted unless:

(a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or

(b) there appears to the judge hearing the motion good reason to doubt the correctness of the Order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

[4] The moving party seeks leave to appeal alleging that Deputy Judge Gouin erroneously relied on Article X of the Respondent's Condominium Corporation Declaration, despite the findings of this Court in *Pearson (Litigation Guardian of) v. Carleton Condominium Corporation No. 178*, 2012 ONSC 3300 (CanLII), contrary to s. 29 of the CJA.

[5] For the reasons set out below, the motion for leave to appeal is granted.

[6] The *ratio* of the decision of Deputy Judge Gouin is found at paragraph 18 of his decision. As is obvious from reading that paragraph, he relied "especially" on his reasoning that it would be unfair that other unit owners should bear the costs of this litigation considering Article X of the Respondent's Declaration.

[7] It is my view that the decision referenced by the Applicant (*Pearson (Litigation Guardian of) v. Carleton Condominium Corporation No. 178*, 2012 ONSC 3300 (CanLII)) demonstrates a difference in principles chosen to guide discretion. As such, it is a conflicting decision for the purpose of rule 62.02(4)(a). Indeed, in *Pearson*, this Court held that a very similar article to Article X (Article XIX in *Pearson*) had no application as there had been no loss, cost, damages or injury to the common elements. I point out that Article X makes no mention of legal costs and that Article X requires the loss, costs, damages, injury or liability whatsoever be to or with respect to common elements and/or all other units. Here, the Deputy Judge was dealing with legal costs that seem to have no connection to the common elements such that his decision conflicts with the decision on this point in *Pearson.*

[8] I find that the second branch of the test is also made out as it is desirable to grant leave to appeal as disputes of this nature, involving condominium corporations are frequently before the Small Claims Court and the proper interpretation of such provisions and their potential impact on costs awards, considering s. 29 of the CJA, reaches that threshold. .

[9] Further, I find that there is good reason to doubt the correctness of the Deputy Judge's decision and that the appeal raises matters of general importance, considering s. 29 of the CJA.

[10] The phrase "good reason to doubt the correctness of a decision" does not require a conclusion that the decision in question was wrong or even probably wrong. Nor does it require that the judge hearing the leave motion would have decided it differently had he or she been presiding as the motion judge. The test is whether the decision is open to serious debate.

[11] I find that the decision of the Deputy Judge is open to serious debate. In exercising his discretion over costs, the Deputy Judge seems to have placed significant emphasis on irrelevant considerations. As indicated above, he indicates at paragraph 18 that he relies "essentially" on his finding that it would be unfair considering the condominium declaration. Section 29 of the *CJA* provides for an exception which does not incorporate such considerations. Consequently, there are good reasons to doubt correctness as the Deputy Judge appears to have exceeded his jurisdiction.

[12] No submissions have been made on the issue of costs of the leave to appeal and these are reserved to the Court hearing this appeal.

Justice P.E. Roger

Released: June 22, 2016

CITATION: *WEXLER V CARLETON CONDOMINIUM CORPORATION NO. 28*, 2016 ONSC 4162

COURT FILE NO.16-2191

DATE: 2016/06/22

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN

NORMA WEXLER

AND

CARLETON CONDIMINIUM CORPORATION #28

BEFORE: Justice P. Roger

COUNSEL: Self Represented (Plaintiff)

Antoni Casalinuovo, counsel for the Defe
ndants

HEARD: In Writing

ENDORSEMENT

Justice P.E. Roger

Released: June 22, 2016
