QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2019 SKQB 173**

Date: **2019 07 19**
Docket: QBG 2822 of 2018
Judicial Centre: Regina

BETWEEN:

WESTFIELD TWINS CONDOMINIUM CORPORATION

PLAINTIFF

- and -

REGINALD MARK WILCHUCK

DEFENDANT

Counsel:

Kelsey A. Kreklewich — for the plaintiff
Reginald Wilchuck — self-represented defendant

FIAT — ROBERTSON J.
July 19, 2019

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[1] This decision addresses applications by both plaintiff and defendant seeking to strike each other's statements of claim and defence. For the reasons which follow, I dismiss the defendant's application and allow the plaintiff's application, striking the statement of defence, with an award of costs of $1,000.00 payable by the defendant to the plaintiff.

BACKGROUND

[2] The plaintiff, Westfield Twins Condominium Corporation [Westfield], is a condominium corporation operating under *The Condominium Property Act, 1993*, SS 1993, c C-26.1. The Westfield condominiums are

located in buildings on parcels of land in the city of Regina bordered by Westfield Drive, Rae Street, Gordon Road and Lockwood Road.

[3] The defendant, Reginald Mark Wilchuck [Wilchuck], is the owner of a condominium unit in the Westfield complex, legally described as Unit 6 in Condo Plan 88R68050 [Unit 6].

[4] On November 13, 2018, Westfield obtained leave to commence an action against Wilchuck, pursuant to subsection 3(2) of *The Land Contracts (Actions) Act*, RSS 1978, c L-3, seeking judgment against Wilchuck, foreclosure for the lien of arrears on Unit 6, sale of Unit 6, immediate possession of Unit 6, appointment of a receiver for the rents, issues and profits of Unit 6 and costs on a solicitor-client basis.

[5] On January 15, 2019, Westfield issued a statement of claim which on February 21, 2019 was served on Wilchuck. This claim identified arrears of common and/or reserve fund condominium fees as the basis for its claim, which arrears were continuing to accumulate.

[6] On March 22, 2019, Wilchuck served and filed a one-page statement of defence. This defence is reproduced in full below:

> Respecting the Plaintiff's Claim in Action to Enforce Payment (Claim),
>
> 1. The Defendant denies each and every allegation made in the Plaintiff's Claim, including specifically paragraph 1, and excluding that which is stated below.
> 2. The Defendant admits to paragraph 2 of the Plaintiff's Claim. [identity and city of residence of Wilchuck]

> 3. The Plaintiff is attempting to collect money from the Defendant that is not due, is not payable, and therefore is not owed.
> 4. The Plaintiff's (sic) discloses no valid claim, and therefore is vexatious and frivolous, or otherwise an abuse of process.
> 5. The Plaintiff's claim should be stricken in its entirety, with costs to the Defendant.

[7] Both parties applied to strike each other's statement of claim and defence. These applications were heard in chambers on July 4, 2019.

[8] There is a history of decisions in this court and the Court of Appeal involving these same parties which is relevant to my determination of these applications to strike.

[9] On January 8, 2018, Justice Layh of this Court dismissed an application by Wilchuck seeking an oppression remedy under s. 99.2 of *The Condominium Property Act, 1993: Wilchuk v Westfield Twins Condo Corporation, Board of Directors*, 2018 SKQB 2. (Wilchuk and Wilchuck, though differently spelled in some documents, is the same person.)

[10] On April 6, 2018, Justice Chow of this Court granted an application by Westfield to strike Wilchuck's statement of claim as an abuse of process: *Wilchuk v Westfield Twins Condominium Corporation* (6 April 2018) Regina, QBG 534 of 2018 (Sask QB) [*Wilchuk QB*].

[11] On December 5, 2018, the Court of Appeal dismissed Wilchuck's appeal against the order of Justice Chow: *Wilchuk v Westfield* (5 December 2018) Regina, CACV3242 (Sask CA).

The Condominium Property Act, 1993

[12] Before turning to the merits of the applications, it may be useful to review the statutory framework for condominium corporations and their authority to levy and collect fees from unit owners.

[13] *The Condominium Property Act, 1993* establishes condominiums as a form of communal ownership of land with democratic governance of the corporation by its member-owners. Condominium owners have title to their unit and share in the ownership of common property.

[14] As members of the condominium corporation, unit owners have both rights and duties. These rights include the right to participate in the governance of the corporation through membership meetings and, if elected by their fellow owners, to serve on the board of directors of the corporation. Their duties include the obligation to contribute to the upkeep of the property by payment of fees. The allocation of costs is usually determined by the unit factors assigned to each unit, with a total of 10,000-unit factors. When done in this manner, there can be little dispute over the allocation.

[15] The duty and authority of the condominium corporation, through its board of directors, to determine and levy fees is set out in Part IV of *The Condominium Property Act, 1993*, in particular ss. 56 – 58, which also provide that these fees are "due and payable on the passing by the corporation of a resolution levying the fee and in accordance with the terms of the resolution" and "may be recovered by the corporation by an action for debt from the person who was the proper owner when the default occurred …": s. 57(2) and s. 58(4).

[16] Section 54 of *The Condominium Property Act, 1993* requires unit owners to contribute through payment of fee levies for common expenses and reserve fund expenses, barring certain defences.

> PART IV
> **Condominium Fees**
>
> **Responsibility for expenses**
> 54(1) Subject to subsection (2), the corporation is responsible for all expenses and liabilities incurred with respect to the common property and common facilities included in the condominium plan.
> . . .
>
> (3) An owner is not exempt from the obligation to contribute to the common expenses or reserve fund expenses even if:
>
> (a) the owner has waived or abandoned the right to use all or part of the common property, common facilities or services units;
>
> (b) the owner is making a claim against the corporation; or
>
> (c) the bylaws restrict the owner from using all or part of the common property, common facilities or services units.

The Queen's Bench Rules

[17] The determination of both applications involves the application of the court's inherent jurisdiction to control its own process. In this regard, the court has made rules to govern proceedings, including the ability to strike pleadings and enter judgment.

[18] The plaintiff expressly relies upon Rule 7-9 of *The Queen's Bench Rules* and the defendant inferentially relies on the same Rule. This Rule

and others should be considered in light of the Foundational Rules. For that reason, Rules 1-3 and 7-9 are reproduced below:

> **Purpose and intention of these rules**
>
> 1-3(1) The purpose of these rules is to provide a means by which claims can be justly resolved in or by a court process in a timely and cost effective way.
>
> (2) In particular, these rules are intended to be used:
>
> (a) to identify the real issues in dispute;
>
> (b) to facilitate the quickest means of resolving a claim at the least expense;
>
> (c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as is practicable;
>
> (d) to oblige the parties to communicate honestly, openly and in a timely way; and
>
> (e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments
>
> . . .
>
> **DIVISION 3**
>
> **Striking Out or Amending Pleading or Document and Related Powers of Court**
>
> **Striking out a pleading or other document, etc. in certain circumstances**
>
> 7-9(1) If the circumstances warrant and one or more conditions pursuant to subrule (2) apply, the Court may order one or more of the following:
>
> (a) that all or any part of a pleading or other document be struck out;

> (b) that a pleading or other document be amended or set aside;
>
> (c) that a judgment or an order be entered;
>
> (d) that the proceeding be stayed or dismissed.
>
> (2) The conditions for an order pursuant to subrule (1) are that the pleading or other document:
>
> (a) discloses no reasonable claim or defence, as the case may be;
>
> (b) is scandalous, frivolous or vexatious;
>
> (c) is immaterial, redundant or unnecessarily lengthy;
>
> (d) may prejudice or delay the fair trial or hearing of the proceeding; or
>
> (e) is otherwise an abuse of process of the Court.
>
> (3) No evidence is admissible on an application pursuant to clause (2)(a).

[19] The courts have cautioned against too-ready striking of claims and defences, since it may amount to a final adjudication. In *Venture Construction Inc. v Saskatchewan (Highways and Infrastructure),* 2015 SKQB 70, [2015] 10 WWR 467, at paras 7 – 13:

> 7. I will, accordingly, determine this application on the basis that it is pursuant to Rule 7-9(1), based on the ground specified in Rule 7-9(2)(a). The principles to be applied on such an application are the same as on an application pursuant to the former Rule 173(a): see *Shinkaruk v Neufeld Building Movers Ltd.*, 2014 SKQB 12 at para 8, 432 Sask R 255, and *Robin Hood Management Ltd. v Gelmich*, 2014 SKQB 347, [459 Sask R 183]. Those principles were recently summarized in *Mann v Hawkins*, 2011 SKCA 146, 385 Sask R 59. Herauf J.A. there adopted (at para. 17) the law as outlined in *Swift Current (City) v Saskatchewan Power Corp.*, 2007 SKCA 27 at para 18, 293 Sask R 6 [*Swift Current*], as follows:
>
> **...**

> (i) The claim should be struck where, assuming the plaintiff proves everything alleged in the claim there is no reasonable chance of success. (*Sagon v. Royal Bank of Canada et al.* (1992), 105 Sask.R. 133 at 140 (Sask C.A.) [*Sagon*]);
>
> (ii) The jurisdiction to strike a claim should only be exercised in plain and obvious cases where the matter is beyond doubt. (*Sagon*, at 140; *Milgaard v. Kujawa et al.* (1994), 123 Sask.R. 164 (Sask. C.A.));
>
> (iii) The court may consider only the claim, particulars furnished pursuant to a demand and any document referred to in the claim upon which the plaintiff must rely to establish its case (*Sagon*, at p. 140);
>
> (iv) The court can strike all, or a portion of the claim (Rule 173) [the former *Queen's Bench Rules*];
>
> (v) The plaintiff must state sufficient facts to establish the requisite legal elements for a cause of action. (*Sandy Ridge Sawing Ltd. v. Norrish and Carson* (1996), 140 Sask. R. 146 (Q.B.)).

8. Western submits that the law now calls for a more "robust and decisive" approach on applications of this kind. In effect, it says that the threshold a respondent must clear to avoid having its claim struck has been raised. It cites *3972674 Canada Inc. v 101114762 Saskatchewan Ltd.*, 2014 SKQB 210 [*3972674 Canada*] and *Hyrniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 in support of that position.

9. I am mindful of the fact that *The Queen's Bench Rules* are now explicitly intended, as Rule 1-3 makes clear, to promote the timely and cost effective resolution of claims. That point is emphasized by my brother Zarzeczny J. in *3972674 Canada* (at paras 16-19) in relation to an application pursuant to Rule 7-1. However, I do not read that judgment as suggesting that the law relating to applications to strike pursuant to Rule 7-9(1) has changed. In my view, it has not. It remains that outlined in *Swift Current*, and confirmed by the recent decision of the Supreme Court of Canada in *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at paras 17-26, [2011] 3 SCR 45 [*Imperial Tobacco*]. In particular, the following cautionary note sounded by McLachlin C.J. remains valid:

> 19 The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out

> the hopeless claims and ensuring that those that have some chance of success go on to trial.
>
> …
>
> 21 Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1963] 2 All E.R. 575 (H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

10. This passage reflects a particular perspective on the proper balance to be struck between avoiding unnecessary burdens on litigants and the court, and maintaining the fundamental right of a litigant to access the court to attempt to make out his or her case and, where appropriate, test the limits of the law...

. . .

13. It is, finally, also worth emphasizing that an application to strike on this ground is not about the evidence, but the pleadings. As McLachlin C.J. puts it:

> 70 ...a motion to strike is, by its very nature, not dependent on evidence. The facts pleaded must be assumed to be true. Unless it is plain and obvious that on those facts the action has no reasonable chance of success, the motion to strike must be refused...Doubts

> as to what may be proved in the evidence should be resolved in favour of proceeding to trial. …

(See also: *Haug v Loran*, 2017 SKQB 92, at paras 29 – 30)

Defendant's Application to Strike Statement of Claim

[20] The defendant filed lengthy written argument and also spoke at the hearing. The essence of his objection appears to be the description of Westfield at paragraph 1 of the statement of claim, which is reproduced below:

> 1. The plaintiff, Westfield Twin Condominium Corporation, is incorporated as a non-profit corporation pursuant to *The Condominium Property Act, 1993* and Amendments thereto, and carries on business at Regina, in the Province of Saskatchewan.

[21] The objection to this seemingly uncontroversial description, required by Rule 3-9(c), is to the words "as a non-profit corporation".

[22] Section 34 of *The Condominium Property Act, 1993* provides for the constituting of a condominium corporation. Wilchuck observes that ss. 34(6) states that *"The Business Corporations Act and The Non-Profit Corporations Act* do not apply to a corporation". In Wilchuck's view, the description "as a non-profit corporation":

> 4. …is another example of the Plaintiff's ongoing practice of, and willingness to ignore, misrepresent, distort, and invent information and facts to benefit themselves. This is the essence of my claims in QBG3353/2018.
>
> [Affidavit of Reginald Wilchuck, sworn June 24, 2019]

[23] When read in context, the description of the plaintiff in paragraph 1 of the statement of claim is accurate and unobjectionable. I see no reason to strike the claim or these words.

[24] The use of the words "as a non-profit corporation" is, at worst, surplusage. Whether Westfield is a for-profit or a non-profit corporation is irrelevant to the issue of Wilchuck's obligation to pay condominium fees.

[25] I listened to Wilchuck's arguments in chambers, read all of his written submissions and have considered his arguments. I am not persuaded. I also reviewed the statement of claim, which I find to accord with the requirements of *The Queen's Bench Rules*. Wilchuck's application to strike the statement of claim is dismissed.

Plaintiff's Application to Strike Statement of Defence

[26] Westfield relies upon Rules 7-9(2)(a) and (e), claiming that the statement of defence "discloses no reasonable defence" and "is otherwise an abuse of process".

[27] With respect to whether the statement of defence "discloses no reasonable defence", the only defence put forward is that the monies claimed are "not due, is not payable, and therefore is not owed" and that the statement of claim "discloses no valid claim". These statements are not allegations of fact, but rather statements of opinion or position.

[28] Regardless, this defence can be rejected for three reasons: First, the claim is based on statutorily authorized levies which the plaintiff is obliged to impose and collect, and the defendant is obliged to pay. Second, the

authority of Westfield to impose these fees has been adjudicated by both Justice Layh and Justice Chow. As Justice Chow wrote in his April 6, 2018 ruling in *Wilchuk QB* at para 14:

> The central and indeed, sole issue raised by the plaintiff in both actions is the legal authority of Westfield and its board of directors to impose fees and assessments upon the plaintiff and other unit holders. The January 8, 2018 judgment of Layh J. is a final decision by a court of competent jurisdiction, and the parties to both proceedings are identical. As such, the plaintiff's claim is clearly *res judicata*, and the within proceedings are an abuse of process.

[29] Third, Wilchuck admitted at chambers that he has refused to pay these levies since December 2017, apparently in retaliation for Westfield failing to repair water damage. Clause 54(3)(b) of *The Condominium Property Act, 1993*, reproduced above, expressly bars unit owners from failing to pay condominium fees on the basis of a claim against the corporation.

[30] I am therefore satisfied that the statement of defence can and should be struck as disclosing no reasonable defence.

[31] With respect to whether the statement of defence constitutes an abuse of process, the previous litigation supports that finding. This is now the fourth adjudication of "the legal authority of Westfield and its board of directors to impose fees upon [Wilchuck] and other unit holders." (*Wilchuk QB* at para 14) Such repetitious proceedings constitute an abuse of process. Wilchuck has also not paid the $6,730.25 on costs awarded in the previous proceedings. (Affidavit of Darren Bird, sworn May 28, 2019, paragraph 9)

[32] The litigation occasioned by Wilchuck has not only taken valuable court time but must also have cost Westfield considerable time and

expense. That private cost to the condominium corporation will have been borne by the other unit owners. Those unit owners, who are Wilchuck's neighbours, presumably must also make up any shortfall in common expenses resulting from Wilchuck's failure to pay his fees. As long as Wilchuck owns a unit, he is required to fulfill his financial obligations to the condominium corporation.

[33] I therefore also find that the statement of defence constitutes an abuse of process.

CONCLUSION

[34] Wilchuck's application to strike the statement of claim is dismissed.

[35] Westfield's application to strike the statement of defence is granted. The statement of defence is struck in its entirety without leave to amend or re-file a new statement of defence.

[36] There being no defence, I considered awarding Westfield judgment for the debt identified in the statement of claim, which was calculated at $12,331.19 as of May 16, 2019. I refrained from doing so, since that relief was not sought in this application. Westfield may wish to proceed with its foreclosure action on the lien for arrears in accordance with s. 63 of *The Condominium Property Act, 1993*, s. 132 of *The Land Titles Act, 2000,* SS 2000, c L-5.1 and *The Land Contracts (Actions) Act.*

[37] Westfield is awarded costs of $1,000.00 payable by Wilchuck.

J.
D.N. ROBERTSON