

**ONTARIO SUPERIOR COURT OF JUSTICE
(Small Claims Court)**

Date: November 18, 2014

Deputy Judge Terry McCarthy

Ontario Court File Numbers SC-11-0000118019

Christine Brown: self- represented

Carleton Condominium Corporation No. 271

Represented by Patricia Simpson

JUDGMENT

PART I BACKGROUND FACTS AND SUMMARY OF THE CASE

[1] The Plaintiff purchased a condominium in Carleton Condominium Corporation # 271, the Defendant in these proceedings, and took possession on March 1, 2010. The Defendant provided a status certificate to the Plaintiff dated February 3, 2010. On or about April 26, 2011, the Defendant advised the Plaintiff and all other unit owners that special assessments would be required totaling \$23,900, to be paid over the period 2010 to 2015. The Plaintiff claims the Defendant was

negligent on three grounds: the status certificate issued by the Defendant was inaccurate; the new reserve fund study was not completed within 3 years of the previous reserve fund study, as required by Section 31 of the regulations under the *Condominium Act*; the Defendant did not propose a plan for future funding of the reserve fund within 120 days of receiving a reserve fund study as required under Section 94 (8) of the Regulations under the *Condominium Act*.

The Defendant states the status certificate was accurate at the date of issue. The Defendant denies they are negligent on the basis of missing the time lines set out in Section 31 and 94(8) of the Regulations under the *Condominium Act*.

The Defendant asserts that the Plaintiff was contributorily negligent by failing to investigate the issues raised by the February 3, 2010 status certificate.

PART II FACTS

[2] The relevant facts are not in dispute. When the Plaintiff bought the condominium unit and took possession on March 1, 2010, she was in possession of a status certificate from the Defendant dated February 3, 2010. Among other things, the status certificate certified the following in paragraphs 11, 12, 14 and 16:

“11.

Since the date of the budget of the Corporation for the current fiscal year, the board has levied the following

assessments against the unit to increase the contribution to the reserve fund or the Corporations operating fund or for any other purpose:

The Corporation has no knowledge of any circumstances that may result in an increase in the common expenses for this said unit, **except;**

- a. The special assessment funding plan will need to be accelerated to pay for the current window replacement project and keep the reserve funds in a positive balance. Special assessment payments that were spread out over three years will now need to be combined into one(1) special assessment payment of \$3900 (\$1200 +\$1300+\$1400) which will be due on April 1, 2010.
 - b. Condo fees will also be increased on April 1, 2010 to deal with the deficit of previous years, the increase in funding to the reserves and the reserves and the implementation of HST.
12. The corporation has no knowledge of any circumstances that may result in an increase in the common expenses for the unit except; **please refer to paragraph 11a/b for the proposed special assessment and condo fee increase.**
14. A reserve fund study has been conducted by Erskine Dredge Associates and is currently being reviewed by the Board of Directors.
16. The Board has sent to owners a notice dated February 23, 2006 containing a summary of the reserve fund, a summary

of the proposed plan for future spending of the reserve fund and a statement indicating the areas, if any, in which the proposed plan differs from the study. The proposed plan for future funding has been implemented and the total contribution each year for the reserve fund is being made as set out in the Contribution Table. Please see attached Form 15.

The Board is finalizing a draft reserve fund study with the recommendation to increase reserve funding effective April 1, 2010 which will be reflected in this year's budget."

- [3] The Plaintiff having received the status certificate of February 3, 2010 renegotiated with the vendors who sold her the condo and succeeded in having them reduce the purchase price by \$3900.00 which was the amount of the special assessment referred to in the status certificate at paragraph 11a.
- [4] Some history leading up to the Plaintiff's purchase is helpful. It would appear in the first half of 2007 the Defendant retained Erskine Dredge & Associates Architects Inc. to prepare a reserve fund study. On November 5, 2007 the Defendant received a draft reserve fund study dated November 5, 2007. The draft report was tabled at a meeting of the Board of Directors on November 28, 2007. The Defendant's evidence is that the study was faulty in several respects, but most importantly, because it had not considered a \$275,000 to \$300,000 expenditure for the window replacement project.
- [5] The draft reserve fund study was sent back to Erskine Dredge & Associates Architects Inc. for revision. The Defendant states that

the Board went through many iterations of the draft study with Erskine Dredge & Associates Architects Inc.

- [6] At a Special Meeting of Owners on September 15, 2010 the Defendant presented the owners with a draft of the Reserve Fund prepared by Erskine Dredge & Associates Architects Inc. On or about October 15, 2010 the Board received a revised final draft of the reserve fund study from Erskine Dredge & Associates Architects Inc. At the Special Meeting of Owners on November 2, 2010 the Defendant rolled out plans for the future funding of the reserve fund. Special Meetings of Owners were held in October, November and December of 2010 to review the possible funding options created by the Board regarding expenditures and funding options. In January of 2011, at the Annual General Meeting, the unit owners voted in favour of the special assessment option.
- [7] On February 22, 2011 Erskine Dredge & Associates Architects Inc. produced the final reserve fund study for the Defendant.
- [8] On or about April 26, 2011, all unit owners, including the Plaintiff, were informed by the Defendant of the additional special assessments which were to be paid as follows:
- 2010/2011 - \$3900;
 - 2011/2012 - \$5000;
 - 2012/2013 - \$5000;
 - 2013/2014 - \$5000;
 - 2014/2015 - \$5000.

**PART III POSITIONS AND EVIDENCE OF THE PARTIES ON
DEFENDANT'S AND PLAINTIFF'S NEGLIGENCE**

- [9] The Plaintiff's position is that the Defendant is negligent because the new reserve fund study was not completed by April 4, 2008 (within 3 years of the previous reserve fund study of April 4, 2005), as required by section 31 of the regulations under the *Condominium Act*. The Plaintiff asserts that the Defendant received a reserve fund study dated November 5, 2007, which was sent back to the authors for revision. The Defendant received a revised reserve study from Erskine Dredge & Associates Architects Inc. on or about October 15, 2010. The study was finalized in February of 2011.
- [10] As well, the Plaintiff asserts that the Board was negligent because they didn't comply with section 94 (8) of the regulations under the *Condominium Act*, which requires the Defendant to propose a plan for future funding of the reserve fund within 120 days of receiving a reserve fund study.
- [11] The Plaintiff further asserts that the status certificate that she received from the Defendant dated February 3, 2010 was not accurate. The Plaintiff claims it did not declare what it knew. The Plaintiff claims the Defendant knew more and the onus was on the Defendant to disclose it. If they had, the Plaintiff claims she would have been informed of the significant special assessment and would either not have bought the condominium unit or attempted to negotiate a

reduction in the purchase price equivalent to the special assessment.

- [12] The position of the Defendant is the status certificate was accurate as of February 3 , 2010; that the status certificate complied with subsection 76.1(m) of the *Condominium Act*; that the Plaintiff was informed in the status certificate that the Board was operating under a 2005 reserve fund study, which the Plaintiff received with her status certificate; that the Board was finalizing a “draft reserve fund study” that was going to recommend an increase in reserve funding; that upon a request of the Plaintiff the Defendant would have provided copies of all the records kept by Defendant described in Section 55(1) of the *Condominium Act*, which included among others, the current draft reserve fund study, copies of the minutes of all meetings of the Board and unit owner. In short, the Defendant says the Plaintiff was warned that an increase in reserve funding was coming. The Defendant states that the evidence of Debra Frazer, the president of the Defendant, made it clear that the pertinent records were kept by the Defendant and all documents would have been produced if requested by either the Plaintiff or her solicitor. No requests were made to inspect these documents by either the Plaintiff or her solicitor. The Defendant contends that the Plaintiff would have been provided all the records she needed to more fully inform her how she should best proceed regarding the purchase of the condominium unit.

[13] Regarding the delay from November of 2007 to February, 2011, the Defendant's position is that the Board acted responsibly. The initial report was flawed and the Board acted properly and responsibly by sending it back to Erskine Dredge & Associates Architects Inc. for revision. The Defendant's evidence was that the Board was extremely hard working and diligent and was besieged by infrastructure and other problems that necessitated reasonable delays.

PART IV ISSUES, ANALYSIS AND THE LAW

[14] The issues are:

- (a) Was the Defendant negligent in not conducting a reserve study within three years of the previous reserve fund study dated April 4, 2005 as set out in in Regulation 48/01, Section 31.(3) of the *Condominium Act, 1998*?
- (b) Was the Defendant negligent in not proposing a plan for the future funding of the reserve fund within 120 days of receiving the reserve fund study as set out in Chapter 19, Section 94.(8) of the *Condominium Act, 1998*?
- (c) Did the Defendant issue an inaccurate status certificate?
- (d) Was the Plaintiff contributorily negligent in failing to undertake her own investigation of the information and issues raised by the status certificate dated February 3, 2010?

- [15] ISSUE (a) Was the Defendant negligent in not conducting a reserve study within three years of the previous reserve fund study dated April 4, 2005 as set out in in Regulation 48/01, Section 31.(3) of the Condominium Act, 1998?
- [16] The Defendant did not have a final reserve fund study until February 22, 2011. The previous reserve fund study was dated April 4, 2005. The Defendant received a draft reserve study from Erskine Dredge & Associates Architects Inc. on or about November 5, 2007. Based on the *Condominium Act* and its regulations, the Defendant was to have a reserve fund study by April 3, 2008. I conclude that the language of the act means that the reserve fund study should be completed within 3 years. The Defendant's minutes from the Board of Director's Meeting of October 12, 2010 state that a "Final Draft Reserve Fund Study" was completed by Erskine Dredge & Associates Architects Inc. in advance of the September 15, 2010 Special Meeting of Owners. I find the Draft Reserve Fund Study was completed by the Defendant sometime between August 10, 2010 and September 15, 2010. The Defendant was approximately 2 years and 5 months beyond the 3 year period permitted by Regulation 48/01, Section 31.(3) of the *Condominium Act, 1998*.
- [17] I find the Defendant was negligent in taking from November 5, 2007 to August/ September of 2010 to conduct a draft reserve fund study and to February 22, 2011 to arrive at a final reserve fund study. I make this finding while accepting the Defendant's evidence that the Defendant was indeed

faced with a November 5, 2007 draft reserve fund study that was significantly flawed; they were besieged by challenges such as weeping tile issues in blocks 3 and 6, safety issues regarding the terraces; budget issues regarding snow costs; patio door replacements. However this still does not explain the inordinate time beyond the 3 year mark before arriving at a final reserve fund report. I find the Defendant were negligent in not completing the reserve fund study within the time allowed by Regulation 48/01, Section 31.(3) of the Condominium Act, 1998.

[18] ISSUE (b) Was the Defendant negligent in not proposing a plan for the future funding of the reserve fund within 120 days of receiving the reserve fund study as set out in Chapter 19, Section 94.(8) of the *Condominium Act, 1998*?

[19] I find the Defendant is not negligent in not proposing a plan for the future funding of the reserve fund within 120 days of receiving the reserve fund study as set out in Chapter 19, Section 94.(8) of the *Condominium Act, 1998*. Based on the Board Minutes and the testimony of the Debra Frazer, the President of the Defendant, I accept the Defendant's evidence that the Defendant had a final draft of the reserve fund study on October 2010 and that draft study was presented to the unit owners at a Special Meeting of Unit owners on November 2, 2010 together with future funding. I find the Defendant did comply with the 120 day time line set

out in Chapter 19, Section 94.(8) of the Condominium Act, 1998.

[20] Issue (c) Did the Defendant issue an inaccurate status certificate?

[21] I find it was not an inaccurate status certificate. The Plaintiff drew the Courts attention to the case of *Durham Condominium Corp. No.63 v. On-Cite Solutions Ltd.*, 2010 ONSC 6342 where P.D. Lauwers J. quoted from a book by Audrey M. Loeb which set out the purpose of the status certificate that is required by section 76 of *the Condominium Act*. Ms. Loeb wrote regarding the purpose of a status certificate:

“This document is intended to ensure that prospective purchasers and mortgagees of units are immediately given sufficient information regarding the property to make an informed buying or lending decision.”

[22] The Defendant is required to give “sufficient information”, not all information, to allow the Plaintiff to make an informed buying decision. Paragraph 14 and 16 of the status certificate received by the Plaintiff, dated February 3, 2010, stated the following:

“14. A reserve fund study has been conducted by Erskine Dredge Associates and is currently being reviewed by the Board of Directors.

16. The Board has sent to owners a notice dated February 23, 2006 containing a summary of the reserve fund, a summary of the proposed plan for future spending of the reserve fund and a statement indicating the areas, if any, in which the proposed plan differs from the study. The proposed plan for future funding has been implemented and the total contribution each year for the reserve fund is being made as set out in the Contribution Table. Please see attached Form 15.

The Board is finalizing a draft Reserve Fund Study with the recommendation to increase reserve funding effective April 1, 2010 which will be reflected in this year's budget."

[23] I find that the status certificate of February 3, 2010 was not inaccurate. I find that the Plaintiff was given sufficient information from the status certificate to make an informed buying decision. The Plaintiff was made aware of the following information; the Defendant was operating under a reserve fund study from April 4, 2005; that a new reserve fund study had been conducted by Erskine Dredge Associates and was currently being reviewed by the Board of Directors; that the Board was finalizing this draft Reserve Fund Study with the recommendation to increase reserve funding effective April 1, 2010 which would be reflected in the 2010 budget. I find that status certificate met the requirements set

out in subsection 76(1) of the *Condominium Act, S.O 1998, c.19*.

[24] Issue (d) Was the Plaintiff contributorily negligent for failing to undertake her own investigation of the information raised by the Status Certificate dated February 3, 2010?

[25] I find the Plaintiff was contributorily negligent. I have considered the following: the Plaintiff was an astute buyer as evidenced by the fact that she renegotiated the purchase price of her unit down upon seeing a special assessment of \$3900 was to take effect on April 1, 2010; she was represented by a lawyer when she purchased her condo unit; all the documents described in subsection 76(1) of the Condominium Act, including the draft reserve fund study, prepared by Erskine Dredge & Associates Architects Inc., with the recommendation to increase reserve funding effective April 1, 2010, were available to the Plaintiff and her lawyer and would have been provided to her or her lawyer upon request; no request for production was made by either the Plaintiff or her lawyer. I find a reasonable person, once informed in a status certificate, that the Board was finalizing a draft reserve fund study, with the recommendation to increase reserve funding effective April 1, 2010, would have taken steps to obtain more information to guide her in her purchasing options.

- [26] The Defendant, in argument, suggested that the case of *Stafford v Frontenac Condominium Corporation # 11*, 1994 Carswell Ont 730 (Ont.C.J (General. Div.) should be followed by this Court since it clarifies the disclosure obligations of a condominium corporation in its status certificate when weighed against the purchasers need for disclosure of pertinent information.
- [27] McWilliam J, in circumstances very similar to the present case, found that the onus was on a purchaser to demonstrate that that the special assessment was not binding on them. He stated, "Since the onus is on the purchaser to show that a disclosure statement (he was referring to the situation of a purchaser buying from a builder) fails to satisfy the Act to the degree that it must be declared non-binding, it seems to me analogously fair that the purchasers here are under the same onus to show that the special assessment is not binding on them. I find that the onus here has not been discharged. The purchasers failed to make any inquiries, even though the potential liability ignored was unknown as to quantum."

PART IV DISPOSITION

- [28] I find the Defendant was negligent in not completing the reserve fund study within the time allowed by Regulation 48/01, Section 31.(3) of the *Condominium Act, 1998*. I find the Plaintiff contributorily negligent in not seeking more financial information after receiving the February 3, 2010 status certificate that warned of a future increase in reserve

funding. The Defendant is liable to the Plaintiff for damages in the amount of \$20,000 less a reduction of \$10,000 as a result of the Plaintiff's contributory negligence.

Regarding costs, in the event the parties can't agree on costs, they may contact the trial coordinator to arrange a time to make submissions on costs before me.

Dated at Ottawa this 18th day of November, 2014.

 J.S.

Deputy Judge Terry McCarthy

Released Dec 4/14


**Superior Court of Justice
Cour supérieure de justice**

**Endorsement Record/Order of the Court
Fiche d'Inscription/Ordonnance Judiciaire**

Ottawa	SC-11-00118019-0000
Small Claims Court / Cour des petites créances de 161 Elgin St 2nd fl	Court File No / N° de la demande
Address / Adresse	
Ottawa, ON K2P 2K1	
(613)239-1079	
Phone number / N° de téléphone	

BETWEEN / ENTRE:

CHRISTINE ANNE BROWN

**Plaintiff
Demandeur**

and / et

CARLETON CONDOMINIUM CORPORATION NO. 271

**Defendant
Défendeur**

Representative of the plaintiff(s): _____
 Représentant du demandeur : _____
 Representative of the defendant(s): _____
 Représentant du défendeur : _____

Event type: _____
 Type d'affaire: _____

On 04-DEC-2014 , a hearing was held in the above matter and the following order was made:
 Le 04-DEC-2014 une audience a eu lieu concernant l'affaire susmentionnée, et l'ordonnance suivante a été rendue :

Decision released Dec 4/14

Signature of Judge / Signature du Juge

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**Superior Court of Justice
Cour supérieure de justice**

**Endorsement Record/Order of the Court
Fiche d'inscription/Ordonnance judiciaire**

SC-11-00118019-0000

Court File No./ N° de la demande

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MAILED

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