

as the property manager for the condominium property since 2008. Zimmer is also one of three YRCC board members.

[4] As a result of damage to the roof of the property caused by the Greater Toronto Area ice storm in January 2014, the unit suffered substantial water damage. Sarrue and Elite filed claims with their property insurer. The damages (including business interruption losses) were paid by the insurer to Elite, as it was apparently Elite which suffered the losses. The insurer subsequently commenced this proceeding (subrogated claims in the names of Sarrue and Elite) against, *inter alia*, YRCC and Talc to recover the funds paid to Elite.

[5] YRCC and Talc bring a joint motion for summary judgment seeking a dismissal of this action on the basis that section 119 of the *Condominium Act* 1998 S.O. 1998, c. C19 (“the Act”) mandated Sarrue and in turn Elite, to include a waiver of subrogation in their property insurance policy in favour of YRCC and Talc, all in accordance with Article 14.03 of YRCC’s by-laws.

[6] In response to the motion for summary judgment, Sarrue now agrees that section 119 of the Act, together with Article 14.03 of YRCC’s by-laws, preclude any subrogated claims against YRCC or Talc and there is no genuine issue requiring a trial of Sarrue’s claim. As such, the parties have already agreed to a dismissal of Sarrue’s claim.

[7] The motion thus proceeded before me on the issue of whether there are any genuine issues requiring a trial with respect to Elite’s claims against YRCC and Talc.

Summary of Relevant Facts

[8] Most if not all of the relevant facts are not in dispute and are summarized above. In order to dispose of this motion for summary judgment, it is important to review the relevant excerpts from YRCC’s by-laws in light of section 119 of the Act.

[9] Article 14.01 of the by-laws requires YRCC to obtain and maintain various forms of insurance for the condominium property, including fire, liability, property damage and motor vehicle insurance.

[10] Article 14.03 of the by-laws provides as follows:

“There are also obligations on the unit owners with respect to property insurance for their unit’s contents and related business interruption loss. Article 14.03 of By-law No. 1 provides that if a unit owner elects to purchase property insurance on the contents of the unit, such insurance shall contain a waiver of subrogation in favour of the condominium corporation and others, including its property manager:

14.3 By the Owner: It is acknowledged that the foregoing insurance is the only insurance required to be obtained and maintained by the Corporation and that the following insurance, or any

other insurance, if deemed necessary or desirable by any owner, may be obtained and maintained by such owner:

- (a) insurance on any additions, improvements or betterments (including any additions, improvement or betterments installed by or on behalf of the owner for the purposes of finishing the unit) made to or acquired by or on behalf of the owner for his unit and for equipment, furnishings, fixtures, decorating and personal property and chattels contained within his unit, and his personal property and chattels stored elsewhere on the property, including his automobile or vehicles, and for loss of use and occupancy of his unit in the event of damage, which policy or policies of insurance shall contain waiver of subrogation against the Corporation, its manager, agents, employees, directors, officers and servants, and against the other owners and their employees, officers, directors, customers, tenants, guests or visitors, except for vehicle impact, arson, fraud, vandalism or malicious mischief;
- (b) public liability and property damage insurance covering any liability of any owner to the extent not covered by any public liability and property damage insurance obtained and maintained by the Corporation.

[11] To summarize, in the event a unit owner opts to purchase its own property insurance for, *inter alia*, equipment, fixtures and chattels, the insurance policy must include a waiver of subrogation against YRCC, its managers, agents, employees, officers and directors.

[12] Schedule “A” to the by-laws set out a series of rules and regulations to be observed by the unit owners, which term includes “any other person occupying a unit with the owner’s approval.”

[13] Section 119 of the Act mandates an occupier of a unit to comply with the Act and a condominium corporation’ declarations, by-laws and rules. The provisions of section 119 are as follows:

“Compliance with Act

119. (1) A corporation, the directors, officers and employees of a corporation, a declarant, the lessor of a leasehold condominium corporation, an owner, an occupier of a unit and a person having an encumbrance against a unit and its appurtenant common interest shall comply with this Act, the declaration, the by-laws and the rules, 1998, c.19, s.119 (1).

Responsibility for occupier

(2) An Owner shall take all reasonable steps to ensure that an occupier of the owner's unit and all invitees, agents and employees of the owner or occupier comply with this Act, the declaration, the by-laws and the rules, 1998, c.19, s.119 (2)."

[14] It is the position of YRCC and Talc that by operation of section 119 of the Act, Elite as an occupier of the unit was mandated to comply with YRCC's by-laws (including by-law 14.03) and obtain a waiver of subrogation in its property insurance policy. Elite in turn submits that it is not bound to any express obligation specifically granted to Sarrue as the unit owner.

Summary Judgment

[15] Rule 20.04(2)(a) of the *Rules of Civil Procedure* provides that the Court shall grant a summary judgment if the Court is satisfied that "there is no genuine issue requiring a trial with respect to a claim or defence." As a result of the amendments to Rule 20 introduced in 2010, the powers of the Court to grant summary judgment have been enhanced to include, *inter alia*, weighing the evidence, evaluating the credibility of a deponent and drawing any reasonable inference from the evidence.

[16] In *Hryniak v. Mauldin* 2014 SCC 7, the Supreme Court of Canada held that on a motion for summary judgment, the Court must first determine whether there is a genuine issue requiring a trial based only upon the record before the Court, without using the fact-finding powers set out in the 2010 amendments. The Court may only grant summary judgment if there is sufficient evidence to justly and fairly adjudicate the dispute, and if summary judgment would be an affordable, timely and proportionate procedure.

[17] The overarching principle is proportionality. Summary judgment ought to be granted unless the added expense and delay of a trial is necessary for a fair and just adjudication of the case.

[18] Nothing in *Hryniak* or the subsequent jurisprudence displaces the onus upon a party responding to a motion for summary judgment to "lead trump or risk losing". The Court must assume that the parties have put their best foot forward and placed all relevant evidence in the record. If the Court determines that there is a genuine issue requiring a trial, the inquiry does not end there and the analysis proceeds to whether a Court can determine if the need for a trial may be avoided by use of its expanded fact-finding powers.

Decision

[19] A unit owner must take all reasonable steps to ensure that an occupier of the unit complies with the Act and all relevant by-laws, rules and regulations. Elite is an occupier of the unit. Section 119 of the Act requires Elite to comply with the Act and YRCC's by-laws. In this case, the owner and directing mind of both the unit owner (Sarrue) and the occupier/tenant (Elite) is Zimmer. There is thus no issue that he could have arranged for an insurance policy to include the necessary waiver of subrogation rights.

[20] The issue is whether Article 14.03 of YRCC's by-laws amounts to an obligation upon Elite to obtain an insurance policy that includes a waiver of subrogation rights. In other words, do the obligations set out in Article 14.03 apply to Elite as tenant of the unit?

[21] YRCC and Talc rely upon the decision of Justice Allen in *Chan v. Toronto Standard Condominium Corp. No. 1834*, 2011 ONSC 108 (CanLII). In *Chan*, a condominium corporation sought an order that a unit owner and her tenants comply with the Act and the condominium corporation's declarations and rules with respect to the leasing of that unit. In granting the condominium corporation's application, Justice Allen relied upon section 119 of the Act to force the tenant to comply with the rules and declarations. Elite argues that *Chan* is distinguishable because the subject rules and declarations related to the usage of the unit permitted either the tenant or unit owner to comply with or breach those particular provisions. In the case before me, Elite submits that Article 14.03 creates no express obligation upon an occupier to do anything, only upon the unit owner, and even that obligation is conditional upon the decision to purchase property insurance.

[22] Elite argues that, as the tenant, it is not subject to every obligation owed by Sarrue as a unit owner. Elite argues that, under Article 14.03, an owner is not mandated to obtain property insurance (i.e. it is a voluntary decision), and even if the owner chooses to obtain property insurance, the obligation to have the policy include a waiver of subrogation rights does not extend to a tenant because the express obligation contained in Article 14.03 is not explicitly, or by term of reference, placed upon Elite as a tenant. Elite points to the specific obligations placed upon a tenant in Schedule "A" to the YRCC by-laws in support of its position that YRCC must have drawn its mind to setting out the express obligations upon tenants, and the obligation to include a waiver of subrogation rights was not listed therein.

[23] Elite relies on the decision of Justice O'Connor (as he then was) in *Peel Condominium Corp. No. 16 v. Vaughan* [1996] O.J. No. 974 (Gen. Div.). In *Peel*, the condominium corporation's insurer sued the defendants, who rented a condominium unit from an owner, for repairs necessitated by the defendants' own negligence. The insurer had waived subrogation rights against the owner under the policy. The issue before the Court was whether there was any responding coverage under the defendants' policy as the condominium corporation took the position that its insurance policy protected itself and the owners, but not the defendants as tenants.

[24] In concluding that the tenants were not covered by the insurance policy, the Court found that the relationship between the owner and the tenants was governed by the *Landlord and Tenant Act* and the word “owner” in the policy and applicable legislation did not include “tenants”. Justice O’Connor granted judgment in favour of the condominium corporation, and refused to “judicially extend” the meaning of owner to include tenant.

[25] The purpose of a waiver of subrogation rights (as in Article 14.03) is based upon the allocation of risk between the condominium corporation (which assumes responsibilities for insuring the building), and the owner of the unit (which is responsible for insuring the contents/equipment of the unit). The intention in allocating those risks is that there will not be subrogation between the two parties for a loss to the other’s property even if caused by the negligence of the other party.

[26] On the specific facts of this case, I agree with Elite’s position. YRCC and Talc’s interpretation of Article 14.03 would be to protect YRCC and Talc from legal responsibility to occupiers caused by the potential negligence of YRCC and Talc. The wording of Article 14.03 is simply not explicit enough on its own to create an obligation upon an occupier (whether arm’s length or not) to maintain property insurance with a waiver of subrogation rights. If the effect of a condominium by-law or regulation is to preclude an occupier from redress for negligence suffered at the hands of the condominium corporation, express and explicit wording ought to be used. This is especially so when a condominium corporation chooses to set out explicit obligations upon occupiers as YRCC did in Schedule “A” to its by-laws.

[27] I realize that on the facts of this case Zimmer wears the hats of owner (directing mind), tenant (directing mind) and YRCC board member. That said, there is insufficient evidence in the record before me to make a finding piercing the corporate veil on a motion for summary judgment, and in any event the main thrust and scope of the motion for summary judgment was based upon the section 119 argument. It remains open for YRCC and Talc to attempt to seek contribution and indemnity from Zimmer (or Sarrue), but at this stage of the litigation I find on the record before me that the issue of piercing the corporate veil requires a trial.

[28] Accordingly, the motion for summary judgment is dismissed. In accordance with the Supreme Court of Canada’s direction in *Hryniak*, I remain seized of this proceeding and counsel for the parties may schedule a case conference before me to discuss next steps.

Costs

[29] I would urge the parties to exert the necessary efforts to try and resolve the costs of this motion, and the proceeding itself. If such efforts prove unsuccessful, the parties may exchange written costs submissions (totaling no more than four pages including a Costs Outline) in accordance with the following schedule:

- a) the plaintiffs may serve and file their costs submissions within 10 business days of this Endorsement; and

- b) the defendants YRCC and Talc shall thereafter have an additional 10 business days from the receipt of the plaintiffs' costs submissions to deliver their responding costs submissions.

Diamond J.

Released: February 13, 2018

CITATION: Elite Vertical Blinds, Mfg. Co. v. YRCC No. 696, 2018 ONSC 1000
COURT FILE NO.: CV-16-543861
DATE: 20180213

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

ELITE VERTICAL BLINDS MFG. CO. and SARRUE
HOLDINGS INC.

Plaintiffs

– and –

YORK REGION CONDOMINIUM CORPORATION
NO. 696, TALC PROPERTY MANAGEMENT INC.
and CONSTRUCTION CONTROL INC.

Defendants

ENDORSEMENT

Diamond J.

Released: February 13, 2018