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York **Condominium Corp.** No. 82 v. Bujold

York **Condominium Corporation** No. 82, Plaintiff (Appellant) and Marie Lillian Bujold, Defendant (Respondent)

Ontario Court of Appeal

M. Rosenberg J.A., J.C. MacPherson J.A., H.S. LaForme J.A.

Heard: February 22, **2013**

Judgment: April 3, **2013**

Docket: CA C55735

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Counsel: Derrick M. Fulton, for Appellant

Sidney Klotz, for Respondent

Subject: Civil Practice and Procedure; Property

Civil practice and procedure

Real property

J.C. MacPherson J.A.:

A. Introduction

1 The appellant, York **Condominium Corporation** No. 82, appeals from the judgment of Perell J. of the Superior Court of Justice dismissing its motion for summary judgment. The motion judge held that, although the appellant had registered a lien against the respondent's condominium unit, the lien had expired because of late registration.

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2 The appeal raises issues relating to the nature of liens, notice, and registration under s. 85 of the *Condominium Act, 1998*, S.O. 1998, c. 19 (the '*Act*').

B. Facts

(1) The parties and events

3 The respondent, Marie Bujold owns a condominium unit in the appellant **condominium corporation**. On June 22, 2007, the corporation served Ms. Bujold with a Notice of Lien because of her failure to pay common area expenses. The Notice of Lien stated that the amount of arrears owing was \$2544.29.

4 The corporation registered a Certificate of Lien against Ms. Bujold's unit on September 25, 2007. The lien was registered in the amount of \$2254.34.

5 Both of these amounts included the total amount of arrears owed by Ms. Bujold that had accumulated since December 31, 2006.

6 In early 2009, the corporation served a Notice of Sale and commenced a claim seeking possession of the unit. In her defence, Ms. Bujold alleged that a charge of \$704.24 that was added on December 31, 2006 was a duplicate from 2004.

7 The corporation moved for summary judgment and sought an order for possession of the property and an order that it was at liberty to obtain a writ of possession regarding the property.

(2) The motion judge's decision

8 The motion judge dismissed the corporation's motion for summary judgment. He found as a fact that there were arrears when the Notice of Lien was served on Ms. Bujold on June 22, 2007. However, he found that, pursuant to s. 85 of the *Act*, while the lien would have been enforceable if it had been registered within three months, the registration date of September 25, 2007 was three days too late. Hence, the lien had expired.

9 The appellant appeals this decision.

C. Issues

10 The issues on the appeal are:

(1) Did the motion judge err by determining that the lien had expired?

(2) If the answer to (1) is 'Yes', did the appellant comply with the notice requirement of the *Act*?

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D. Analysis

11 Both issues require interpretation of s. 85 of the *Act*, the relevant parts of which are:

85 (1) If an owner defaults in the obligation to contribute to the common expenses, the corporation has a lien against the owner's unit and its appurtenant common interest for the unpaid amount together with all interest owing and all reasonable legal costs and reasonable expenses incurred by the corporation in connection with the collection or attempted collection of the unpaid amount.

(2) The lien expires three months after the default that gave rise to the lien occurred unless the corporation within that time registers a certificate of lien in a form prescribed by the Minister.

(3) A certificate of lien when registered covers,

(a) the amount owing under all of the corporation's liens against the owner's unit that have not expired at the time of registration of the certificate;

(b) the amount by which the owner defaults in the obligation to contribute to the common expenses after the registration of the certificate;

.....

(4) At least 10 days before the day a certificate of lien is registered, the corporation shall give written notice of the lien to the owner whose unit is affected by the lien.

(1) The separate lien issue

12 I begin by noting that the motion judge made an error on which nothing turns for the purposes of this appeal. The motion judge held that the lien arose on June 22, 2007, the date on which the corporation served its Notice of Lien on Ms. Bujold. However, the parties agree that, pursuant to s. 85(1) of the *Act*, the lien arose on the date of default giving rise to the lien. The default in this case was June 1, not June 22. Nothing turns on this, as both of these dates are outside the three month registration period prescribed by s. 85(2).

13 The appellant submits that the late registration of the lien did not cause the corporation to lose all of its lien rights. The appellant contends that a new lien arises upon each default which, in this case, was the first day of each month when common area expenses became due. Each lien expires three months after the default unless the corporation registers a certificate in that time. The effect of the corporation having registered its lien on September 25, 2007 is that it lost its liens arising more than three months earlier. However, the registration on September 25 meant that the liens that arose after June 25 were valid, namely, the liens relating to defaults on July 1, August 1 and September 1.

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14 I agree with this interpretation. The use of the plural "liens" in s. 85(3)(a), which provides that registration of a lien essentially consolidates all of the corporation's liens against the unit that have not expired, indicates that a corporation can have multiple liens against the same unit. The wording of s. 85(1) provides that an unregistered lien arises upon default automatically. In my view, the proper reading of s. 85 is that a corporation has a lien that arises upon each default. This accords with the wording of s. 85(1) and, otherwise, there is no explanation for the use of the plural in s. 85(3)(a). Subsection 85(2) provides that the lien expires three months after the default that gave rise to it unless it is registered. It follows that registration consolidates only those liens that arose in the three months before registration. Delayed registration does not invalidate all liens, just those that arose from defaults that occurred more than three months before the registration.

15 I make a final observation on this issue. Although this issue does not appear to have been considered in prior cases, the condominium industry seems to be operating in accordance with the above interpretation. Audrey Loeb, in her text *The Condominium Act: A User's Manual*, 3rd ed. (Toronto: Carswell, 2009), states at p. 255: "The certificate of lien covers liens arising up to three months prior to its registration as well as defaults occurring after registration." Similarly, J. Robert Gardiner, in his text *The Condominium Act, 1998: A Practical Guide* (Aurora: Canada Law Book, 2001), states at p. 211: "The new wording makes it clear that a lien may be registered at any time and will secure payment of unpaid amounts that fell due within three months prior to the date of registration of a lien".

16 For these reasons, I conclude that the motion judge erred by determining that the lien had expired. It had expired for all the liens that might have arisen before June 25, 2007. It was potentially valid for any liens that arose after that date.

(2) The notice issue

17 In light of his conclusion on the first issue, it was not necessary for the motion judge to consider the validity of the notice given in the present case.

18 Accepting the appellant's submission that a separate lien arises on every default, the question becomes whether the notice given on June 22, 2007 was sufficient to cover any subsequent liens that arose between that date and registration on September 25. The answer to this question requires an interpretation of s. 85(4) of the *Act* which, for ease of reference, I set out again:

At least 10 days before the day a certificate is registered, the corporation shall give written notice of the lien to the owner whose unit is affected by the lien.

19 The appellant points out that the lien is a creature of statute and submits that the statute does not require separate notice every time there is a default. It submits that the purpose of the notice is to advise the owner of the fact that he or she is in arrears and of the corporation's intention to register a lien; all that is required is that notice be given at least ten days before the Certificate of Lien is registered, which it was in this case.

20 I do not accept this submission. First, it is conceptually inconsistent with the core of the appellant's submission on the first issue, namely, that each default gives rise to a new lien. Second, s. 85(4) requires that the corporation give

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written notice "of the lien"; in my view, this suggests that notice needs to be given of each lien arising from each default. Third, in this case the lien for which the corporation had given notice had already expired, as discussed above. It strikes me as anomalous that notice of an expired lien could cover subsequent defaults. Fourth, I do not think that requiring **condominium corporations** to provide notice of each default before registering the lien creates a hardship. Once registration is achieved in a timely fashion, s. 85(3)(b) makes it clear that all future defaults are covered by the Certificate of Lien; notice will no longer be required.

21 For these reasons, I conclude that the appellant did not provide adequate notice of its lien. The appeal must be dismissed on this basis.

E. Disposition

22 I would dismiss the appeal. The respondent is entitled to her costs of the appeal, which I would fix at \$6000 inclusive of disbursements and HST.

M. Rosenberg J.A.:

I agree.

H.S. LaForme J.A.:

I agree.

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