SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Foley v. Halifax County Condominium Corporation No. 19*, 2020 NSSM 12

Date: 2020-01-06
Docket: SCCH 491754
Registry: Halifax

Between:

Patricia Foley

Claimant

- and -

Halifax County Condominium Corporation No. 19

Defendant

Decision

Adjudicator: Eric K. Slone

Heard: In Halifax, Nova Scotia on December 16, 2019

Appearances: For the Claimant, Brian Foley and Patricia Foley

For the Defendant, Robert Horodyski, Board Member

BY THE COURT:

[1] The Claimant is the owner of a unit in Embassy Towers, the high-rise condominium building operated by the Defendant on Spring Garden Road in central Halifax. It was pointed out at the hearing that the Defendant was wrongly identified as "Halifax Condominium Corporation No. 19," when it should be "Halifax County Condominium Corporation No. 19." This is a minor technicality only and the style of cause is amended accordingly.

[2] The Claimant seeks compensation from the Defendant (hereafter "the corporation") for damages to the parquet floor in her unit after some water incursion several years ago. Her theory of the case is that the corporation is responsible for the common elements of the condominium, and where those

common elements fail in some respect, the cost of repairing the damage to individual units should be borne by the condominium owners, through the corporation.

[3] The corporation was at one time amenable to paying for repairs, but in about late 2018 a new board was elected that took a different view of its legal obligations. The current board, represented at the hearing by Mr. Robert Horodyski, believes that the Claimant is responsible to cover her own repairs. In fact, Mr. Horodyski testified, after the new board took over it investigated a number of unit owners' similar claims and determined that a good many of them did not stand up to scrutiny. Mr. Horodyski says that the board owes a fiduciary duty to all of the unit owners to be a responsible steward of their financial resources, which means taking a stricter view of the corporation's responsibilities.

[4] In order for the claim to succeed, the Claimant must surmount some legal as well as factual barriers.

Legal framework

[5] With respect, neither of the parties appeared to have a good grasp of the legal issues, which is perhaps not surprising as the law is confusing.

[6] More than a decade ago, I had occasion in the case of *Browning v. Halifax Condominium Corporation #6*, 2007 NSSM 51 (CanLII) to review the state of the law. I am quoting extensively from that decision because the same comments could be made here:

> [31] To the extent that the claim rests upon a theory of negligence, I must first find that there is a duty of care owed to the Claimant, and then find that it was breached in the sense that the care actually exercised fell below a reasonable legal standard.
>
> [32] I accept that the Defendant owes a duty of care to unit holders. There are numerous cases which recognize and enforce such a duty, many of them decided in British Columbia and Ontario where condominium ownership is highly developed. The condominium corporation is the owner of the common elements and has unit owners at its mercy, in effect, since individual unit owners cannot and should not repair common elements. As for a standard of care, it must respond reasonably to problems as they arise, and must also be alive to future problems in order to avoid preventable damage. In essence, it must perform repairs as needed, hire competent contractors, and have in place a reasonable program of preventative maintenance. On the other hand, as a

> fiduciary it must be a careful steward of the unit holders' money, and cannot be expected to spend more than it can reasonably charge to the unit owners or raise through other sources. Unfortunately, condominium corporations have a very limited ability to raise money except by assessing unit holders. Even where funds are borrowed, it still amounts to a deferred tax on all of the residents, present and future.

[7] I went on to find that there was no negligence proven. I believe the same can be said here, where the Claimant did not argue that the corporation was actively at fault for anything it did or failed to do.

[8] I then went on to consider other applicable legal principles:

> [36] The fact that the Defendant was not negligent in failing to prevent the water damage, or allowing it to occur, or in not repairing it soon enough, does not end the matter. It is the Claimant's theory that the underlying legal relationship places the onus upon the Defendant to pay for any repairs after damage. This requires me to interpret the applicable provisions in the *Condominium Act* and the Declaration. Those that are pertinent are:
>
> > *The Condominium Act*
> >
> > **Maintenance and repairs**
> >
> > 35 (1) For the purposes of this Act, the obligation to repair after damage and to maintain are mutually exclusive, and the obligation to repair after damage does not include the repair of improvements made to units after acceptance for registration of the declaration and description.
> >
> > (2) Subject to Section 36, the corporation shall repair the units and common elements after damage.
> >
> > (3) The corporation shall maintain the common elements.
> >
> > (4) Each owner shall maintain that owner's unit.
> >
> > (5) Notwithstanding subsections (2), (3) and (4), the declaration may provide that
> >
> > (a) subject to Section 36 [which deals with substantial damage that may dictate deregistration of the condominium], each owner shall repair that owner's unit after damage;
> >
> > (b) the owners shall maintain the common elements or any part of the common elements; or

(c) the corporation shall maintain the units or any part of the units.

(6) The corporation shall make any repairs that an owner is obligated to make and that the owner does not make within a reasonable time.

(7) An owner shall be deemed to have consented to have repairs done to the owner's unit by the corporation pursuant to this Section. R.S., c. 85, s. 35. (Emphasis mine.)

[37] The regime of the Act clearly is to the effect that "the corporation shall repair the units and common elements after damage" unless the Declaration provides that "each owner shall repair that owner's unit after damage." This brings me to consider whether the subject Declaration has done just that:

The Declaration

7.01 Maintenance and Repairs of units by the Owner

(a) Subject to the provisions of this Declaration, each Owner shall maintain his unit and shall also repair his unit after damage, including without limiting the generality of the foregoing repair to all improvements made by the Declarant in accordance with the Architectural plans and specifications, notwithstanding that some of such improvements may have been made after the registration of this Declaration all at his own expense, to the intent that such Owner will restore his unit to a state of repair at least equivalent to its condition at the time it was originally completed for sale by the Declarant.

7.02 Repairs of Common Elements by the Corporation

The Corporation shall repair the Common Elements after damage, including the repair and replacement of all exterior doors providing ingress to and egress from all units at its own expense ....

7.03 Maintenance of the Common Elements

The Corporation shall maintain the common elements, save and except for any improvements made by an Owner to the limited common elements appurtenant to his unit.

11.02 The Corporation shall indemnify and save harmless the Owner of each unit from and against any loss, costs, damages, injury or liability whatsoever which may be suffered or incurred by each Owner, his family or any member thereof, any other occupants of his unit or any guests, invitees or licencees of

> such owner or occupants, resulting from or caused by the negligence or wrongful act or omission of the Corporation, its manager, agents, servants, employees or independent contractors, or for damage done to the unit substantially resulting from the repair or maintenance by the Corporation of the Common Elements, provided that notwithstanding anything herebefore contained, each owner agrees to look solely to the proceeds received from the Insurer or insurers of the public liability and property damage insurance of the Corporation in the event of such loss, costs, damage, injury or liability.
>
> [38] From the language above cited, it is clear that the Declaration has overridden the s.35 of the *Condominium Act*, at least to an extent. The words "[s]ubject to the provisions of this Declaration, each Owner shall maintain his unit and shall also repair his unit after damage" could hardlybe clearer.
>
> .....
>
> [45] In summary, I find that the Declaration here clearly places the onus on the unit owner to perform repairs "after damage," unless such repair is necessitated by the negligence of the corporation or as a result of "damage done to the unit substantially resulting from the repair or maintenance by the Corporation of the Common Elements." As already noted, the damage which the Claimant has incurred has resulted not from any remedial work done by the Corporation, but from water incursion that the remedial work has been designed to address.

[9] The Defendant introduced as evidence one page from the Declaration for the corporation, but that page omits some of the applicable articles - most notably article 7.01 or an equivalent, which played an important part in the *Browning* case. I cannot assume that the Declaration for the corporation here was the same as that in the *Browning* case. Indeed, on its face I can see that it is not identical, though I cannot say in what respects it differs. In the absence of that entire Declaration, or at least something more, I am unable to make the same finding that I did in *Browning*, namely that the effect of the Declaration was to override the provision in s.35 of the *Condominium Act* to *"repair the units and common elements after damage."* The legal onus to establish that the corporation had overridden the duty in s.35 is on the corporation, and it has not met that onus.

[10] The corporation also provided a copy of the estoppel certificate which would have been provided to owners of the units, at some point in time, which I find unhelpful except to the extent that it makes owners aware of their obligation to carry insurance.

[11] In the result, I find that the corporation has a statutory duty to repair units that

incur damage as a result of a failure or deficiency in the common elements.

[12] However, this is far from the end of the inquiry.

What caused the leaks?

[13] There does not seem to be any doubt that water entered the Claimant's unit through the balcony, causing damage to the floor just inside. The Claimant says that the concrete developed a crack, and that this crack was to a common element which is entirely the responsibility of the corporation to maintain. The Claimant's witness, former property manager Susan Graham, testified that the corporation always maintained a "leak list" of those units that would have to be repaired once the source of the leaks was identified and repaired. Ms. Graham's evidence was that until 2018 when her company's services were terminated by the new board, the corporation had always accepted its responsibility to repair the units.

[14] Ms. Graham testified that the superintendent had located a "large crack" on the balcony outside the Claimant's unit, which was repaired by the contractor Duron Atlantic, which specializes in waterproofing buildings. The crack would have been repaired by some form of caulking.

[15] Mr. Horodyski offered a different theory to explain the water incursion. He testified that the previous owner of the Claimant's unit had made a change to the balcony, laying ceramic tile over the concrete. He suggests that this changed the natural flow of water on the balcony, and also that it disturbed the water barrier that was there to prevent water getting through the short curb or parapet into the inside of the unit. He speculated that the previous owner may even have removed the caulking that seals the gap between the concrete slab and the parapet, to allow the tile to fit more snugly. It was his evidence, and argument, that once the previous owner made changes to a common element, that owner took responsibility for the condition of that common element. In support of that argument, Mr. Horodyski pointed to wording in the Estoppel Certificate that states:

> "any renovations or upgrades carried out in units are carried out at the risk and expense of the unit owner. The unit owner agrees to indemnify [the corporation] and hold it harmless against any loss or claim that may arise resulting from the renovations or upgrades."
>
> "The cost of any upgrades, design, changes etc. initiated by the unit owner are considered Betterments and Improvements and as such it is a requirement of the unit

> owner to purchase additional coverage in the event of loss. The [corporation] is obligated to repair the unit after damage to just those components defined as Standard Unit."

[16] I have several problems with Mr. Horodyski's theories.

[17] First of all, Mr. Horodyski did not say what credentials he has to testify about the source of this leak or the mechanics of how water entered the unit. About all that he could say with any authority is that the balcony has (or had) ceramic tile installed at some point. He does not know from personal involvement what, if anything, was done to the caulking that is meant to prevent water from getting into the unit. He appeared to me to be speculating, or hypothesizing, which is no substitute for expert evidence (or at least direct, first-hand factual evidence) on the subject.

[18] I also do not find any support for Mr. Horodyski's proposition that once changes are made to a common element, that the owner takes full responsibility for it. I think that would depend on the precise circumstances.

[19] Lastly, there was evidence from Ms. Graham that she understood the crack in the parapet to have been vertical, not horizontal, which means that it had nothing to do with the overlaid ceramic tiles. That evidence was given in reply, as something of an afterthought, but it stood unchallenged by Mr. Horodyski.

[20] Accordingly, I find that the corporation has a duty to pay for reasonable repairs to the unit caused by a crack in the common element.

Damages

[21] This brings me to the slightly problematic evidence supporting damages.

[22] In the Claim, the Claimant sought $11,600.00 plus interest and costs. However, the documents submitted to back up the damages contains very different numbers. There were two invoices from Utopian Kitchen & Baths, both dated in February 2019. It appears that the Claimant replaced the damaged parquet mostly with ceramic tile. The two invoices total $8,527.93. Although Mr. Foley tried to convince me that there were expenses over and above what is in the two invoices, I am not satisfied that this was the case.

[23] I take notice of the fact that the installation of ceramic tile is considerably

pricier than that for wood, or a wood product such as parquet.

[24] I can appreciate that the Claimant might want a superior product, but I believe that there is a significant betterment factor here to consider.

[25] Betterment has been defined in *Doherty v. Rethman*, 2015 NSSM 13 (CanLII) by one of my fellow Adjudicators as follows:

> Betterment is the concept which recognizes that restoration will put a party in a superior position than before the breach of contract or misrepresentation.
>
> Justice Wright of the Supreme Court of Nova Scotia dealt with a case of misrepresentation in *Desmond v. McKinlay* (2000), 2000 CanLII 2201 (NS SC), 188 N.S.R. (2d) 211. In that case, his Lordship found the Defendants liable for misrepresenting the state of the water and septic system. He ordered damages to cover the cost of a new system, less the cost of a water pump which was plainly visible. He then stated the following:
>
> > "[62] Otherwise, I am satisfied that the costs of repairs and/or replacement of the water and sewage disposal systems were reasonably incurred and represent an appropriate measure of damages. However, I also conclude based on the evidence that a betterment allowance should be applied against the damages figure of $17,302.28. This is because the plaintiff now has brand new water supply and sewage disposal systems servicing her property in contrast to what was there before. These modern systems, which are in some respects custom designed for the property, represent a substantial betterment and it would be appropriate, in my view, to make an allowance for that betterment of one-third of the above referenced invoices which I have allowed.
> >
> > [63] I note that a similar approach was followed by the New Brunswick Court of Queen's Bench in the recent case of *Domokos v.Phillips* [1996] N.B.J. No. 410 where McLellan, J. made a betterment allowance of one-third of the contractor's charges for the cost of repairs to a home. .....

[26] Not only did the Claimant end up with a product that is much more desirable than parquet, but also she ended up with one that is a lot newer and which will likely outlive the life expectancy of the original parquet, by a wide margin. These are two distinct types of betterment.

[27] I am accordingly inclined to make two deductions for betterment. I find that the proven costs of $8,527.93 should be reduced by 25% for the better quality of product, and a further 25% for the life expectancy. The Claimant is accordingly entitled to 50%

of her cost, which is $4,263.97.

[28] I am prepared to allow prejudgment interest for 8 months at 4% per annum, totalling $113.70.

[29] The Claimant is also entitled to her cost of filing the claim in the amount of $199.35 plus $75.00 for serving the claim, for a total of $4,652.02.

Eric K. Slone, Adjudicator