CITATION: Washington v. York Condominium Corporation No. 441, 2017 ONSC 4956
DIVISIONAL COURT FILE NO.: 409/16
DATE: 20170821

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:	)	
	)	
NAVAL WASHINGTON	)	*B. Nagra*, for the respondent
	)	
Plaintiff/Respondent	)	
	)	
– and –	)	
	)	
YORK CONDOMINIUM CORPORATION NO. 441	)	*L. Molinaro*, for the appellant
	)	
	)	
Defendant/Appellant	)	
	)	
	)	
	)	**HEARD at Toronto:** August 16, 2017

NORDHEIMER J.:

[1] The appellant appeals from the judgment granted by Deputy Judge Prattas on July 21, 2016 in which the defendant was ordered to pay to the plaintiff the sum of $17,336.84 together with court disbursements, interest and costs.[1] The following reasons explain why I have concluded that the judgment must be set aside and a new trial ordered.

[2] The plaintiff owns a commercial condominium in the defendant condominium building and has for many years. A plumbing blockage occurred on March 15, 2013 that affected the plaintiff's unit along with three others. Upon discovering the blockage, the plaintiff's wife contacted a plumber who attended at the unit. The plumber discovered that the blockage affected other units and, consequently, the defendant's property manager became involved. After briefly

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[1] *Washington v. York Condominium Corp. No. 441*, [2016] O.J. No. 7016

checking to determine if other plumbers were available to address the blockage, the property manager retained this plumber to clear the blockage. The ensuing work took a number of days to complete.

[3] As a result of information provided by the plumber, the Board of Directors of the defendant concluded that the plaintiff's unit was the cause of the blockage. The defendant then demanded payment from the plaintiff of the costs incurred in clearing the blockage. The defendant also registered a lien against the plaintiff's unit. More than a year later, the plaintiff paid the amount demanded (albeit under protest) and the lien was discharged.

[4] Approximately two months after paying the amount, the plaintiff commenced this action in the Small Claims Court to recover the amount that he had paid to the defendant. The plaintiff's position was that his unit was not the cause of the plumbing blockage.

[5] A trial proceeded over two days – December 1, 2015 and March 23, 2016. On July 21, 2016, the Deputy Judge released his reasons in which he found in favour of the plaintiff. It is the content of those reasons that gives rise to the central issue on this appeal.

[6] The Deputy Judge had before him various pieces of information regarding the source of the plumbing blockage. One was handwritten invoices issued by the plumber that did not provide any real information regarding the cause of the blockage. Another was undated typed pages from the plumber that explained the charges incurred including the number of hours and hourly rates charged. In these typed pages, there are references to the cause of the plumbing blockage, namely, the presence of grease or hardened grease. There is also reference to the grease possibly emanating from Unit #48 (the plaintiff's unit); Unit #47; and Unit #51. Yet another was the videotape of the actual clearing of the blockage on which the plumber's voice can be heard referring to grease and chicken grease. I should note that, prior to the trial, the plumber involved had passed away.

[7] It is not disputed that the plaintiff uses his unit to prepare food for Caribbean cuisine dishes for restaurants. As a consequence of this food preparation, the plaintiff installed a grease trap in his unit that is cleaned, on average, every six to eight weeks. No other unit involved in

this situation produces food grease. Unit #47 is an upholstery shop and Unit #51 is a mechanic's shop. There is some suggestion in the evidence that Unit #51 might produce grease (although this is unclear) but there is no suggestion that that grease would be food grease.

[8] The central problem with the trial judge's reasons is that he appears to find that, in order for the defendant to resist the plaintiff's claim, the defendant had to prove absolutely that the plaintiff caused the plumbing blockage. In so finding, the trial judge appears to have reversed the onus of proof and also to have applied the wrong burden of proof.

[9] On this point, I note the following from the trial judge's reasons, at paras. 36 and 38:

> [36] Taking the totality of the evidence into consideration I am not persuaded on a balance of probabilities that the source of the blockage was definitively determined to be from 48.
>
> …
>
> [38] Since the defendant took the position that the source of the blockage was from 48, it was incumbent upon the defendant to prove in an unambiguous and straightforward fashion the source of the blockage. It failed to do so.

[10] With respect, the defendant was not obliged, in defending the plaintiff's claim, to "definitively" prove that the source of the plumbing blockage was the plaintiff's unit nor was the defendant obliged to prove "in an unambiguous and straightforward fashion" that the plaintiff's unit was the source. Rather, as in any civil proceeding, the onus rested on the plaintiff. In order to succeed on his claim, it was the plaintiff's obligation to establish that it was more likely than not that he was not the source of the plumbing blockage. It is, of course, open to the defendant to lead evidence that will result in the plaintiff failing to prove his case, as the defendant attempted to do in this case, but the defendant does not bear the onus of proof. On this point, I repeat the observation of Rothstein J. from *F.H. v. McDougall*, [2008] 3 S.C.R. 41 where he said, at para. 49:

> In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

[11] While this might be seen to be a simple quarrel over semantics, it is not in this case when one considers all of the evidence, especially the evidence revealed by the videotape of the actual cleaning of the pipes and the comments made by the plumber thereon. The two videotapes of the cleaning of the pipes show the plumber "snaking" the pipes to clear the blockage. He is heard, on at least three occasions, referring to grease including one specific reference to "chicken" grease. The only unit producing "chicken" grease was the plaintiff's unit.

[12] It is of some concern that the trial judge does not make any reference to the audio portion of these videos in his reasons given its potential importance to the central issue that had to be determined, that is, the likelihood that the plaintiff was the source of the grease that caused the plumbing blockage. This failure is especially troublesome because the trial judge did engage in an exercise of deciding that issue, at least in part, by referring to whether the handwritten invoices from the plumbing company were more helpful on the subject of the possible source of the grease as opposed to typed notes also provided by the plumbing company on the subject. In weighing that respective evidence, the audio from the videos that also discusses the source of the blockage would seem to be very relevant evidence and yet it is not mentioned.

[13] I am also concerned that, in reaching his conclusion, the trial judge appears to have discounted, if not completely rejected, the evidence of the members of the Board of Directors, who gave evidence regarding their reasons for concluding that the plaintiff was the source of the blockage, because of the language that the directors used in the course of their discussions. More specifically, the trial judge concluded that the members of the Board were "irresponsible" and "rather flippant" in their decision because their discussion of the subject was "laden with expletives". With respect, the manner in which different people may express themselves is hardly a solid foundation for rejecting their evidence. The trial judge's consideration of this evidence also does not appear to accord the required degree of deference to which the Board of Directors of a condominium corporation is entitled: *3716724 Canada Inc. v. Carleton Condominium Corp. No. 375*, [2016] O.J. No. 4526 (C.A.) at para. 52.

[14] In any event, I am reinforced in my concern about the approach taken by the trial judge by the many references in his reasons where he refers to the defendant failing to produce

evidence when he does not appear to hold the plaintiff to the same requirement. As I have said, it is the plaintiff who bears the onus of proving his case.

[15] In the end result, given the concerns that I have with the onus of proof that the trial judge appears to have employed, with the standard of proof he appears to have applied, and with his failure to refer to key evidence, I am not satisfied that the decision reached is a safe and reliable one. Consequently, the decision cannot stand. At the same time, given the nature of the evidence, I am not in a position to say that the plaintiff could not succeed in his claim if the proper analysis of the evidence is undertaken. As a result, a new trial must be ordered.

[16] The appeal is allowed, the judgement below is set aside and a new trial is ordered before a different trial judge. The defendant is entitled to its costs of the appeal fixed in the amount of $5,000.00 inclusive of disbursements and HST payable by the plaintiff within thirty days.

NORDHEIMER J.

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BETWEEN:

NAVAL WASHINGTON

Plaintiff/Respondent

– and –

YORK CONDOMINIUM CORPORATION NO. 441

Defendant/Appellant

REASONS FOR DECISION

NORDHEIMER J.

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