

2014 BCSC 512
British Columbia Supreme Court

Wolodko v. Zhang

2014 CarswellBC 791, 2014 BCSC 512

**Andrew William Wolodko and Shirley Mae Wolodko, Plaintiffs and Wei Zhang
also known as Michael Zhang and the Owners, **Strata** Plan VR 2456, Defendants**

D.M. Masuhara J.

Heard: March 10, 2014; March 11, 2014

Judgment: March 25, 2014

Docket: Vancouver S125630

Counsel: R.A. Fayerman, for Plaintiffs

M.J. Steven, for Defendants

Subject: Civil Practice and Procedure; Property; Torts

Table of Authorities

Cases considered by D.M. Masuhara J.:

Chiang v. Yang (1999), 1999 BCPC 29, 1999 CarswellBC 3276 (B.C. Prov. Ct.) — referred to

*Chorney v. **Strata** Plan VIS770* (2011), 2011 BCSC 1811, 2011 CarswellBC 3645 (B.C. S.C. [In Chambers]) — referred to

Sauve v. McKeage (2006), 46 R.P.R. (4th) 130, 2006 CarswellBC 1239, 2006 BCSC 781 (B.C. S.C. [In Chambers]) — referred to

***Strata** Plan LMS 2768 v. Jordison* (2012), 2012 CarswellBC 31, 15 R.P.R. (5th) 291, 2012 BCSC 31, 30 B.C.L.R. (5th) 126, [2012] 6 W.W.R. 813, 346 D.L.R. (4th) 721 (B.C. S.C.) — referred to

***Strata** Plan NW87 v. Karamanian* (1989), 1989 CarswellBC 1985 (B.C. S.C.) — referred to

***Strata** Plan VR 2000 v. Grabarczyk* (2006), 2006 CarswellBC 3284, 2006 BCSC 1960, 55 R.P.R. (4th) 36 (B.C. S.C.) — referred to

***Strata** Plan VR 2000 v. Grabarczyk* (2007), 55 R.P.R. (4th) 34, 2007 BCCA 295, 2007 CarswellBC 1115 (B.C. C.A.) — referred to

Rules considered:

Supreme Court Civil Rules, B.C. Reg. 168/2009

R. 9-7 — referred to

App. B, s. 2(2)(b) — referred to

D.M. Masuhara J.:

Introduction

1 The plaintiffs and defendant Mr. Zhang are owners of adjoining **strata** lots on the 8th floor of Highbury Tower in Vancouver, B.C. The plaintiffs say they find the piano playing by the defendant's son to be disturbing and by way of summary trial seek to enjoin the defendant from permitting piano playing in his **strata** unit on the basis that the piano playing is of such a nature that it constitutes a nuisance.

2 The plaintiffs had also sought relief against the **strata corporation** which included: a declaration that Mr. Zhang had contravened the **strata's** noise bylaws, an order that the **strata** enforce the bylaws against Mr. Zhang, and an order that the **strata** impose fines against Mr. Zhang for violating the bylaws. However, at the start of the hearing, the plaintiffs advised that they had consented to the dismissal of their claims against the **strata corporation**. I was not provided a copy of the consent order but I took this as the plaintiffs having abandoned their assertion of a breach of the noise bylaws of the complex and their claim to relief arising from that finding.

3 The remaining parties agree that the dispute before me can be decided by summary trial under Rule 9-7. Though there are some aspects which make findings somewhat problematic, I agree this procedure is appropriate, particularly in light of the principle of proportionality.

Background

4 The plaintiffs are a retired couple. They have lived in unit #803 of Highbury Tower since 2006. Mr. Wolodko was a member of the **strata** council (the "Council") until March 2012. The defendant purchased and moved into unit #804 in late 2010. The two units share a common wall. The defendant's piano is located in a room which is one room removed from the room which has the common wall between the two units.

5 Shortly after Mr. Zhang moved in, Mr. Wolodko began to hear piano sounds emanating from unit #804 into all areas of their unit. He and his wife found this to be disturbing. Mr. Wolodko made a complaint to the **strata** council on December 6, 2010. On December 13, 2010 he emailed a complaint to the property manager for Highbury Tower. He was advised by two council members to speak directly with Mr. Zhang about the noise. It turned out that the piano playing was that of Mr. Zhang's then-14-year-old son, who is now 17-years-old and is in Grade 12. Mr. Wolodko has deposed that he spoke with Mr. Zhang about the piano noise and brought to his attention the **Strata's** bylaws which deal with noise and the use of musical instruments. Mr. Zhang denies having this conversation.

6 The plaintiffs say that the piano noise "reverberates" throughout their unit and its continuation over time has led to feelings of anxiety and has been a source of tension and stress between the plaintiffs. The plaintiffs, in their affidavits, described various negative effects of the piano playing on their day-to-day life.

7 The plaintiffs say that the "frequency and the level of sound from the piano in Unit 804 has varied. At times, the noise level is loud and untenable. Invariably, Mr. Zhang's son is not playing an entire piece of music (which could be background music). Instead, he is practicing portions of pieces of music repetitively." They also say the piano playing is "irregular and intermittent".

8 The son is an accomplished pianist who has now completed the Grade 10 piano Certificate Program of the Royal Conservatory of Music and is presently studying and practising for his Performance Certificate. His desire is to attend university in the United States to study engineering but has also applied to the University of British Columbia.

9 On February 8, 2011, Mr. Wolodko made a further complaint to the **strata** council through the property manager. His complaints provided the date and time when the disturbances were said to have occurred.

10 On March 14, 2011 the property manager on behalf of the **Strata** Council issued a letter to Mr. Zhang advising of the complaints of Mr. Wolodko and provided him an opportunity to respond. The letter set out by-law 3(5)(d) which related to the playing of musical instruments. It states:

An Owner, Tenant or Occupant must not:

...

d) use any musical instrument, amplifier, sound reproduction equipment or other device within or about any **Strata** lot, the common property or any limited common property such that it causes a disturbance or interferes with the comfort of any other Owner, tenant or occupant.

11 There is another noise restriction contained in bylaw 3(1)(b) and (c) which I set out here as well:

An Owner, Tenant, Occupant or visitor must not use a **Strata** lot, the common property or common assets in a way that

...

b) causes unreasonable noise,

c) unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets or another **strata** lot...

12 On March 21, 2011, Mr. Zhang responded by advising the **strata** council that his son would alter his playing time in the evening to between 4:00 p.m. and 6:30 p.m.; close the windows when the piano was played; and a carpet would be placed over the back of the piano.

13 On March 22, 2011, the Council discussed Mr. Zhang's proposal and found it not acceptable. The property manager wrote to Mr. Zhang on April 11, 2011 and advised him of the Council's rejection of his proposed solution and stated:

Instead of contravening the **strata** bylaws by playing the musical instrument inside your **strata** lot, Council suggested that you may take other options, such as playing the electric keyboard with a headphone or practicing playing in other areas rather than Highbury Tower.

14 On April 18, 2011, the property manager received another complaint from Mr. Wolodko about the piano playing. On the same day, the property manager received a communication from Mr. Zhang which appears to dispute that the piano playing contravened the bylaws and that the alternatives suggested by the Council were not suitable given the advanced level of his son's program. He sought a dispute resolution process as outlined in the bylaws and requested the Council's assistance in establishing a committee for this purpose.

15 On May 15, 2011, Mr. Wolodko delivered a further complaint to the Council.

16 On July 12, 2011, the Council concluded that the noise complained of by Mr. Wolodko had been controlled.

17 On September 27, 2011, Mr. Wolodko reported piano disturbance on September 24, 2011 from unit #804.

18 On January 4, 2012, the Council received another infraction report occurring on January 3, 2012 from Mr. Wolodko. In his report he required enforcement by the Council.

19 On January 27, 2012, the property manager for the Council wrote to Mr. Zhang and advised:

Council has met to specifically discuss this issue and have come to the conclusion that if the complainant(s) have issued as many complaints as they have, they are truly unable to completely enjoy their **strata** lot. Council has unanimously voted to

uphold the bylaw and are requesting that immediate actions be taken by Unit 804 to stop the playing of the piano which is causing the disturbance. Fines are required to be implemented if bylaw infractions continue after the receipt of this letter.

There is strong compassion towards the budding musician in Unit 804 and council truly hopes other mechanisms can be used to continue their musical development.

20 In response to the letter, Mr. Zhang wrote to the property manager on January 31, 2012 and disputed that the piano playing caused an unreasonable noise and stated that in addition to the earlier measures he had stated, the following steps would be taken:

- (a) to use the piano silence pedal when practising scales;
- (b) to use a blanket as a noise damper to reduce sound passing through the wall;
- (c) to use a carpet beneath the piano to reduce sound passing through the floor; and
- (d) to control the volume of piano playing and to minimize unnecessary repetitive playing.

21 Mr. Zhang also requested an independent investigation into the noise complaint as well as a hearing before the Council.

22 Mr. Wolodko rejected the suggestions of Mr. Zhang as being ineffective and maintained that the son should practise piano playing at an offsite location.

23 On February 19, 2012, Mr. Wolodko registered another complaint of piano playing to the property manager.

24 Subsequently, a meeting of Council with Mr. Zhang and Mr. Wolodko was arranged for March 6, 2012. At the meeting, Mr. Zhang proposed having the noise level independently assessed.

25 Council later sought a quote for such an assessment. The matter of who was to bear the cost was discussed with Mr. Zhang. The assessment did not go forward at that point.

26 On March 30, 2012 another complaint of noise was registered by Mr. Wolodko.

27 By letter dated April 20, 2012, the Council advised the plaintiffs that they believed they were obligated to assess the noise level within the plaintiffs' suite and sought access for three members. They wrote:

Under the SPA, Council has the unenviable responsibility of deciding whether or not a complaint has merit and the course of action (if any is required) to be pursued thereafter. Council is therefore requesting that you grant access to your unit, #803, in order to help us assess the merits of the noise complaint.

Further, on advice of counsel, the **Strata** Council also needs particulars of each complaint. To date, Council does not have sufficient detailed information on how long the noise lasted, or the specific time of day. This information is crucial to helping Council members come to a decision and, if warranted, pursuing further action to resolve the problem. Such a record would also be required for Council to be able to act on any future complaint.

28 Counsel for the plaintiffs wrote to the Council advising that the plaintiffs were opposed to providing access to council members and stated that a delegation of that duty to an independent professional was more appropriate.

29 Counsel for the **strata corporation** advised the Council that the assessment as to the merits of a complaint was the purview of the council and that an independent assessor was not appropriate.

30 Counsel advised me that sometime in early 2014 the parties retained an acoustical engineer for settlement purposes. The evidence agreed to be admitted is found in Mr. Zhang's affidavit in which he deposed that "on the recommendation of a noise expert" he placed "high-tech sound insulating cups" on the bottom of each of the four legs of the piano. Mr. Zhang also deposed that the expert advised that the sound reaching the plaintiffs' unit was not "airborne" but rather "travelled through the floor"

because of the building's concrete structure. I was not told of the findings or whether there were other recommendations made by the acoustical engineer; however, this step as described by Mr. Zhang did not work in the plaintiffs' view.

31 The plaintiffs have set out, in their affidavits, the dates and times when the piano noise occurred from December 2010 through February 2014. Mr. Zhang does not dispute that piano playing occurred on those dates and times. The record indicates that there were months when the playing occurred on as many as ten days of the month. There were other months during this period in which no playing occurred. It is fair to say that there are far more months in which piano playing occurred than not. By my estimation, it appears that the occurrences averaged about five per month. The duration of each instance is described as ranging from a few minutes to an hour. My estimation of the record indicates that the duration roughly averaged between 15 to 30 minutes. The occurrences predominantly happened in the late afternoon to around 8:00 p.m. or 9:00 p.m.

32 Mr. Zhang has not taken issue with the above record. However, he objects to the assertion that the piano playing contravenes the by-laws or is a nuisance. As already mentioned by-law contravention is not before me.

Law of nuisance

33 The parties agree as to the applicable law. The test for determining whether there is a nuisance is an objective one: It is whether a reasonable person in the specific locality would find the impugned activity to be a nuisance. Various decision of this court have adopted the following statement from R.F.V. Heuston, *Salmond on the Law of Torts*, 17th ed (London: Sweet & Maxwell, 1977) at p. 56 as the standard:

The question in every case is not whether the individual plaintiff suffers what he regards as substantial discomfort or inconvenience, but whether the reasonable man who resides in that locality would take the same view of the matter. The reasonable man connotes a person whose notions and standards of behaviour and responsibility correspond with those generally obtained among ordinary people in our society at the present time, who seldom allows his emotions to overbear his reason and whose habits are moderate and whose disposition is equitable. He is not necessarily the same as the average man — a term which implies an amalgamation of counter-balancing extremes...

34 The plaintiffs referred to the following cases in support of their case. *Strata Plan NW87 v. Karamanian*, [1989] B.C.J. No. 629 (B.C. S.C.); *Strata Plan VR 2000 v. Grabarczyk*, 2006 BCSC 1960 (B.C. S.C.), aff'd *Strata Plan VR 2000 v. Grabarczyk*, 2007 BCCA 295 (B.C. C.A.) [*Grabarczyk*]; *Chorney v. Strata Plan VIS770*, 2011 BCSC 1811 (B.C. S.C. [In Chambers]); and *Strata Plan LMS 2768 v. Jordison*, 2012 BCSC 31 (B.C. S.C.).

35 The defendants cases included: *Strata Plan NW87 v. Karamanian*, [1989] B.C.J. No. 629 (B.C. S.C.); *Sauve v. McKeage*, 2006 BCSC 781 (B.C. S.C. [In Chambers]); *Chiang v. Yang*, [1999] B.C.J. No. 966 (B.C. Prov. Ct.); and *Grabarczyk*.

Discussion

36 The plaintiffs have noted numerous instances when they say that the piano playing has interfered with the enjoyment of their unit. Mr. Zhang does not contest these occurrences. There is no question that piano playing can constitute a nuisance. There also appears to be sensitivity to musical instrument playing within this specific complex as evidenced by the bylaw and I recognize that the subject location is a residential high rise *strata*. I also note that at one point the Council found that the piano playing had contravened the bylaws. However, these facts in concert with the plaintiffs' numerous complaints are not sufficient to establish nuisance. The test, as stated above, is an objective one relative to the locality. In my view the evidence is not sufficient to find that a reasonable person would conclude that the described incidents of piano playing constitute a nuisance.

37 In the circumstances here where:

(a) there are only the complaints of Mr. and Mrs. Wolodko in respect to the piano noise;

(b) there is an absence of complaints regarding the Zhang unit from others in the complex, which can be contrasted with another piano-noise complaint problem in the complex arising from unit #904 in 2009, where there were several complaints

of noise throughout the complex and from people residing on different floors (7th to 10th) and which complaints led to fines being imposed;

(c) there are no recordings of the complained of piano playing;

(d) there is the absence of any objective measures or readings of the piano noise; and

(e) the plaintiffs refused to permit members of the Council to come to their unit to listen for themselves to determine if there had been a contravention of the noise bylaws.

the case of nuisance, objectively, cannot be said to have been made out. A further difficulty here for the plaintiffs is the fact that they consented to the dismissal of their action against the **strata**, which related to alleged infractions of the noise bylaws.

Conclusion

38 The plaintiffs' action is dismissed. The defendant is awarded costs on Scale B.