(ONTARIO)
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

CITATION: BROWN vs. CARLETON CONDOMINIUM CORPORATION NO. 271, 2016 ONSC 7361
DATE: 2016-11-29
COURT FILE NO.: 15-2085
REGISTRY: Ottawa, Ontario

BETWEEN:	
CHRISTINE ANNE BROWN	Self-Represented Respondent (Plaintiff)
PLAINTIFF (RESPONDENT, Appellant by Cross Appeal)	
- and -	
CARLETON CONDOMINIUM CORPORATION NO. 271	Patricia B. Simpson, for the Appellant (Defendant)
DEFENDANT (APPELLANT, Respondent to the Cross Appeal)	
	Heard at Ottawa, Ontario: October 18, 2016

On appeal from the decision of Deputy Judge T. McCarthy, Ottawa Small Claims Court, dated November 18th, 2014.

James, J.:

REASONS FOR DECISION

[1] The appellant, respondent on the cross-appeal, is a condominium corporation (sometimes hereinafter referred to as "CCC#271"). The respondent, appellant by

cross-appeal, is a purchaser of a unit in the condominium that was offered for re-sale by the previous unit owner.

[2] The appellant appeals the trial judge's finding that the appellant was negligent in failing to complete a reserve fund study within three years of the date of the previous study as required by Regulation 48/01, s. 31(3) of the *Condominium Act*, S.O. 1998, c. 19 ("the *Act*").

[3] The respondent cross-appeals the trial judge's finding that the status certificate issued by CCC#271was not negligently prepared and that the respondent was contributorily negligent in respect of the damages she sustained.

[4] The condominium corporation in question was a 36 unit townhouse style development built in 1984.

[5] A reserve fund study was prepared in April, 2005. Pursuant to the requirements of s. 31(3) of the the *Act*, a new reserve fund study or an update of the 2005 study was due in April, 2008.

[6] In or about September, 2007, CCC#271 retained the firm of Erskine Dredge & Associates Architects Inc. to prepare a new, comprehensive reserve fund study. A draft of the new reserve fund study was initially circulated in November, 2007. The study was limited to major expenditures for common property items. Routine maintenance and repair work was not included as this work was performed on an as-required basis. At that time it was apparent that a major expenditure for new windows was required but the cost of replacement was not included in the study because according to the draft "windows are scheduled to be replaced this year or next. Assuming remaining life is 30 years, scheduled replacement would be in 2037". Costing for patio door replacement was left out of the study for the same reason. In some instances, however, costing for the replacement of a particular system or element scheduled to occur in 2008 was included in the costing spreadsheet (see for example site lighting replacement).

[7] A subsequent draft dated January 14, 2008 contained revised expenditure and cash flow spreadsheets that included entries for deck membrane repairs in 2008 at an estimated cost of $50,000 and window replacement in 2011 at an estimated cost of $300,000. In fact, the windows were replaced in 2009-2010. Also

listed were additional items including garage heater replacement in 2009 estimated at $17,400, entry light replacement in 2009 estimated at $10,800, weeping tile replacement in 2008 estimated at $72,800 and masonry repairs in 2009 estimated at $16,500.

[8] The reserve fund study was not completed until February, 2011. A short time after the study was completed, the board of the corporation issued a notice to the owners advising that an annual special assessment would be levied in the sum of $5,000 for the next four years.

[9] During the period between the initial draft of the reserve fund study in 2007 and its finalization in 2011, the respondent purchased Unit #3 in the condominium. The Agreement of Purchase and Sale was signed on or about January 20, 2010.The respondent completed the purchase on March 1, 2010. The agreed purchase price was $312,000. The status certificate was provided on or about February 3, 2010.

[10] Section 76 of the *Act* provides that a condominium corporation is obliged to issue a status certificate upon request to an interested party. The *Act* lists the various matters that the certificate must address. The purpose of the certificate is to provide basic information about the corporation, including financial disclosure. The statute includes a requirement to disclose major additions, alterations or improvements to the common elements that the board has proposed but has not yet implemented and a statement of current plans, if any, to increase the reserve fund.

[11] The status certificate issued to the respondent contained the following information:

> 11. .....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 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 $3,900

($1,200+$1,300+$1,400) 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 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 proposed special assessment schedule.

Reserve Fund

13. The Corporation's reserve fund amounts to $259,766.01 as of December 31st, 2009. [Note: This figure is un-audited and does not include any accrual calculation for work done on behalf of the corporation but not paid by the corporation as at the aforementioned date. Additional Note: The Corporation is currently in the midst of a substantial replacement project. Therefore, the aforementioned amount is being reduced.

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

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16. The board has sent to owners a notice dated February 23,2006 containing a summary of the reserve fund study, a summary of the proposed plan for future funding 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 to 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.

[12] The certificate did not contain a statement of proposed substantial additions, alterations or improvements together with a statement of the purpose of them as required by clause (n) of s. 76(1) of the *Act* although it was apparent at the time that major projects were pending.

[13] Section 12 created the erroneous impression that the details of the proposed special assessment could be found in the preceding paragraph yet s. 11 gave no hint that a costly window replacement was underway and that a substantial increase in funding would be required to fund other repairs that were apparent at the time. Also, s. 11 referred to the possibility of condo fees being increased without any reference to the possibility of a significant, multi-year special assessment.

[14] The trial judge correctly referred to the legal test to be applied. In order to be entitled to a declaration that an owner is not bound by a special assessment due to deficiencies in the status certificate, the owner is obliged to establish objectively that had the information been properly disclosed at the time it was delivered to the purchaser, he or she would not likely have gone ahead with the transaction, but would have rescinded the agreement before the expiration of the 10 day cooling-off period (see *Abdool v. Somerset Place Developments of Georgetown Ltd.* [1992] O.J. No. 2115 (C.A.) at paras. 46, 47).

[15] The trial judge concluded that the status certificate was "not inaccurate" and held that the plaintiff was given sufficient information to make an informed buying decision. This is a conclusion with which I respectfully disagree. In my view, a prospective purchaser had inadequate disclosure of the pending special assessment. I am satisfied that if a prospective purchaser had been supplied with correct and complete information, it would have likely prompted him or her to withdraw from the transaction or at a minimum, to make a request for a price reduction because of the magnitude of the pending renovations and the substantial expenses associated with them. This view is reinforced by the fact that the respondent used the information about the special assessment of $3,900 to negotiate a reduction in the purchase price of her unit.

[16] The trial judge did not comment on the omissions and inaccuracies contained in the certificate. He said that the reserve fund study recommended a special assessment to replace the existing assessment and this should have put a prospective purchaser on notice but he overlooked the fact that para. 12 implied that the proposed special assessment schedule was contained in the certificate when it was not.

[17] In concluding that the status certificate was sufficiently accurate and complete to permit a prospective purchaser to make an informed buying decision, the trial judge made a palpable and overriding error that warrants appellate review.

[18] A condominium corporation owes a duty of care to a prospective purchaser in the preparation of a status certificate (see *Orr v. Metropolitan Toronto Condominium Corporation No. 1056*, 2014 ONCA 855 at para. 47).

[19] In *Durham Condominium Corporation No. 63 v. On-Site Solutions Ltd.*, 2010 ONSC 6342 at paras. 22 and 25, Lauwers, J., as he then was, held that from a purposive perspective, if an undisclosed problem or misleading information prevented a prospective purchaser from negotiating a price adjustment with the seller of the unit, a remedy ought to be available against the condominium corporation (see also the quote in the *Durham* case at para. 24 from *Condominium Law and Administration*, 2d ed. at p. 9-7 that there is an obligation to disclose potential expenses arising from engineering studies even if a special assessment has not been approved).

[20] The trial judge found that the prospective purchaser in this case was contributorily negligent in failing to make inquiries to follow up on the information contained in the status certificate. He said that a reasonable person would have made inquiries to better inform herself because the certificate disclosed that the corporation was headed towards bringing in special assessments. I disagree. Firstly, I do not regard it as unreasonable that the purchaser would accept the certificate at face value. After all, one of the essential elements of the tort of negligent misrepresentation is "reasonable reliance" by the aggrieved party. Secondly, the trial judge appeared to confuse the onus on a prospective purchaser to prove that he or she would likely not have completed the transaction had proper disclosure been made with a failure on the part of the prospective purchaser to take proper care resulting in the erroneous view that the respondent was contributorily negligent (see paras. 25 and 27). Thirdly, the trial judge found the purchaser 50%

liable for not seeking more information yet at the same time he found no liability on the part of the corporation for the contents of the status certificate. It is a reviewable error to find the purchaser partially liable for her damages when the purported wrongdoer is not liable at all. On this point, recall that the basis of the finding of negligence against the corporation was in not having completed the reserve fund study within three years, not for issuing an inadequate status certificate.

[21] On the issue of whether the corporation was negligent in failing to complete the required reserve fund study, the statutory requirement is contained in section 31 of Ontario regulation 4/01 which says that either a comprehensive study or an update study must be performed every three years. In this case a study was completed in April, 2005. A new draft reserve fund study was prepared in November, 2007. It was followed by a second draft a month later. A third draft was released in January, 2008. Another draft was released in September, 2010 and a final draft in October, 2010. Finally, three years after that a final version was released in February, 2011. In an apparent effort to gloss over the failure to comply with the timing requirements of the Regulation, the author of the final version said in the introduction that "the 2008 draft and this final version of the reserve fund study are considered to fulfil the mandated requirement for the comprehensive study and the undated reserve fund study, respectively."

[22] The appellant says that the relationship between the respondent and the appellant should be viewed as one between a potential purchaser and the corporation and as such there is no direct and close relationship i.e. they lack "proximity". The appellant distinguishes between rights owed to owners of units and any alleged rights of potential purchasers. Moreover, the appellant says that there is a conflict between the duty owed to owners and potential purchasers, consequently "a duty of care that conflicts with a duty owed to another group, i.e., the owners, should not be recognized."

[23] I see no conflict between duties owed to owners and the possibility of duties owed to potential purchasers but more to the point, on my view of the situation, the respondent's complaint arises not as a potential owner but rather from his status as an owner faced with a special assessment he didn't see coming.

[24] The problem with the finding of negligence against the corporation for not having proceeded quickly enough to finalize the reserve fund study is that the

respondent's claim is one of pure economic loss. Claims for pure economic loss are assessed differently than claims where property damage or personal injury has occurred. In this latter class of tortious conduct, the monetary award is *consequential* to the property loss or injury. It is the injury or damage that triggers the right to make a claim.

[25] Recognition of the right to compensation in the absence of physical damage or injury is a relatively recent development. There are five categories of negligence for pure economic loss:

i) negligent misrepresentation. This is the basis of the corporation's liability for the defective status certificate.

ii) negligent performance of a service. An example of this would include solicitor's negligence.

iii) defective products or buildings.

iv) relational economic loss consequent on damage to a third party.

v) independent liability of a statutory public authority. An example of this would include negligent inspection of a building under construction by municipal officials.

[26] Each of the above categories is governed by its own duty of care. The Supreme Court of Canada has acknowledged that new categories may emerge, but directs that courts should exercise caution and not strain to find new categories.

[27] While the proximity test may be satisfied on the facts here (owners detrimentally affected by the improper delay in completing the study on time), the second step of the analysis in recognizing a new category involves an assessment of public policy considerations, particularly the question of indeterminate liability.

[28] The question arises- if a corporation is slow completing a reserve funding study without proper justification- is it automatically liable in damages, at what point, to whom and for what reason? I see no compelling reason on the facts here to recognize a new category of liability and I would allow the appeal in relation to the finding of negligence due to the delay in completing the reserve fund study.

[29] In the result, both the appeal and the cross-appeal are allowed. The judgment at trial is set aside and a finding that CCC#271 is liable to Ms. Brown for $20,000 is substituted in its place.

[30] Ms. Brown is entitled to her costs of this appeal. This will include reasonable disbursements and a reasonable allowance for her time and any missed work resulting in a loss of income as a result of the appeal. In the event that the parties are unable to agree on costs, Ms. Brown may deliver an outline of her costs within 15 days and the corporation shall have 15 days to respond.

M.D. James J.

The Honourable Mr. Justice James

Released: November 29, 2016

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REASONS FOR JUDGMENT

The Honourable Mr. Justice James

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