In the Provincial Court of Alberta

Citation: Wilson v. Condominium Corporation No. 021 1057, 2010 ABPC 150

Date: 20100430
Docket: P0890104690
Registry: Calgary

Between:

Edward A. Wilson

Plaintiff

- and -

Condominium Corporation No. 021 1057, also known as Copperwood 1 - Coppercliff and also known as Copperwood Phase 1 Condominium Association

Defendant

- and -

Walk Construction Ltd. and Sandlewood Developments Ltd.

Third Parties

Reasons for Decision of the Honourable Norman R. Hess
Assistant Chief Judge

The Background

[1] The plaintiff, Edward A. Wilson ("Wilson"), claims the carrying costs incurred by him when his condominium unit was vacant while the defendant, Condominium Corporation No. 021 1057, also known as Copperwood 1 - Coppercliff and also known as Copperwood Phase 1 Condominium Association ("Copperwood"), was carrying out repairs to an adjoining unit. Copperwood claims indemnity from the third party, Walk Construction Ltd. ("Walk").

[2] Wilson's civil claim seeks damages totalling $21,332.49.

[3] At the conclusion of Wilson's evidence, Copperwood made an application for a non-suit. For the reasons which follow, I am of the opinion that Copperwood's application should fail.

Wilson's Evidence

[4] Wilson bought a condominium unit in Copperwood's complex in 2003. His unit was located on the third floor of a four storey building. He first observed water leaking into his unit in May, 2004. The leak was reported to Copperwood and an investigation was undertaken by Walk. I gather no cause was determined for the water incursion into Wilson's unit at that time, although Wilson reported some caulking was carried out.

[5] The problem reoccurred in the spring of 2005. By now the leak was apparently more serious as significant damage was being caused to the ceiling in the master bedroom of the unit, with water pooling in the bedroom and living room. Again Walk attended to investigate and on September 15, 2005, a portion of the drywall ceiling in the master bedroom of Wilson's unit was removed. I was told the source of the water leak was determined to be from the fourth floor unit, immediately above Wilson's unit. While the source of the leak was determined, the cause of the leak was not.

[6] In May 2006, the water incursion started again, with increased volumes being reported. To facilitate further work which Walk was to carry out, Wilson moved his furniture from the master bedroom on June 16. He testified that and from that point onward he did not have the use of the master bedroom and when in the unit, slept in a single bed which was in a second, smaller bedroom which he used as an office for his home based consulting business. The following day, Walk again attended and enlarged the opening in the ceiling of the master bedroom and opened a portion of the wall. The size of the opening was, by then, roughly four times that of the original.

[7] According to the emails entered into evidence by Wilson, on July 6, Walk determined the source of the problem to be with deficiencies in the original construction of the unit above Wilson's unit and on July 11 took steps to solve the problem. By an email to Copperwood, Wilson advised he wanted testing carried out and assurances given that the leaks were repaired and put Copperwood on notice of his intention to either sell or rent out his unit in September.

[8] In the chronology entered by Wilson, he reported that the problem with water leaking into his unit continued. He wrote that on August 8 and 10, heavy rains caused significant water incursion into his unit.

[9] On or about August 23, Wilson became aware Copperwood had retained the services of a firm of consulting engineers, Morrison Hershfield, to investigate the problem. By September 6, Wilson was given assurances that a solution had been found, part of which included the installation of a new door and waterproof membrane, leading from the patio of the fourth floor unit above his.

[10] In October, Wilson decided to move from his unit and place his furniture in storage. At this point he took up residence with his fiancée. Wilson explained that there were a variety of reasons why he made this decision. He intended to sell his condominium as soon the source of the leak has been determined, he was satisfied the problem had been corrected and the master bedroom had been restored. This decision meant he would be leaving his condominium in the near future in any event. He also told me he had accepted permanent employment and, as a result, he no longer needed to work from his home office. He also told me he felt that because of the ongoing water intrusion and

attendant inconvenience as well as the condition of the master bedroom, which was not to be restored until the source of the leak was found and corrected, he was not prepared to continue to reside in his unit. He said he felt as if his unit had been "hijacked", his property "held for ransom" and his right of "peaceful possession and quiet enjoyment" breached by Copperwood.

[11] Wilson went on at some length to tell me about what he understood to be the problems encountered by either Copperwood or Walk in ordering the replacement door. In the result, the door was not ordered for approximately two months, and was not installed until early January, 2007.

[12] Because of the winter conditions, it was not possible to conduct testing to determine if the problem had been remedied and as a consequence, Copperwood was not able to complete the repairs and restore Wilson's condominium until March. Shortly afterward, Wilson listed his unit for sale.

[13] At the conclusion of his evidence, Wilson entered a spreadsheet summarizing his carrying costs for the period November 2006 to March 2007. Those costs included interest on his mortgage, utilities, condominium fees, taxes, insurance, storage charges for his furniture and the difference between an aborted sale and the sale which ultimately closed. These losses total $9,934.21, and while Wilson did not seek an amendment to his civil claim, this is the extent of the evidence on the issue of damages.

[14] Wilson went to great lengths to impress upon me that the problem would not have been identified, nor would a solution have been found, had he not pressed Copperwood relentlessly to get on with the matter. He introduced a significant number of emails and correspondence from him to Copperwood, individual members of Copperwood's board of directors, the property manager and others, captioned with such subjects as:

- Two leaks in the ceiling at 1301 Copperwood
- Roof Leak At 1301 Copperwood
- Progress Report-Leaking Ceiling at 1301 Copperwood
- Need some help-roof leak at 1301 Copperwood
- Roof leaks at 1301-Leak Testing
- Status of 1301 Copperwood Leak Remediation?
- DEMAND FOR ACTION-LEAKS AT 1301 COPPERWOOD
- Claim for Direct Costs-Repair Period June 2007 to March 2007
  Personal Displacement from 1301 Copperwood.

The Issues

[15] I have been asked by Copperwood to dismiss Wilson's claim for two reasons. Firstly, Copperwood argues there is no requirement, express or implied, that it was obligated to make good any repairs diligently or in a timely fashion. Secondly, Copperwood argues that, if I find such an obligation exists, Wilson failed to introduce evidence of a breach.

The Reasons

[16] Copperwood's application is made under Rule 160 of the Alberta Rules of Court. To paraphrase the commentary in the *Alberta Civil Procedure Handbook 2209*, by Stevenson and Côté, I am being called upon to determine if the evidence adduced by Wilson has made out a cause of action and then determine if the elements of the cause of action have been proven.

[17] The test on a non-suit has been put by Sopinka, Lederman and Bryant in *The Law of Evidence in Canada*, Second Edition, at page 139, in the following terms:

> "§5.4 The trial judge, in performing this function, does not decide whether he or she believes the evidence. Rather, the judge decides whether there is any evidence, if left uncontradicted, to satisfy a reasonable person. The judge must conclude whether a reasonable trier of fact could find in the plaintiff's favour if it believed the evidence given in the trial up to that point. The judge does not decide whether the trier of fact should accept the evidence, but whether the inference that the plaintiff seeks in his or her favour could be drawn from the evidence adduced, if the trier of fact chose to accept it ..."

[18] In confirming the trial judge's dismissal of a non-suit application, the foregoing passage was cited and approved by both o'Leary, J. A. and Fruman, J.A. in *Foley* v. *Alberta (Administrator of the Motor Vehicle Claims Act)*, [223] 8 W.W.R. 271.

[19] The only evidence introduced by Wilson which touches on the issue of Copperwood's obligation to correct the problem of the water intrusion is found in Copperwood's By-laws. By-law 4 contains the following provisions:

> "4. In addition to duties of the Corporation set forth in Act, the Corporation, through its Board SHALL:
>
> e) subject to any obligations imposed by the By-laws or by the Corporation upon any owners to maintain any part of the common property or a unit over which such owners are granted exclusive right of use, clean, maintain and repair:
>
> i) the exterior or outside surfaces of the buildings comprising the units (INCLUDING all windows and doors except to the extent the owner is required to repair and maintain under By-law 3(c));
>
> (ii) the repair of any leakage around windows ;
>
> (iii) all other outside accoutrements affecting the appearance, useability, value or safety of the parcel or the units and the common property including the structural maintenance of any privacy area which is located on any part of the common property to an owner has been granted exclusive use pursuant to By-law 5 or By-law 58;"

[20] I am unable to locate, nor did Wilson direct me to, an express obligation in the By-laws requiring Copperwood to proceed in a timely fashion in discharging its duties.

[21] The obligations imposed upon owners of the complex, are by comparison, sprinkled with terms such as "duly and properly", "forthwith", "ten (10) days' notice to the owner" and "comply strictly".

[22] Throughout his testimony, and in presenting his argument in response to the non-suit application, Wilson relied upon the term that "time was of the essence". I believe, in the absence of any express term that time was to be of the essence, Wilson was trying to impress upon me that I ought to find an implied term in the By-laws that Copperwood was obligated to carry out its obligations within a reasonable period of time and that best efforts or due diligence ought to be brought to bear to resolve the problem.

[23] I was not provided with any authority, nor was I able to locate any, to support the proposition that a trial judge is able to imply terms or provisions into a condominium corporation's by-laws. In my view, principles of contract interpretation dealing with ascertaining the intention of the parties to a contract and implying terms to give effect to that intention have no application to the interpretation of the rights and obligations created by by-laws promulgated under the requirements imposed by legislation. By-laws are not negotiated as between the condominium corporation and unit owners and I my view the court should not be reading provisions into the by-laws at the instance of either of the parties.

[24] In the absence of an obligation to effect repairs in a timely fashion or to carry out repairs with due diligence, I am of the view any obligation, imposed by contract or statute, in the absence of a disclaimer, must be carried out or performed in a reasonable time and with reasonable effort. This principle ought to be applicable to by-laws enacted for the join benefit of all of the owners of units in a condominium complex as well as the condominium corporation. I am satisfied that this is the proper approach having regard to the reasoning in *Buskell* v. *Linden Real Estate Services Inc.*, [2004] 4 W. W. R. 366, at paragraph 19 and *Oldaker* v. *Strata Plan VR 1008*, [2007] 12 W. W. R. 742, at paragraph 54.

[25] The question for my determination, is whether Wilson has but sufficient evidence before me that Copperwood failed to carry out the necessary repairs in a reasonable time, bringing reasonable efforts to bear to resolve the problem using reasonable efforts.

[26] The question of reasonableness is one of fact. The evidence offered by Wilson is that he first reported water leaking into his unit in May, 2004. Despite Wilson's reports of the leaking continuing into 2005, Copperwood did not commission an engineering study until the fall of 2006, and too late to effect and test the sufficiency of the repairs until the spring of 2007. In my view, absent any evidence the contrary, this is not reasonable.

[27] I believe the evidence offered by Wilson and I find he has satisfied the onus upon him to demonstrate that Cooperwood has breached the implied obligation to perform the duties imposed

by the its By-laws to repair and maintain "the exterior or outside surfaces of the buildings" or that it has failed "the repair of any leakage around windows".

The Result

[28] For the foregoing reasons, I am satisfied Wilson has met the onus upon to demonstrate an implied duty to complete the repairs in a reasonably timely fashion and that evidence of that breach has been put before me. Copperwood's application is therefore dismissed and the parties are asked to contact the trial coordinator to secure a date to conclude this matter. Wilson shall have the costs of this application, in any event of the cause, which may be addressed at the conclusion of the trial.

Heard on the 19th day of April, 2010.

Dated at the City of Calgary, Alberta this 30th day of April, 2010.

Norman R. Hess
A Judge of the Provincial Court of Alberta

Appearances:

Edward A. Wilson
for himself

D. A. Reid
counsel for the defendant

E. Gruenke
agent for the third party, Walk Construction Ltd.

No appearance
by the third party, Sandlewood Developments Ltd.