CITATION: Toronto Condominium Corp. 1462 v. Dangubic, 2018 ONSC 491
COURT FILE NO.: CV-17-568359
DATE: 20180119

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: TORONTO STANDARD CONDOMINIUM CORPORATION NO. 1462, Plaintiff

– AND –

ANDREJ DANGUBIC, Defendant

BEFORE: EM Morgan J.

COUNSEL: *Spencer Toole*, for the Plaintiff

Nan Zheng, for the Defendant

HEARD: January 19, 2018

MOTION FOR SUMMARY JUDGMENT AND ENFORCEMENT OF LIEN

[1] The Defendant is owner of a unit in the Plaintiff's condominium building. He is not a good neighbor, and has misbehaved in ways which breach the by-laws of the Plaintiff. He has used the building's party room in an excessively noisy manner in violation of the other owners' rights of quiet enjoyment. He has also gotten into verbal confrontations with other owners, left obscene and aggressive voicemail messages for them, etc. The police have been contacted by the Plaintiff in order to deal with some of this.

[2] The misconduct of the Defendant is baldly denied but, in reality, is not seriously contested by him. He admits leaving the disturbing voicemail messages, he does not dispute in any serious way the noise complaints about the party room. He contends that he would like to have a trial so that he can cross-examine his neighbours on some of these complaints, but in my view this is just a deflection of the issues. Defendant's counsel also submits that the security guard in the building should be examined as an objective observer and witness to many of the events at issue. She has explained that he was not examined on this motion because the Defendant did not want to incur any further expenses, but that in any event his testimony would be helpful at trial.

[3] With respect, the Defendant, like all parties to a summary judgment motion, is expected to have put his best foot forward in responding to the motion: *Combined Air Mechanical*

Services Inc. v Flesch, 2011 ONCA 764. He has to date come up with little or no real counter to the Plaintiff's evidence against him. There is also no real indication that any further examination of other unit owners or managers or security guards of the Plaintiff will add to his case. Taken as a whole, the record suggests, as Laskin JA has stated in a well-known essay on legal advocacy, that the Defendant "did not lead trump because he had no trump to lead!": John I. Laskin, *Forget the Wind-Up and Make the Pitch: Some Suggestions for Writing More Persuasive Factum*s, at para 10, online: http://www.ontariocourts.ca /coa/en/ps/speeches/forget.htm.

[4] The only real dispute here is whether the Defendant is in arrears of common expenses. The Plaintiff says that he currently owes a total of $14,358.40. This is composed of:

$ 3,136.32 (legal costs of compliance letters written by Plaintiff's lawyers to Defendant)
1,659.82 (accrued interest)
9,562.50 (legal costs in respect of the lien and attempted collection of arrears)

[5] The Plaintiff's By-law 4 governs the payment of common expenses. Section 11.2 of the by-law sets out the unit owner's obligations to pay, and section 11.4 deals with default on common expenses. Both section 9 of Part 2 and section 31 of Part 7 of the Condominium Declaration, as well as the By-laws of the Plaintiff, provide for the indemnification of these expenses to be added to the common expenses and to be dealt with in the same manner as common elements.

[6] The record contains uncontroverted evidence that the Plaintiff has in fact incurred the expenses for which it seeks indemnification in this way. There is no need for a trial of these issues, as they are all readily established on the basis of written invoices and other hard copy pieces of evidence as well as affidavits already in the record. The Defendant was aware of these provisions and through his conduct has brought these extra expenses on himself. In my view, this is an appropriate case for summary judgment: *Hyrniak v Mauldin*, [2014] 1 SCR 87.

[7] The only remaining issue here is whether the lien registered by the Plaintiff in an effort to enforce the arrears in common expenses is valid.

[8] The first compliance letter sent to the Defendant by the Plaintiff's lawyers was dated November 24, 2015. The second compliance letter from the Plaintiff's lawyers to the Defendant was sent on December 4, 2015. The Plaintiff registered a lien in respect of the arrears in common expenses on March 29, 2016. Section 85(2) of the *Condominium Act* provides that a lien may be registered against a condominium owner in respect of arrears of common expense payments. The Plaintiff is also required to give notice of any such lien claim to the owner: *York Condominium Corporation No. 82 v Bujold*, 2013 ONCA 209, at paras 11, 17, 20.

[9] Counsel for the Defendant has brought to my attention the case of *Couture v Toronto Standard Condominium Corp. No. 2187*, 2015 ONSC 7596, which she submits suggests that legal fees incurred by a condominium corporation in dealing with an owner may in some instances not be validly included in a lien to enforce common expense arrears. In my view, however, that case is not applicable here. In *Coutoure*, at para 31-32, the court specified that the

legal fees in issue were a matter of contention and possibly not justified, and, accordingly, the registration of a lien that included these legal fees was not a reasonable or authorized step.

[10] Here, by contrast, I see nothing unreasonable about the inclusion of legal fees in the common expenses. The Defendant was fully aware of this claim and certainly knew the circumstances of how and why the fees were incurred. They are supported by the solicitors' accounts and are not an unreasonable amount for the legal work done.

[11] Defendant's counsel also submits that the lien was registered out of time. Section 85(2) of the *Condominium Act* provides that the lien must be registered within 3 months of the claim for arrears. Since the claim was first made by the Plaintiff on November 24, 2015 and the lien was not registered until March 29, 2016, it appears on the surface at least that the 3 month period had already passed. If that were the case, the debt would still be owing but the lien would not be valid as a means of enforcing the debt.

[12] Counsel for the Plaintiff explains that the lien amount has been adjusted monthly on a rolling forward basis. Commencing January 1, 2016, the Defendant has paid the monthly common expenses by means of pre-authorized deductions from his account. The Plaintiff, however, has been allocating these payments to the earliest arrears first, not to the latest arrears as the Defendant would have it. Since each monthly payment is allocated to the earliest arrears, the arrears for which the Defendant's unit has been liened move forward each month and therefore this debt does not expire.

[13] In *York Condominium Corporation No. 482 v Christiansen*, [2003] OJ No 343, at para 44, the court made it clear that the arrears can be allocated in whatever way the condominium corporation sees fit. It is for the creditor, not the debtor, to apply its accounting method to the monthly payments made.

[14] This approach was adopted and further elaborated upon by Gilmore J. in *Durham Condominium Corp. No. 56 v Stryk*, 2013 ONSC 2196. There the unit owner in arrears put forward an argument that is almost identical to the Defendant's argument here – i.e. that monthly payments made by a condominium owner in arrears of common expenses should be allocated to the most recent amount owing. Gilmore J. reasoned that there is nothing wrong with the condominium corporation crediting any payments in a chronological way against the oldest outstanding expenses first, including common expenses owing due to a special assessment and not part of the ordinary monthly expenses. She specifically held, at para 44, that:

> As payments came in from the defendant each month for her common expenses, the default rolled forward every thirty days. Doing otherwise would fetter the corporation's ability to apply funds to outstanding debts owed to them as they see fit…

[15] I adopt the same approach here. I also note that in the ledger produced by the Plaintiff that accompanied registration of the lien, the ongoing payments made by the Defendant are calculated in this way. The amounts owing and the credits reflecting monthly payments are added to and deducted from chronologically, from the oldest to the most recent moving forward.

There is nothing surprising about this approach. It conforms to what prior case law has authorized. Accordingly, the debt owed by the Defendant rolled forward every month that he remained in arrears of common expenses, as did the 90 day period for registering the lien. The lien was therefore not out of time when registered on March 29, 2016.

[16] The Defendant has recently amended his Statement of Defense to add a Counterclaim. As counsel for the Plaintiff points out, the Counterclaim flows directly from the lien claim, and raises no further facts than the ones already canvassed in this record. It alleges that there is no valid debt owing to the Plaintiff, that the lien was improper, and that the lien and claim amount to oppression of him.

[17] As an aside, I note that the Statement of Defense and Counterclaim also contains a rambling and only partially coherent discussion of section 11 of the *Canadian Charter of Rights and Freedoms*, the relevance of which is difficult to fathom in the context of a private condominium dispute. In general, the Defendant's pleading reads more like a rant about what the Defendant says is the nature of "Canadian Democracy or harassment free country" than it does a legal document.

[18] I hasten to add that counsel for the Defendant was apparently retained at the very last moment and was not responsible for drafting the Statement of Defense. Apparently, the Defendant was self-represented up to that point, and his present counsel barely had time to add a few Counterclaim sentences to the pleading as already drafted. The new parts added by Defendant's counsel are perfectly understandable and appropriate, and stand in stark contrast to the balance of the Statement of Defense.

[19] That said, counsel for the Plaintiff is correct that the Counterclaim rises and falls with the identical evidence as the main claim. I am conscious of the caution which the Court of Appeal has expressed with respect to granting summary judgment where a Counterclaim exists. That caution is addressed to the problem of potentially inconsistent findings if the main claim and counterclaim are tried in separate proceedings: *Bayview Homes Partnership v Haditaghi*, 2014 ONCA 450, at para 37. That, however, is not the situation here.

[20] If the lien is valid in the way that the Plaintiff says it is, then there is no issue left for the Counterclaim. Those parts of the Statement of Defense and Counterclaim that are understandable as raising cogent legal points simply repeat what the Defendant has said in his defense of the main claim.

[21] The Plaintiff's motion for summary judgment is granted. The Defendant shall pay the Plaintiff $14,358.40. The Plaintiff shall also have an order for possession and leave to issue a writ of possession.

[22] The Defendant's Counterclaim is dismissed.

[23] The Plaintiff deserves its costs of the motion and action. The condominium's by-laws suggest that the Plaintiff deserves full indemnity for all legal costs incurred in recouping common expenses owed by a unit owner. Section 85(3)(c) of the *Condominium Act* provides that

all reasonable costs and expenses are recoverable. Plaintiff's counsel has submitted two alternative scales in his Costs Outline, seeking either $18,223.39 on a full indemnity basis or $16,556.41 on a substantial indemnity basis.

[24] In general, costs are discretionary under section 131 of the *Courts of Justice Act*. This discretion is to be exercised in accordance with the criteria set out in Rule 57.01 of the *Rules of Civil Procedure*, including the principle of indemnity for the successful party (Rule 57.01(1)(j)) and "the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed": Rule 57.01(1)(k). The Defendant had much advanced warning that the Plaintiff was incurring legal costs in pursuing its remedies, and he should not be taken by surprise by what in any event are the relatively modest amounts requested by the Plaintiff.

[25] While I hesitate to make the Defendant's neighbours assume any of the burden of the legal fees incurred, I am cognizant of the fact that Defendant's counsel was compelled to approach this case hamstrung by budgetary restrictions. I will therefore exercise my discretion to award the lesser of the two amounts sought by the Plaintiff. The Defendant shall pay the Plaintiff costs of this motion and action in the amount of $16,556.41, inclusive of all fees, disbursements, and HST.

Morgan J.

Date: January 19, 2018