CITATION: Zelinski v. Peel, 2019 ONSC 6395
COURT FILE NO.: CV-18-608543
DATE: 20191105

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: HELEN ZELINSKI and PETER BUDDELL., Applicants

AND:

PEEL CONDOMINIUM CORPORATION NO. 395, Respondent

BEFORE: Justice S. Nakatsuru

COUNSEL: *Timothy Duggan*, for the Applicants

Puja Walia., for the Respondent

HEARD: October 21, 2019

ENDORSEMENT

[1] This a dispute between condominium unit owners, Ms. Zelinski and Mr. Buddell, who co-own unit 207, and the condominium corporation, Peel Condominium Corporation 395 (PCC 395). The 97-unit condominium is at 25 Agnes Street in Mississauga. The Applicants have brought an application under ss. 134 and 135 of the *Condominium Act,* 1998, S.O. 1998, c. 19 as amended (the "*Act"*).The Applicants submit that under sections 89, 90, 117, 119(1) of the *Act* and section VII(2) of the Declaration, PCC 395 should be ordered to repair the leak in their bathroom. Under s. 135 of the *Act* the Applicants submit that PCC 395 and its employees/agents have over a significant period, conducted itself in an oppressive or unfairly prejudicial manner in a multitude of different ways including, but not limited, to how they responded to the leak.

[2] For the following reasons, this application is dismissed.

A. THE LEAK IN THE APPLICANTS' BATHROOM

[3] In and around July of 2013, Esmar Nursing, the commercial unit owners of a unit directly below the Applicants' unit, complained of water leakage coming through its ceiling. This was reported to PCC 395 who sent a superintendent to investigate. PCC 395 determined it was the Applicants' bathtub that was the origin of the leak. The Applicants disputed this. After some back and forth, PCC 395 sent in a plumber from Best Way Plumbing and Drains to inspect. The Applicants did not agree with his findings and would not permit him to do any repairs. PCC 395 advised the Applicants that they could retain a plumber or contractor to undertake the repairs themselves. However, these expenses would be paid for by the Applicants or would be charged

back to them. Nothing has been done to fix the leak, aside from lawyers getting involved, and this application being brought.

[4] By failing to fix the leak, the Applicants submit that PCC 395 has failed in its obligation to maintain and repair the common elements and has permitted a condition to exist that has caused damage to property and has created a risk of harm to them.

[5] The Respondents submit that the leak in the bathroom is the responsibility of the Applicants who have failed to repair the leak despite the investigation showing the origin of the leak and several attempts to have them comply.

[6] The first issue is one raised by PCC 395. The bathtub in the unit was not the original bathtub. PCC 395 submits that the Applicants changed the bathtub without approval by the Board of PCC 395. It argues that it was this alteration that has led to the leak. The bathtub replacement was contrary to the Declaration where no alteration to the common element or removal and installation of a bathtub can be done without the consent of PCC 395, which was not obtained. As a result, the Applicants are not in compliance and must repair the leak and return the bathtub to its original state.

[7] After careful review of the evidence, I find that the Applicants did not make alterations to the bathroom. I accept Ms. Zelinski's affidavit where she avers that she did not make these changes to the bathtub. The bathtub was there when she originally purchased the unit. Her testimony was not undermined in cross-examination on this point and substantially confirmed by the MLS listing which notes the jacuzzi bath tub in the unit. Ms. Mary Kahn, the condominium property manager, under cross-examination was unable to say who made the changes and has no evidence to contradict Ms. Zelinski.

[8] PCC 395 further argues that if I find that it was not the Applicants who installed the bathtub, they are nonetheless responsible for any repairs and damages resulting from a previous owner's installation as a result of the Status Certificate given to Ms. Zelinski on her purchase of the unit in 2013. PCC 395 relies upon a provision in that Status Certificate that states it is the purchaser's responsibility to review the Declaration and the unit's description to ascertain whether any structural changes or modifications to common elements were made without PCC 395's consent. The provision provides that PCC 395 reserves its right to enforce any non-compliance notwithstanding its existence prior to the issuance of the Status Certificate. PCC 395 relies upon this to argue that Ms. Zelinski is now responsible for what the previous owner has done in replacing the bathtub.

[9] I reject this submission.

[10] First of all, the Status Certificate and the application of this provision must be seen in the context of the purpose of such certificates. In *Durham Condominium Corp. No. 63 v. On-Cite Solutions Ltd.*, 2010 ONSC 6342, Lauwers J. (as he then was) adopted the following commentary regarding the purpose of such Status Certificates (at para. 21):

> In her book *Condominium Law and Administration*, 2d ed., loose-leaf (Toronto: Carswell, 1998-Updated), Audrey M. Loeb comments on the purpose of the Status Certificate required by section 76 at p. 9-2: "This document is intended to ensure that prospective purchasers and mortgagees of units are immediately given sufficient information regarding the property to make an informed buying or lending decision."

This authority was confirmed by the Ontario Court of Appeal in *Orr v. Metropolitan Toronto Condominium Corp. No. 1056,* [2014] O.J. No. 5752 at para 55.

[11] Ms. Zelinski was not aware of the alteration at the time of her purchase. She was not aware of any lack of written consent by PCC 395. She was not aware of the lack of compliance with the Declaration by the previous owners. In my opinion, it would be unfair and inequitable to hold her responsible for any repairs required to common elements due to the actions of a previous owner given the purpose of such Status Certificates which is to protect the purchaser, her lack of knowledge, and the ambiguous and overly broad provision as found in the Status Certificate.

[12] On the other hand, I conclude that PCC 395 is not prevented from requiring the Applicants to fix what they are obligated to fix under the Declaration and Schedule. The Status Certificate does not insulate the Applicants from complying with their obligations despite the bathtub being installed by the previous owner. There is no evidence that PCC 305 was aware of this alteration to the bathtub when they issued the Status Certificate. To this extent the provision in the Status Certificate can be relied upon by PCC 395.

[13] Of course, the Applicants must still prove that PCC 395 has failed to repair a common element and thereby permitted damage and a risk of harm.

[14] The resolution of this issue requires a factual determination. It depends upon whether the leak is one that PCC 395 or the Applicants are required to repair.

[15] I find that the best evidence of the nature of the leak is from Mr. Joseph Jarosz, a plumber who owns Best Way Plumbing and Drains. I accept Ms. Kahn's evidence regarding what she was told by Mr. Jarosz. Ms. Kahn was candid and forthright and not impeached in cross-examination. In addition, while Mr. Jarosz did not provide an affidavit, his opinion was written on the original invoice and later backed up by an explanatory letter. Mr. Jarosz inspected the Applicants' bathroom on November 26, 2016 and found what was causing the leak. I have no reason to doubt his opinion that was stated contemporaneously on the invoice of November 26, 2016. This was further confirmed in his letter of January 4, 2018, to the Board of Directors of the Respondent. Mr. Jarosz opines that the bathtub had been upgraded from the original and rather than brass piping, PVC piping was used. The thin grade of this PVC piping was not certified to be used in a high-rise building. The concrete floor had been chipped away to make room for the bathtub drain and pipe; waste and overflow. When the bathtub was filled and drained, the overflow pipe leaked underneath into the commercial unit. Mr. Jarosz writes: "The

leak comes from the bottom connection, located underneath the bathtub. This drain services only this tub in unit 207 only."

[16] I do not accept the evidence of Ms. Zelinski that the water leak was from a pipe connecting the common elements or that only a small amount leaked. Ms. Zelinski was not present during the investigation by Mr. Jarosz. Peter Buddell only was present and provided a confirmatory affidavit adopting the hearsay component of Ms. Zelinski's affidavit. However, this evidence does not outweigh the opinion of Mr. Jarosz. Mr. Buddell is not a qualified plumber.

[17] The superintendent of PCC 395 confirms Mr. Jarosz. However, it is not necessary to resort to such confirmation. I accept Mr. Jarosz's opinion. I attach little weight to Ms. Zelinski's averments that a previous plumber named "Ziggy" could not find the source of the leak. The cross-examination of Ms. Zelinski on this issue was effective. She was inconsistent about what Ziggy advised her about the various leaks. I also do not accept that it was the leak from the upper unit that caused the water to flow through to the commercial unit below. I do not accept it because of the timing of the leaks, the fact the leak into the commercial unit continued despite the upper unit leak being fixed, and Mr. Jarosz's opinion. I also note Ms. Zelinski's letter dated December 7, 2016, to the commercial unit owner where she advises that the Applicants were going to resume using the bathtub and that it is possible this may result in further leaks occurring in the commercial unit.

[18] Based upon this factual determination, I find that Applicants have not proven that PCC 395 have failed in its obligation to maintain and repair the common elements and has permitted a condition to exist that has caused damage to the property and has created a risk of harm to the Applicants. The Respondent's Declaration and Schedule thereto attached sets out the boundaries of each unit and the responsibilities of the unit owner and condominium corporation therein. The Applicants are responsible for repairs to "all pipes…that supply the service to that particular unit only and that lie within the above limits as set out." The limits include the lower surface of the concrete floor slab. The leak comes from an overflow pipe within the boundary of the unit. The overflow pipe only services the unit's bathtub and not other units or common elements.

[19] I have come to this conclusion fully aware that the PVC pipe has been dug into the concrete floor an inch and a half deep. Thus, arguably, a portion of it could be below the concrete floor. However, based upon my best assessment of the evidence, the leak is above the floor. Even if the leak is in a portion of the pipe which is below the floor level due to the fact that the concrete floor was chipped away, given that this pipe only services the bathtub in the unit and the circumstances where the floor was dug out without PCC 395's approval, a common sense interpretation of the Schedule and Declaration results in the unit owner being responsible for fixing the leak.

[20] The Applicants have taken the position that in the absence of an application by PCC 395, I should not declare that it is part of the Applicants' obligations to fix the leak. In order to properly determine the issue raised by the Applicants, by necessity, it was incumbent upon me to make the factual determinations that I have. That said, I will not make a declaration or provide any order that the Applicants are required to fix the leak. None was sought by PCC 395.

Therefore, I will simply find that the Applicants have not proven that PCC 395 violated its obligation to maintain and repair the common elements or otherwise abide by the *Act* or Declaration by failing to fix the leak and pay for doing so.

B. OPPRESSION

[21] Inn *Toronto Standard Condominium Corporation No. 2051 v. Georgian Clairlea Inc.*, 2019 ONCA 43, the two-part test for oppression that the Supreme Court of Canada set out in para. 68 of *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, was approved:

> In summary, the foregoing discussion suggests conducting two related inquiries in a claim for oppression: (1) Does the evidence support the reasonable expectation asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

[22] Oppressive conduct is conduct that is coercive, harsh, harmful, or an abuse of power. Unfairly prejudicial conduct is conduct that adversely affects the claimant and treats him or her unfairly or inequitably from others similarly situated. Unfair disregard means to ignore or treat the interests of the complainant as being of no importance. It is not necessary to find that such conduct was intended before oppression is proven.

[23] In this case, looking at the allegations made by the Applicants individually as well as cumulatively, I find that the Applicants have failed to prove oppressive or unfairly prejudicial conduct.

[24] First of all, I do not find the conduct of PCC 395 regarding the leak to be oppressive. PCC 395 was entitled to take the position that it did. When the leaks arose, PCC 395 investigated, sent in their staff, and obtained a plumber. This goes for the leak in the Applicants' ceiling as well as the leak into the commercial unit below. While there was some delay, it was not unreasonable in all the circumstances. Some delay occurred given the inability to arrange or make appointments. Nothing out of the ordinary. Some delay can be attributed to the position taken by the Applicants disputing the leak or their responsibility to fix it. The Declaration further provides for indemnification. In this context, the evidence does not support a reasonable expectation by the Applicants. While PCC 395 may have erroneously attributed to Ms. Zelinski the conduct of replacing the bathtub, this was an honest mistake. Further, I have concluded that PCC 395 were justified in taking the position that fixing the leak was the Applicants' responsibility. It was unreasonable for the Applicants to expect PCC 395 would repair the leak given the information available about its origins. Finally, there was nothing oppressive or unfair about the path PCC 395 has taken in responding to the leak and the Applicants. I appreciate that Ms. Kahn testified that PCC 395 was concerned about expenses and submitting an insurance claim where unit owner negligence is involved, but I find this concern is not beyond the range of deference that should be afforded to condominium corporations who must balance various competing interests.

[25] At the hearing, PCC 395 has undertaken on this application that it is willing and able to fix any damage caused by water leaks (whether from the unit above unit 207, from an unrelated floor regarding the water leak on June 15, 2018, or the bathtub if the Applicants are unwilling to fix it themselves) provided that the Applicants give it access to do so. Of course, the *Act* and the Declaration and Schedule will determine who will pay for it. As indicated above, it is not necessary for me to declare who should pay for what repair beyond what I have already determined.

[26] While the Notice of Application and Ms. Zelinski's affidavit set out a litany of complaints in addition to the leak, in oral argument, the Applicants have focused on three other areas which they submit constitute oppression or unfair prejudicial conduct.

[27] The Applicants point to a security camera which they claim is unfairly being aimed at their front door. There is no merit to this. Security cameras are ubiquitous in buildings such as this for good reason. Reasonably viewed, rather than being intrusive, they provide safety and security for their inhabitants. While Ms. Zelinski's affidavit does not make much mention of this issue, the fact that it was one of the issues highlighted in oral argument indicates to me the Applicants' sensitivity to the conduct of the PCC 395 and the breakdown in trust in the relationship. While this much is clear, I find it is not evidence of oppression or unfair prejudicial conduct.

[28] At the hearing, PCC 395 advised that they were willing to try and direct the camera to face in another direction and to place monitors at security so that the public will not be able to view the screens. This seems to me a fair compromise to deal with the sensitivity of the Applicants. While I agree this compromise should have been achievable before this point, the failure to do so does not support the Applicants' argument on oppression. On this issue, the evidence does not establish that PCC 395 was given sufficient notice of this issue in advance.

[29] The Applicants argue that PCC 395 imposed improper charges and common expenses. I will not elaborate on each incident claimed by the Applicants. I find they were mostly caused by the Applicants having insufficient funds in their account for the pre-authorized withdrawals and understandable miscommunications/misinterpretations, delays, or mistakes when money orders were used to rectify the deficiencies. Further, they were isolated incidents over the years. While it is a reasonable expectation that PCC 395 would act with care and accuracy in dealing with such expenses, I find that these incidents do not rise to the level of oppression or unfair prejudicial conduct. Finally, one way or another, these matters have been rectified.

[30] The Applicants submit that there was inconsistent enforcement of condominium rules. The incident specifically pointed to by the Applicants as demonstrating this is when the superintendent advised them to take their Halloween wreath off their door while other unit residents had decorated their unit entry doors. I appreciate the Applicants submit that the superintendent was aggressive and intimidating. That said, even on the evidence produced by the Applicants I am not able to make such a finding. Further, the fact that a few other unit residents were breaching condominium rules is far from determinative that PCC 395 were

permitting them to do so let alone indicative of an arbitrary or biased enforcement of the rules against the Applicants. This incident has little probative value. I reject this submission.

[31] Regarding the other matters that are in the factum and the Application Record but not touched on in oral argument, such as failure to investigate a bicycle theft, the fan coil, pest control appointments, the workers installing cladding on the building, and governance issues, I find them lacking in merit. No condominium dweller can reasonably expect life in an urban multi-unit such as 25 Agnes Street to be free of day-to-day incidents or unpredictable events such as fraud, that may annoy, bother, or frustrate them. Individually or collectively, they do not constitute oppression or unfair prejudicial conduct. Again, I find that they are indicative of the sensitivity of the Applicants with respect to PCC 395's conduct and a break-down in their relationship.

[32] In sum, I find that the Applicants have not proven that PCC 395's conduct was coercive, harsh, harmful, or an abuse of power. I find that PCC 395 has not conducted itself in a way that adversely affected the Applicants and treated them unfairly or inequitably from others similarly situated.

[33] The application is dismissed.

[34] If the issue of costs cannot be resolved between the parties, I will entertain written submissions, each one limited to two pages regarding when the issue of costs should be resolved, and the nature of the costs award. The Respondent shall file within ten days of this decision. The Applicants shall file within seven days thereafter. There will be no reply submissions without leave of the court.

Justice S. Nakatsuru

Released: November 5, 2019