

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Terry v. The Owners, Strata Plan NW 309*,
2016 BCSC 237

Date: 20160216
Docket: 106411
Registry: Kelowna

Between:

Debra Dawn Terry

Petitioner

And

The Owners, Strata Plan NW 309, and Maude, MacKay & Co. Ltd.

Respondents

Before: The Honourable Mr. Justice Skolrood

Reasons for Judgment

Counsel for Petitioner:

T.C. Fitzpatrick

Counsel for Respondents:

S. Todesco
(Acting as agent for P.J. Dougan)

Place and Date of Trial/Hearing:

Kelowna, B.C.
December 11, 2015

Place and Date of Judgment:

Kelowna, B.C.
February 16, 2016

Introduction

[1] The petitioner, Debra Terry, is the registered owner of a strata lot (the “Strata Lot”) in the respondent strata corporation (the “Strata Corporation”), which is located in Abbotsford, B.C. The petitioner purchased the Strata Lot in 1989 with her mother Lorraine Terry as joint tenants. Lorraine Terry lived in the Strata Lot until her death in July 2013.

[2] There is a long history of disputes between Lorraine Terry and the Strata Corporation dating back to the early 1990s over issues such as late payment of strata fees, special assessments and fines. Many of those issues continued when the petitioner assumed sole ownership of the Strata Lot following her mother’s death.

[3] By way of this petition, she seeks to resolve the central issues between the parties and achieve some finality with respect to the long standing dispute.

[4] The corporate respondent, Maude, MacKay & Co. Ltd. (“Maude”), was up until March 2015 the manager of the strata development. Maude was also the rental manager for the petitioner when she sought to rent out the Strata Lot following her mother’s death.

Background

[5] As noted, the dispute dates back to the 1990s. In 1998, the Strata Corporation commenced an action in provincial court against the respondent and her mother seeking recovery of amounts owing in connection with the Strata Lot. A lien was also placed against the Strata Lot (the “Original Lien”). On October 13, 2000, the Strata Corporation obtained judgment in the amount of \$3,271.95.

[6] Various payments were made on the judgment by way of garnishing orders issued against the petitioner and her mother. The matter was ultimately resolved and the Original Lien was discharged from the Strata Lot in December 2003.

[7] The dispute over amounts allegedly owing in respect of the Strata Lot nonetheless continued and on October 20, 2008, the lien which is the subject of this proceeding was filed against the Strata Lot in the amount of \$18,361.02 (the “2008 Lien”).

[8] No court action has been commenced by the Strata Corporation to collect the amounts allegedly owing, although counsel advised that instructions have now been provided to bring a proceeding.

Legal Framework

[9] The petitioner relies on ss. 135, 164, 165 and 169 of the *Strata Property Act*, S.B.C. 1998, c. 43 [Act], which provide as follows:

Complaint, right to answer and notice of decision

135 (1) The strata corporation must not

- (a) impose a fine against a person,
- (b) require a person to pay the costs of remedying a contravention, or
- (c) deny a person the use of a recreational facility

for a contravention of a bylaw or rule unless the strata corporation has

- (d) received a complaint about the contravention,
- (e) given the owner or tenant the particulars of the complaint, in writing, and a reasonable opportunity to answer the complaint, including a hearing if requested by the owner or tenant, and
- (f) if the person is a tenant, given notice of the complaint to the person's landlord and to the owner.

(2) The strata corporation must, as soon as feasible, give notice in writing of a decision on a matter referred to in subsection (1) (a), (b) or (c) to the persons referred to in subsection (1) (e) and (f).

(3) Once a strata corporation has complied with this section in respect of a contravention of a bylaw or rule, it may impose a fine or other penalty for a continuing contravention of that bylaw or rule without further compliance with this section.

Preventing or remedying unfair acts

164 (1) On application of an owner or tenant, the Supreme Court may make any interim or final order it considers necessary to prevent or remedy a significantly unfair

(a) action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant, or

(b) exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.

(2) For the purposes of subsection (1), the court may

(a) direct or prohibit an act of the strata corporation, the council, or the person who holds 50% or more of the votes,

(b) vary a transaction or resolution, and

(c) regulate the conduct of the strata corporation's future affairs.

Other court remedies

165 On application of an owner, tenant, mortgagee of a strata lot or interested person, the Supreme Court may do one or more of the following:

(a) order the strata corporation to perform a duty it is required to perform under this Act, the bylaws or the rules;

(b) order the strata corporation to stop contravening this Act, the regulations, the bylaws or the rules;

(c) make any other orders it considers necessary to give effect to an order under paragraph (a) or (b).

Limit on owner's responsibility for costs

169 (1) If the strata corporation joins or sues an owner in the owner's capacity as owner or as owner developer, or if an owner sues the strata corporation, that owner

(a) is not liable to contribute to legal costs that a court or arbitrator requires the strata corporation to pay,

(b) does not, despite being an owner, have a right to information or documents relating to the suit, including legal opinions kept under section 35 (2) (h), and

(c) does not, despite being an owner, have a right to attend those portions of any annual or special general meeting or council meeting at which the suit is dealt with or discussed.

(2) If the strata corporation pays an amount to an owner in full or partial satisfaction of the owner's claim against the strata corporation, whether or not under a judgment, the owner is not liable to share in the cost of the payment with other owners.

[10] As can be seen, s. 164 is concerned with remedying actions of a strata corporation that are "significantly unfair". In *Gentis v. The Owners, Strata Plan VR*

368, 2003 BCSC 120, Mr. Justice Masuhara described the concept of significant unfairness in these terms at paras. 27-29:

The scope of significant unfairness has been recently considered by this Court in **Strata Plan VR 1767 v. Seven Estate Ltd.** (2002), 49 R.P.R. (3d) 156 (B.C.S.C.), 2002 BCSC 381. In that case, Martinson J. stated (at para. 47):

The meaning of the words "significantly unfair" would at the very least encompass oppressive conduct and unfairly prejudicial conduct or resolutions. Oppressive conduct has been interpreted to mean conduct that is burdensome, harsh, wrongful, lacking in probity or fair dealing, or has been done in bad faith. "Unfairly prejudicial conduct" has been interpreted to mean conduct that is unjust and inequitable: **Reid v. Strata Plan LMS 2503**, [2001] B.C.J. No. 2377.

I would add to this definition only by noting that I understand the use of the word 'significantly' to modify unfair in the following manner. Strata Corporations must often utilize discretion in making decisions which affect various owners or tenants. At times, the Corporation's duty to act in the best interests of all owners is in conflict with the interests of a particular owner, or group of owners. Consequently, the modifying term indicates that court should only interfere with the use of this discretion if it is exercised oppressively, as defined above, or in a fashion that transcends beyond mere prejudice or trifling unfairness.

I am supported in this interpretation by the common usage of the word significant, which is defined as "of great importance or consequence": **The Canadian Oxford Dictionary** (Toronto: Oxford University Press, 1998) at 1349.

[11] Section 165 is concerned with ensuring compliance with the *Act* and a strata corporation's bylaws. In *Christensen v. The Owners, Strata Plan KAS468*, 2013 BCSC 1714, Mr. Justice Butler held that the court's jurisdiction under s. 165 is limited to current issues. He said at para. 38:

The respondent submits, and I agree, that subsection (b) is intended to be applied by a court to remedy or address a current breach. There must be some existing or contemporaneous action of the strata corporation which requires a remedy in the nature of a mandatory injunctive order. As should be obvious from the facts of this case, it is simply too late to issue such an order. The contravention of the *Act* occurred several years ago. The allocation of expenses and collection of levies took place more than three years ago. The expenditures which were agreed to have been paid and the funds disbursed. Accordingly, the respondent argues, and I agree, that it is not currently contravening the *Act*. There is no evidence before the court to indicate that it intends to contravene the *Act* in the future.

[12] A similar view was taken by the court in *Binichakis v. Porter*, 2015 BCSC 750; and *Mitchell v. The Owners, Strata Plan KAS 1202*, 2015 BCSC 2153 [*Mitchell*], although in *Mitchell*, Mr. Justice Betton observed that “what is current must be viewed liberally and in the context of the particular circumstances” (at para. 85).

The Parties’ Positions

[13] The petitioner advances the following points:

- a) some of the amounts alleged to be owing, that form the basis for the 2008 Lien, were incurred prior to 2003 and were discharged along with the Original Lien in 2003;
- b) the 2008 Lien includes amounts for fines levied against the Strata Lot which under the *Act* cannot properly be the subject of a lien;
- c) the amount claimed by the Strata Corporation includes fines for which the Strata Corporation failed to give proper notice, and as such, the fines are invalid;
- d) many of the charges claimed by the Strata Corporation are statute barred by virtue of the *Limitation Act*, R.S.B.C. 1996, c. 266 (now repealed);
- e) the Strata Corporation has improperly charged the Strata Lot with a portion of its costs of defending this petition, which is prohibited under the *Act*; and
- f) Maude, in its capacity as rental manager for the Strata Lot, has improperly withheld monthly rental payments and has applied them towards amounts allegedly owing to the Strata Corporation.

[14] The respondents submit:

- a) while certain amounts may be in dispute, the 2008 Lien is nonetheless valid;

- b) the lien amount does not include any amounts for fines;
- c) the Strata Corporation gave proper notice of any fines levied; and
- d) the arrears are not statute barred as the petitioner confirmed the debt on at least two occasions which postponed the running of the limitation period.

Discussion

[15] Many of the concerns raised by the petitioner involve historical amounts charged against the Strata Lot. Nonetheless, given that the 2008 Lien remains registered against the Strata Lot and the respondents continue to claim the subject amounts, the dispute is sufficiently current to permit the petitioner to have recourse to ss. 164 and 165 of the *Act*.

The Lien Amount

[16] I will deal first with the petitioner's point that certain of the amounts claimed pre-date December 2003 and thus were discharged along with the Original Lien. I agree with the petitioner on this issue.

[17] In conjunction with the release of the Original Lien, the respondents filed an Acknowledgment of Payment which stated "[t]he amount owing under the *Condominium Act* Charge registered...against title to the strata lot...has been received" and "[t]he lien against the strata lot has now been released".

[18] It is common ground between the parties that a lien is a floating charge and it therefore covers all amounts owing up until the time of discharge.

[19] Based on the respondents' own account statement, which is included in the documents attached as exhibit "B" to the affidavit of Mr. MacKay, Maude's managing broker, the balance allegedly owing as of December 2003 was \$9,067.14. That amount was released by virtue of the discharge of the Original Lien and thus was improperly included in the 2008 Lien amount, which again was \$18,361.02.

[20] The balance of the charges included in the 2008 Lien amount, again taken from the respondents' own statement, are for monthly strata fees, special assessments, legal fees and interest charges. It is not possible however to determine from the statement how much was properly owing at the time the lien was registered because the interest claimed includes interest charged against pre-2004 charges, which again were released with the discharge of the Original Lien in December 2003. While the Strata Corporation's bylaws permit it to charge interest, it cannot do so on amounts no longer owing.

[21] The petitioner submits that the lien amount also includes fines levied against the Strata Lot which is not permitted under s. 116(3)(c) the *Act*. In support of this position, the petitioner has produced a statement from the Strata Corporation that consistently indicates the application of late payment fines for a number of years leading up to October 2008, when the 2008 Lien was registered.

[22] However, a statement produced by the respondents, and attached to a demand letter issued by the Strata Corporation's counsel dated August 21, 2008, does not include any fines for the same time period. That statement indicates an outstanding balance of \$16,299.10 owing as of August 2008. A subsequent letter dated October 20, 2008 demands payment of \$18,361.02, which is the amount of the 2008 Lien.

[23] No explanation was provided by the respondents as to why there are different statements covering the same period of time that include different amounts. Given the different statements, it is not possible to determine whether the amount claimed in the 2008 Lien includes fines or not.

[24] Regardless, the certificate of lien filed against the Strata Lot did include other improper amounts, specifically the pre-2004 amounts and improper interest charges, as detailed above. The question then becomes whether that renders the 2008 Lien invalid, or only unenforceable with respect to the improper amounts.

[25] The petitioner cites *Strata Plan VR386 (The Owners) v. Luttrell*, 2009 BCSC 1680 [*Luttrell*], where Master Taylor found that a certificate of lien that included amounts for fines was invalid (at para. 46). In coming to that conclusion, Master Taylor rejected the proposition that a lien was not rendered invalid by reason of including improper amounts, provided that some amount was properly owing.

[26] For their part, the respondents cite *The Owners, Strata Plan LMS 1378 v. Chu*, 2006 BCCA 10 [*Chu*], as support for the proposition that the inclusion of improper amounts does not render a lien invalid. There, Mr. Justice Lowry, sitting in chambers, said at para. 5:

...The applicant insists that the lien the Owners seek to enforce is illegal because, as filed, it wrongly included amounts for fines the Owners sought to impose, but the Owners conceded they were not entitled to a lien for fines and the judgment they obtained limits them to enforcing their lien only to the extent of the fees and special levies...

[27] In my view, *Chu* does not support the respondents' position. The above passage simply reflects a concession made by the owners and it does not appear that Mr. Justice Lowry was asked to consider whether the inclusion of fines, or other improper amounts, would render a certificate of lien invalid.

[28] Moreover, as noted by Master Taylor in *Luttrell*, Form G of the *Strata Property Regulation*, B.C. Reg. 43/2000, which is the Certificate of Lien form, requires that a strata council member or the strata manager certify that the amount claimed in the certificate is owing to the strata corporation pursuant to s. 116. This is inconsistent with the notion that a certificate of lien can be registered for any amount just so long as the owner owes something for strata fees (*Luttrell*, at para. 45).

[29] In summary on this point, the certificate of lien filed against the Strata Lot is invalid and must be discharged at no cost to the petitioner.

Outstanding Fines

[30] Regardless of whether fines were included in the 2008 Lien amount, the petitioner submits that the fines levied against the Strata Lot are invalid because the

respondents did not follow the correct procedure as set out in s. 135 of the *Act*. Specifically, she submits that the respondents did not give her and/or her mother proper notice of any complaints giving rise to the fines nor were they given an opportunity to answer such complaints.

[31] The petitioner cited a number of authorities in which courts have declined to enforce the payment of fines where strata corporations have failed to adhere to the procedural requirements set out in s. 135: *Re Scoffield and Strata Corporation N.W. 73 et al* (1983), 145 D.L.R. (3d) 574 (B.C.C.A.); *Dimitrov v. Summit Square Strata Corp.*, 2006 BCSC 967; and *The Owners, Strata Plan VR19 v. Collins et al.*, 2004 BCSC 1743.

[32] The respondents submit that proper notice of the fines was given and that the petitioners had ample opportunity to be heard. They point to years of correspondence that went back and forth between the Strata Corporation, often through counsel, and the petitioner and/or her mother where it was made clear that there were amounts owing for strata fees and special levies and that late payment fines were being charged.

[33] I pause here to note that the correspondence relied on by the respondents is attached to the affidavit of Mr. MacKay. He says at para. 7 of his affidavit:

...now shown to me and marked collectively as **Exhibit "B"** to this my affidavit are true copies of letters written at different periods of time to Debra and Mrs. Terry by legal counsel for the Owners regarding outstanding common expenses, outstanding fines, legal fee charge backs and lien warning notices. The late fines charged against the Property relate to non/late payment of strata fees and interest charges for outstanding strata fees and special levies. to (sic) the best of my knowledge Debra Terry was or ought to have been well aware of her mother's indebtedness to the Owners prior to the death of her mother as evidenced by the documents attached as Exhibit "B" to this my Affidavit.

[34] Exhibit "B" to Mr. MacKay's affidavit comprises 180 pages of correspondence, statements, invoices and other documents spanning over 15 years which appear to constitute most or all of Mr. MacKay's file concerning the Strata Lot. Many of the documents are unreadable and a large number are not documents that are

admissible into evidence through Mr. MacKay. This type of “document dump” approach to preparing affidavits is both inappropriate and unhelpful.

[35] That said, it is apparent from documents attached to Mr. MacKay’s affidavit that are admissible that there has been a long history of communication between the Strata Corporation and the petitioner and her mother about amounts owing in connection with the Strata Lot.

[36] It is also apparent that the fines in issue are in respect of late payment of strata fees and special levies. This was made clear in the correspondence and, as such, I am satisfied that the petitioner and her mother received adequate notice of the complaint giving rise to the fines, as required by s. 135 of the *Act*. Further, while I was not taken to any correspondence in which the petitioner was specifically offered an opportunity to be heard, there are numerous instances in which she in fact made her views known.

[37] In the circumstances, I would not accede to the petitioner’s request to set aside the fines levied by the respondents.

[38] However, I am not able on the evidence included in the record to determine how much might be properly owing in fines. As noted above, different statements have been produced, some of which appear to include fines and some of which do not. The respondents have produced a statement purporting to summarize the total amount owing in connection with the Strata Lot as of June 1, 2015 which includes the sum of \$8,050.00 owing for “outstanding late fines and interest”. The statement also includes a year by year summary of the amounts said to be owing for the years 2002-2015. However, no back-up documentation is attached to the summary and, on its face, it includes amounts for 2002 and 2003 which were released as part of the discharge of the original lien on December 30, 2003.

[39] If the parties cannot agree, it will be for the respondents to establish the proper amount in their enforcement action.

Limitation Issues

[40] The petitioner submits that any amounts claimed as owing by the respondents prior to December 1, 2009 are statute barred by virtue of s. 3(5) of the former *Limitation Act*, and she seeks a declaration to this effect.

[41] The respondent agrees that a six year limitation period applies but submits that there have been repeated acknowledgements of the debt by the petitioner that have operated to postpone the running of the limitation period pursuant to s. 5 of the former *Limitation Act*.

[42] In my view, this issue cannot properly be determined in this proceeding. The provisions of the *Limitation Act* operate to extinguish the underlying claim and serve as a defence to an action brought outside of the stipulated limitation period (*Friesen v. Friesen*, 2008 BCSC 878 at para. 98). Here, while the respondents say that an action will be commenced, that has not yet occurred. If and when it does, the petitioner may raise a limitation defense depending upon the specific claim advanced. However, there is no basis on which the court can issue an advance declaration on the limitation issue in the absence of an actual action.

Legal Fees

[43] The petitioner submits that the respondents have improperly assessed the Strata Lot for a portion of the legal fees incurred in defending the petition. She states in her written submission at para. 104 that:

...“it appears that the Strata Corporation has charged back its legal costs for 2015, which appears to be its defence costs of this Petition. This is in direct contravention of section 169 of the *Strata Property Act*. No explanation for this charge appearing on the Petitioner’s account statements have been provided.

[44] Section 169(1)(a) of the *Act* again provides that in an action between an owner and a strata corporation, the owner “is not liable to contribute to legal costs that a court or arbitrator requires the strata corporation to pay”.

[45] While that section deals with court ordered costs, s. 167(2) is more on point with respect to the funding of litigation between an owner and the strata corporation:

The expense of defending a suit brought against the strata corporation is shared by the owners in the same manner as a judgment is shared under section 166, except that an owner who is suing the strata corporation is not required to contribute.

[46] Thus, it is not open to the Strata Corporation here to charge the petitioner for a share of its costs in defending the petition: see *Rettie v. The Owners, Strata Plan LMS 2429*, at paras. 32-36 (August 30, 2012, Vancouver Registry No. S108428).

[47] The June 1, 2015 summary statement prepared by the respondents includes the amount of \$10,435.07 for outstanding legal fees. In his affidavit, Mr. MacKay says at para. 9:

The legal fees were incurred by the owners in connection with efforts to recover strata fee and special levy arrears, late fines and accrued interest.

[48] On the state of the evidence, it is not possible to determine whether some or all of the legal fees claimed were incurred directly in relation to the petition or whether some or all relate to more general efforts to collect outstanding amounts owing. Absent a more detailed breakdown of the fees, Mr. MacKay's vague statement about the legal fees sheds little light on the issue.

[49] In the circumstances, the petitioner is entitled to a declaration that the Strata Corporation may not charge the Strata Lot for any portion of its legal costs incurred in defending this petition and a further order requiring the Strata Corporation to refund any portion of the legal costs that have been improperly charged and paid by the petitioner. To the extent that there are other legal fees properly charged to the Strata Lot, the Strata Corporation will have to prove them as part of its enforcement action.

Withholding of Funds by Maude

[50] The petitioner submits that Maude, in its capacity as rental manager for the Strata Lot, has improperly withheld rental payments received in connection with the Strata Lot to pay for strata fees and other expenses.

[51] The petitioner says that shortly before Maude resigned as rental manager, it issued a cheque to the petitioner which appears to be in respect of excess funds withheld, but Maude provided no explanation or accounting.

[52] As I explained to counsel at the hearing of the petition, this issue is essentially a contractual dispute between her and Maude in respect of Maude's duties owed under their rental management agreement. It is not a matter which falls within ss. 164 or 165 of the *Act* and is not suitable for determination in this proceeding. I therefore decline to deal with this aspect of the petition.

Miscellaneous Relief Sought

[53] In addition to the specific issues addressed above, the petitioner sought the following additional relief:

- a) A declaration that the Strata Corporation has neglected, failed, and/or refused to perform certain duties that it is required to perform under the bylaws of the Strata Corporation and the provisions of the *Act*;
- b) A declaration that the Strata Corporation has contravened certain provisions of the Strata Corporation's bylaws and the *Act*; and
- c) An order that the Strata Corporation perform those duties that it is required to perform under the bylaws of the Strata Corporation and the provisions of the *Act*, and that the Strata Corporation stop contravening the Strata Corporation's bylaws and the *Act*.

[54] Having dealt with the specific issues raised by the petitioner, such general compliance orders are of little value. As noted by Mr. Justice Betton in *Mitchell*, at

para. 80, “there is an obvious redundancy making orders that a strata corporation comply with legislation governing its conduct”. I therefore decline to grant these additional orders.

[55] The petitioner also seeks an order that the Strata Corporation provide her with a detailed account summary for the Strata Lot, identifying all amounts charged to the account and all payments received, dating back to the last \$0.00 balance. Given the fact that different statements have apparently been produced at different times, the fact that the 2008 Lien amount includes improper charges and the fact that it is not clear on the record whether the Strata Corporation has improperly charged legal fees, an accounting is both necessary and appropriate and I so order.

[56] It may be that when such an accounting is done, the parties will be able to agree on what if anything is properly owing with respect to the Strata Lot and thereby avoid the need for further proceedings.

Summary

[57] In summary:

- a) the Certificate of Lien registered against the Strata Lot on October 20, 2008 under No. BB905875 is invalid and shall be discharged at no cost to the petitioner;
- b) the petitioner is entitled to a declaration that the Strata Corporation may not charge the Strata Lot for any portion of its legal costs incurred in defending this petition and a further order requiring the Strata Corporation to refund any portion of the legal costs that have been improperly charged and paid by the petitioner; and
- c) the Strata Corporation shall provide the petitioner with a detailed accounting for all amounts charged against the Strata Lot and all payments received dating back to the last \$0.00 balance.

[58] The petitioner has been largely successful and is therefore entitled to her costs. In the petition, she seeks an order for special costs, or alternatively, increased costs although she did not press this point to any significant degree. In my view, this is not a case in which either special or increased costs are warranted. The petitioner is therefore entitled to her ordinary costs at Scale B. In accordance with s. 169(1)(a) of the *Act*, she is not liable to contribute towards those costs.

“The Honourable Mr. Justice Skolrood”