IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan KAS 3162 v. Staerkle,* 2018 BCSC 1290

Date: 20180801
Docket: S109673
Registry: Kelowna

Between:

The Owners, Strata Plan KAS 3162

Plaintiff

And

Neil Staerkle and Chantal Staerkle

Defendants

Before: The Honourable Madam Justice Gropper

Reasons for Judgment

Counsel for the Plaintiff:	M. Danielson
The Defendants, appearing in person:	C. Staerkle N. Staerkle
Place and Date of Trial/Hearing:	Kelowna, B.C. July 11, 2018
Place and Date of Judgment:	Kelowna, B.C. August 1, 2018

Introduction

[1] The plaintiff is a strata corporation for a bare land strata development known as Highpointe, located in Kelowna, British Columbia. It consists of 63 bare land strata lots overlooking the city of Kelowna. The defendants are the registered owners of Lot 4.

[2] The plaintiff seeks judgment against the defendants in respect of fines that were levied by the plaintiff for the defendants' breach of the building scheme and bylaw that is equally a breach of s. 24.7 of the bylaws.

[3] The amount claimed is $54,285.71 of accrued fines between July 4, 2012 and June 26, 2017. The plaintiff also seeks interest in accordance with the *Court Order Interest Act*, R.S.B.C. 1996, c.79.

Background

[4] From the time that the defendants became the owners of Lot 4, a statutory building scheme (the "building scheme") was registered against the title. The building scheme regulates improvements permitted on each lot. It features strict architectural landscape controls that the developers established to ensure a consistent contemporary look for all residences built at Highpointe. The building scheme prescribes certain limitations on the siting of dwellings, grading, structure height, architectural styles, chimneys, skylights, eaves, lighting, colours, porches, doors, windows and accent materials, landscaping irrigation, driveways, pools, baths, patios, fencing and many other features.

[5] The building scheme requires approvals which must be obtained before starting development on any lot at Highpointe:

a) all owners of Highpointe must have their houses reviewed and approved by the architectural review consultant (the "ARC") identified in the building

scheme. The ARC for Highpointe was initially John McDonald of Weslan Developments Inc. He subsequently designated Tara Sullivan-Woll of Red Crayon Design Ltd. as Highpointe's ARC;

b) all owners of Highpointe must have their houses reviewed and approved by a landscape review consultant (the "LRC") identified in the building scheme. The LRC for Highpointe was Site360 Design Inc.;

c) the owners could not make any material changes to the plans approved by the ARC and the LRC affecting the exterior appearance of the house or the yard without further approval by the ARC and/or LRC.

[6] The plaintiff is governed by a set of bylaws registered in the Kamloops land title office. The bylaws provide that each breach of the building scheme is equally a breach of the bylaw. Section 24.7 of the bylaw provides:

> Each strata lot owner shall observe the terms and conditions of the Statutory Building Scheme registered against title to his/her strata lot. Any breach of the Statutory Building Scheme shall be deemed a breach of these bylaws.

[7] The bylaws authorize the plaintiff to charge a maximum fine of $200 for each contravention of the bylaws. They further authorize the plaintiff to impose such fine every seven days for continuing contravention of the bylaws.

[8] After the defendants purchased Lot 4, they submitted house and landscape plans that were approved by the ARC and LRC. After the plans were approved, the defendants wished to make certain changes to the plans. Some of the changes requested by them were approved by the ARC and LRC. Other changes were rejected. The defendants took the position that they were going to continue building the improvements on Lot 4 in accordance with their amended plans despite their not being approved by the ARC/LRC. They advised the plaintiff that they "exonerate[d]"

their contractor from the consequences of their decision to proceed without ARC/LRC approval.

[9] On November 1, 2011, the plaintiff received a letter from another Highpointe owner complaining that the construction on Lot 4 did not adhere to the building scheme.

[10] The plaintiff convened a special general meeting on November 2, 2011 to discuss the letter.

[11] The plaintiff did not immediately start imposing fines against the defendants for the breach of this building scheme. Instead, they sought to assist the defendants to bring Lot 4 into compliance with the building scheme. A member of the strata council and a representative of the developer, Geby Wager, introduced the defendants to Karl Wilms of Wilms Design Services Ltd. Mr. Weger and Mr. Wilms worked with the defendants for several months. The defendants then advised Mr. Wager that they would not make the changes to Lot 4 to comply with the building scheme, in any event.

[12] The plaintiff says that because of the defendants' withdrawal from the process of bringing Lot 4 into conformity with the building scheme, it decided to take steps to enforce the building scheme in relation to Lot 4.

[13] On May 24, 2012, the plaintiff convened a meeting of its strata council. The plaintiff was authorized to issue a letter to the defendants regarding the breaches of the building scheme. On June 11, 2012, the plaintiff formally advised the defendants that Lot 4 did not comply with the building scheme. The plaintiff also advised that the defendants were entitled to respond to the letter within 14 days in writing or by requesting a hearing of the strata council. The plaintiff also advised the defendants that they would be fined the maximum fine of $200 if they did not remedy their

contraventions of the building scheme and that that fine would be imposed every seven days until Lot 4 was brought into compliance with the building scheme.

[14] The defendants did not respond to that letter or request a hearing of the strata council. The defendants say that they did not request a hearing because they did not believe they would get a fair hearing “given how some of the strata council members have acted towards [them] in the past".

[15] On June 22, 2012, the plaintiff convened a strata council meeting. The fine of $200 was approved and that the fine would be imposed every seven days thereafter was also approved.

[16] On July 4, 2012, the plaintiff’s strata management company, Associated Property Management provided a notice of bylaw violation to the defendants and advised that the fine of $200 was imposed and it would be re-imposed every seven days until the contravention was remedied.

[17] The defendants have not paid any of the fines that have accrued regarding Lot 4’s non-compliance. As noted, the fines presently accrued is $54,285.42.

Suitability of Summary Trial

[18] The plaintiff's application is under Rule 9-7 of the *Supreme Court Civil Rules* that provide that a party may apply for judgment in an action where a response has been filed, in a summary trial.

[19] The defendants have not suggested that this matter is unsuitable for summary trial. Nevertheless, before I proceed, I must determine whether the matter is suitable for summary trial. I consider that it is. The cost of taking this matter to trial would be out of proportion to the amount in issue. There are no significant conflicts of the evidence that must be resolved in order to give judgment. The documentary evidence, including the plain wording of the building scheme and the defendants’

admission that they did not follow certain of the requirements of the building scheme satisfactorily resolve any conflicts in the evidence between the parties.

Legal Framework

[20] The *Strata Property Act*, S.B.C. 1998, c. 43 [*SPA*] addresses bylaws and rules in Part 7. Division 3 of that part sets out the procedure a strata corporation must follow in finding an owner of a strata or lot who contravenes a bylaw.

[21] Section 130(1) of the *SPA* authorizes a strata corporation to fine an owner of a strata lot if the owner contravenes a bylaw. Section 132 provides that a strata corporation must set out in its bylaws the maximum amount it may fine an owner for each contravention of the bylaw or rule. The fines cannot exceed the maximum amount and frequency set out in the *Strata Property Regulation*, B.C. Reg. 43/2000 [*Regulation*].

[22] Section 7.1 of the regulation provides that for the purposes of s. 132 of the *Act*:

> **Maximum fines**
>
> 7.1 (1) For the purposes of section 132 of the Act, the maximum amount that a strata corporation may set out in its bylaws as a fine for the contravention of a bylaw or rule is
>
> (a) $200 for each contravention of a bylaw, and
>
> …
>
> (3) For the purposes of section 132 of the Act, the maximum frequency that a strata corporation may set out in its bylaws for the imposition of a fine for a continuing contravention of a bylaw or rule is every 7 days.

[23] Section 135 of the *Act* provides that before imposing a fine under a bylaw contravention, the strata council must provide particulars of the complaint about the contravention in writing and give the owner a reasonable opportunity to answer the complaint, including a hearing if requested by the owner.

[24] In *Terry v. The Owners, Strata Plan NW309*, 2016 BCCA 449, the court addressed the procedural requirements for a strata corporation to impose a fine, at para. 28:

> [28] In my view, an owner… who may be subject to a fine must be given notice that the strata corporation is contemplating the imposition of a fine for the alleged contravention of an identified bylaw or rule, and particulars sufficient to call to the attention of the owner or tenant the contravention at issue. In addition, the owner…must be given a reasonable opportunity to answer the complaint. What constitutes a reasonable opportunity to be heard in response is a case-specific inquiry that must take account of the nature of the alleged contravention, the context in which the violation is said to have occurred, and the time that might reasonably be required to gather information or evidence needed to answer it.

Has the Plaintiff Complied with the Requirements of the *SPA*?

[25] The plaintiff received the complaint about Lot 4 and the defendants' failure to conform to the building scheme. The details of the complaint were given to the defendants in writing. The defendants were given a reasonable opportunity to answer the complaint and were invited to request a hearing to respond to the complaint. The defendants did not respond to the complaint or request a hearing to respond to the complaint.

[26] I find the plaintiff complied with the requirements of s. 135. The plaintiff authorized the issuance of the fines at its council meeting held June 22, 2012. The plaintiff's strata manager provided a notice of bylaw violation to the defendants. The plaintiff's strata manager also provided the defendants with periodic statements of account with a balance of the fines.

Breaches of the Bylaw

[27] There is no dispute that the defendants built on Lot 4 in accordance with their amended plans that did not comply with the building scheme and had not been approved by the ARC or LRC. In particular, they failed to comply with the building scheme in respect of:

a. Stucco colour;

b. Windows;

c. Stonework;

d. Fascia;

e. Landscape;

f. Pool equipment enclosure; and

g. Pool drainage.

[28] The defendants have explained their decision to proceed without approval.

[29] It is unnecessary for me to describe the ways in which their amended plans did not accord with the building scheme or why they proceeded in the way they did. There were continuing breaches of the building scheme and of the bylaw.

Defendants' Response

[30] The defendants raised several arguments about why the plaintiff should not be entitled to judgment in the amount of the fines:

a. The plaintiff has unreasonably allowed the fines to accumulate by imposing them after the house was completed. The plaintiffs singled out the defendants out in its imposition of fines. The defendants attempted to negotiate a settlement of the dispute;

b. Any breaches of the building scheme were *de minimis*: that is, too trivial to merit consideration. Their contractor led them to believe that the changes that they made would not offend the building scheme;

c. The building scheme was vague, and the ARC was unreasonable in not approving the changes that the defendants sought;

d. The defendants ought to be entitled to relief from forfeiture, that is, the amount of the judgment should be less than what the plaintiffs claim based on the defendants' circumstances: they are from Switzerland and were not aware of the requirements in respect to their lot, they experienced family tragedies and they broke up in January 2017 and now must sell their property or be subject to foreclosure.

Analysis

Allowing fines to accumulate

[31] There is no evidence upon which I can conclude that the defendants were treated unfairly in relation to the other strata owners. The plaintiff demonstrated that that the defendants breached the building scheme and the bylaw by making changes to their plans and executing them without ARC or LRC approval. The plaintiff responded in a timely matter to the breaches when they occurred: once the defendants actually built their home in accordance with their unapproved plans.

[32] The plaintiff accepts that the home is now in compliance with the bylaw and has been since August 2017. The fines ceased as of June 26, 2017.

[33] In *Wilson v. Highlands Strata Corp.*, [1999] B.C.J. No. 2637, the court set aside the fines that had been assessed against the owner of one of the strata lots that the strata corporation considered to be in breach of the rental bylaw. The court found that the owners have been granted special permission to rent out their unit from time to time on the basis of economic hardship; the strata corporation did not commence an action to enforce the fines; and the strata corporation did not provide the owner with a proper hearing to appeal the fines due to miscommunications between the parties (at para. 27).

[34] The *Wilson* decision was distinguished in *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.*, 2016 BCSC 32 where a commercial strata corporation assessed fines against the defendants for bylaw violations for failing to keep its store open during mall hours. The defendants argued that the plaintiff had behaved unreasonably in allowing the fines to accumulate. The court rejected the argument. It distinguished *Wilson* on three bases: (1) the owners in *Wilson* did not have a real opportunity to appeal the decision to disallow the rental of their unit; (2) all the owners had an interest in ensuring that all stores stayed open during mall hours; and (3) the plaintiff did not unreasonably delay in bringing court action against the defendants to enforce the fines. The court also noted that the owners did not request a meeting with the strata council, although there might have been some “ill will" between the parties, the court could not infer the strata council would have refused such a meeting if the owners had requested one (at paras. 243 to 247).

[35] The plaintiff notes that it was the defendants who have caused this action to be delayed several years by adjourning the trial on the first day, requesting adjournments, changing counsel, requesting examinations for discovery that were not pursued, making an application to stay the hearing of the summary trial pending a resolution of a retroactively approved transfer of the proceedings from Small Claims Court to Supreme Court, and filing a separate civil resolution tribunal proceeding regarding the same subject matter of this action.

[36] Our courts have held that building schemes involve a “community of interests” to protect all the owners’ interests. In *Gubbels v. Anderson*, [1994] 91 B.C.L.R. (2d) 379 (S.C.), aff’d [1995] 8 B.C.L.R. (3d) 193 (C.A.) discussed building schemes and community of interests at para. 23:

> 23 A building scheme, however, involves a community of interests. Under a building scheme all landowners share similar burdens and enjoy benefits relating to these limitations on property use. Purchasers of property within areas covered by building schemes do so with knowledge of the restrictions and often because they seek the specific benefits provided by the building

> scheme. The terms imposed are known to each owner and are entered into by the successors in title.

[37] I expect that the defendants and the plaintiff have discussed a potential settlement of the dispute: most litigants do before attending court. In many cases, those negotiations are successful and in others they are not. In these circumstances they were not successful.

[38] I do not accede to the defendants' position that the plaintiff has unreasonably allowed the fines to accumulate or have acted unfairly toward the defendants.

Breaches of the building scheme were *de minimis*

[39] It is not for the Court to determine whether the building scheme was breached in a significant or insignificant way. In this case, the defendants were aware that their amended plans had not been approved by the ARC/LRC and proceeded to implement the changes in any event. The building scheme and bylaw set out that the design was subject to the approval of the ARC. The ARC did not approve, the defendants proceeded without approval: the breach of the building scheme and bylaw is clear.

[40] The defendants' position concerning their contractor is an odd allegation, particularly, where the defendants told their contractor that they knew what they were doing was in breach of the building scheme/bylaw but proceeded and purported to "exonerate" the contractor from liability.

The building scheme was vague

[41] Whether or not the building scheme was vague does not address the issue before me. The building scheme and the bylaw were clear in that the owners were required to obtain approval from the ARC or LRC before making changes to the approved plans. The defendants did not have such approval and proceeded with the

changes in spite of that. There is no vagueness to the fact that proceeding to build without the approval was a breach of the bylaw.

Relief from forfeiture

[42] Relief from forfeiture is addressed in s. 24 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253:

> 24 The court may relieve against all penalties and forfeitures, and in granting the relief may impose any terms as to costs, expenses, damages, compensations and all other matters that the court thinks fit.

[43] Relief from forfeiture is a discretionary remedy. The applicable principles in determining whether a party should be granted a relief from forfeiture were outlined by Mr. Justice Abrioux in *Sechelt Golf & Country Club Ltd. v. District of Sechelt*, 2012 BCSC 1105 at paras. 138-139:

> [138] Relief from forfeiture is a purely discretionary remedy. No party is entitled to this relief as of right.
>
> [139] A summary of the applicable principles to be considered in deciding whether SGCC ought to be granted relief from forfeiture on the facts of this case include:
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> (a) whether the sum forfeited is out of all proportion to the loss suffered;
>
> (b) whether it would be unconscionable in the traditional equitable sense for relief not to be granted;
>
> (c) the applicant's conduct, the gravity of the breaches and the disparity between the value of the property forfeited and the damage caused by the breach;
>
> (d) whether there are any collateral equitable grounds which exist including the party coming to court with "unclean hands";
>
> (e) whether the applicant is "prepared now to do what is right and fair, but must also show his past record in the transaction is clean"
>
> [citations omitted]

[44] I cannot find that the defendants are entitled to relief from forfeiture in this case. They knew that they could not change their plans without approval from the

ARC and LRC and that their requested design changes were rejected by the ARC. They proceeded in any event and sent a letter to the ARC "exonerating" their builder from any wrongdoing associated with their non-compliance. Although the fines have accumulated to a significant amount, the property is listed for $2,495,000. The fines are a small proportion of that amount.

[45] While the Court is sympathetic to the stress that the defendants were undergoing, it does not excuse the defendants' behaviour, which was in clear violation of the building scheme and bylaw.

Judgment to the plaintiff

[46] In all the circumstances, I grant judgment for the plaintiff in the amount claimed and interest. The plaintiff is also entitled to costs at Scale B.

"Gropper J."