CITATION: Lozano v. TSCC No. 1765, 2020 ONSC 4583
COURT FILE NO.: CV-19-628257
DATE: 20200728

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
VICTORINA LOZANO and CHARLES JOSEPH LOZANO	)	*Gary Caplan*, for the Applicants
	)	
Applicants	)	
	)	
– and –	)	
	)	*Megan Mackey*, for the Respondent
TORONTO STANDARD CONDOMINIUM CORPORATION NO. 1765	)	
	)	
Respondent	)	
	)	
	)	**HEARD:** June 29, 2020

REASONS FOR DECISION

J.E. FERGUSON J.

Factual Background

[1] Mr. And Mrs. Lozano are owners of Unit 414 (the "Unit") at 83 Borough Drive in Toronto. The Respondent Toronto Standard Condominium Corporation ("TSCC No. 1765") manages and operates the condominium in which the Unit is located. At all material times, Allstate Insurance Company ("Allstate") insured the Unit.

[2] Since taking possession of the Unit in 2010, the Lozanos have not conducted any renovations. However, at some point in April 2018, the float in the toilet tank of the ensuite developed a crack in it, causing it to sink to the base of the tank. As a result, Mr. Lozano replaced the float. This was the only work done in the ensuite bathroom, and there were no other repairs, replacements, or renovations to any other part of the toilet at any point.

[3] On or about November 26, 2018, the Lozanos left to visit the Philippines for approximately five months, set to return to Canada on April 26, 2019. During this time, the Unit was unoccupied. However, at the request of the Lozanos, their nephew ("Kester") checked the premises every two weeks to ensure the heat was turned on and to collect mail from the mailbox. In early April, a family friend ("Juanita") took over from Kester and periodically checked the Unit. The Lozanos maintain that at no point did either Kester or Juanita use the ensuite toilet.

[4] On April 12, 2019, Juanita notified the Lozanos that a water leak had begun from the toilet in the master ensuite. Once the leak was discovered, TSCC retained a plumber for the Unit who reported that the leak had occurred as the result of a broken ballcock at the base of the stem which caused water to constantly fill and overflow the toilet. The leak caused damage to Unit 414, ceiling damage to the unit below (Unit 314), and damage parts of the third and fourth floor hallways.

[5] The Condominium's By-Law No. 1 states that where a Unit owner commits an "act or omission" which leads to damage, the owner will be liable to pay the lesser of the cost of repair and the deductible limit of the Corporation's insurance deductible. In this case, the total cost of repairs totalled $5,473.63; a figure below the Condominium's insurance deductible.

[6] The Lozanos maintain that they have not committed an "act or omission" that would render them financially liable for these costs. TSCC No. 1765 submits that by failing to adequately maintain their ensuite toilet, the Lozanos did commit such an "act or omission" and must cover the costs of repair.

[7] On October 8, 2019, after this application had been brought, TSCC No. 1765 registered a lien against the Lozanos' Unit in the amount of $10,022.33 (inclusive of repair costs, and legal costs and fees relating to this application, with interest). In order to discharge the lien, the Lozanos, by their insurer, ultimately agreed to pay the lien amount without prejudice.

[8] The Lozanos seek a declaration that TSCC No. 1765 has no lawful right to chargeback the cost of repairs to the Lozanos in connection with the water leak that occurred on April 12, 2019 because the Lozanos did not commit an "act or omission" which would render them responsible. They also seek an order requiring that TSCC No. 1765 return monies paid by the Lozanos in the amount of $10,022.33.

[9] TSCC No. 1765 asks that this application be dismissed. Both parties seek costs.

Legal Framework, Issues and Analysis

a. Are the Lozanos liable to pay the cost of repairs (up to the insurance deductible)?

[10] Condominium owners are responsible for the care and upkeep of their units. Where damage arises from a lack of care, unit owners will be held financially responsible.

[11] Section 105 of the *Condominium Act, 1998* states:

Deductible

> **105.** (1) Subject to subsection (2) and (3), if an insurance policy obtained by the corporation in accordance with this Act contains a deductible clause that limits the amount payable by the insurer, the portion of a loss that is excluded from coverage shall be a common expense. 1998, c. 19, s. 105 (1).
>
> Owner's responsibility
>
> (2) If an owner, a lessee of an owner or a person residing in the owner's unit with the permission or knowledge of the owner through an act or omission causes damage to the owner's unit, the amount that is the lesser of the cost of repairing the damage and the deductible limit of the insurance policy obtained by the corporation shall be added to the common expenses payable for the owner's unit. 1998, c. 19, s. 105 (2).
>
> Same, by-law
>
> (3) The corporation may pass a by-law to extend the circumstances in subsection (2) under which an amount shall be added to the common expenses payable for an owner's unit if the damage to the unit was not caused by an act or omission of the corporation or its directors, officers, agents or employees. 1998, c. 19, s. 105 (3).

[12] Pursuant to this authority, TSCC No. 1765 has enacted By-Law No. 1, which, at section 12.03, reiterates that owners who cause damage to their units through "acts or omissions" will be liable for the lesser of the cost of repairing the damage and the deductible limit of the Corporation's insurance policy.

[13] There is no dispute that the damage to the Lozanos' unit and nearby common areas was caused by the malfunction of the master bedroom ensuite toilet and the associated leak. Rather, the disagreement rests on whether the Lozanos committed an act or omission which led to this malfunction in the first instance.

[14] TSCC No. 1765 asserts that the Lozanos committed an unreasonable act by failing to have a plumber repair their toilet when its plastic parts first showed signs of decay in April 2018. TSCC No. 1765 maintains they always recommend unit owners secure a plumber to make repairs given that flooding can cause "catastrophic damage" in high-rise buildings. Further, when the Lozanos made repairs in 2018, they should have replaced the entire ballcock mechanism and not just the float element.

[15] The Lozanos' position is that they did not commit any acts or omissions which led to the toilet's malfunction and the resulting leak. They submit that the unit was carefully maintained and that when the toilet required repairs in April 2018, they were promptly made. The Lozanos

point to the fact that the toilet functioned properly after being repaired in 2018 and that the decay of the plastic mechanism was completely unforeseeable.

[16] The parties agree that the standard for establishing an act or omission is neither negligence nor strict liability, but exists somewhere between the two.

[17] Notably, proving an act or omission does not depend on a finding of negligent behaviour.

[18] The case law is clear on this point. Although owners must act reasonably in the maintenance of their units, an unforeseen incident will not absolve a unit owner of their financial responsibilities towards repair costs. In *Chai v. York Condominium Corporation No. 325*, 2009 CarswellOnt 8984, the unit owners failed to maintain fixtures in the unit and "winterize" the box window air conditioner, both of which led to flooding and associated damage. The unit owner was held liable for the cost of repairs up to the insurance deductible.

[19] In *Owners: Condominium Plan No. 7721985 v. Breakwell*, 2019 ABQB 674 ("*Breakwell*"), the internal circuit board in a unit furnace malfunctioned and caused a flood. The furnace had otherwise been in good working condition, and there was no indication that the circuit board would malfunction when it did. The unit owner maintained that they had no idea there was an issue with the furnace's internal wiring, particularly as it was only three years old. Still, the Court determined that in failing to have the furnace inspected following its installation, and failing to regularly maintain it, the unit owner had committed an "act or omission" which would render them responsible for the cost of repair up to the insurance deductible.

[20] The context in the case at bar is more straightforward than that in *Breakwell*. Here, the Lozanos were aware that the toilet had previously malfunctioned and chose not to employ a plumber to address the problem or to maintain the plumbing subsequently. In *Breakwell*, the unit owner had no notice that the internal wiring of the unit furnace was in jeopardy. Even still, the *Breakwell* Court determined that the unit owner's act or omission did not have to be negligent - and the damage did not have to be foreseeable – in order to make them liable for the cost of repair.

[21] The same determination was made in *Cornerstone Heights Condominium Corporation v. Payam and Sanaz Holdings Limited*, 2019 SKPC 70 ("*Cornerstone*"), where a slow leak from a three-year-old unit furnace caused significant water damage. The unit owner claimed that they could not be held responsible for the cost of repair (up to the insurance deductible) because they had not been aware that the furnace was leaking. The Court held that although the unit owner had not committed a negligent omission in failing to ensure that the condensate line was property attached to the furnace, this nevertheless constituted an omission writ large, for which the unit owner would be liable.

[22] In the *Cornerstone* decision, Justice Demong adeptly captured the balancing act inherent in condominium regulation, where the proximity of one's neighbours means that the "acts or omissions of individual unit holders may have a much more immediate, and much more significant impact" than would otherwise be expected in a conventional neighbourhood of

separated homes (at para. 37). Although Justice Demong referred to Saskatchewan's provincial legislation in the decision, the analysis applies to condominium arrangements in Ontario, too, as the legislation is highly similar across these jurisdictions. At para. 45, Justice Demong wrote:

> As I read Section 65(6) of the Act, it operates to allow a condominium corporation to place upon a unit owner the responsibility to pay the insurance deductible when damage is caused to a unit arising from an act or omission of that particular unit owner. When considered in the context of insurance (the purposive analysis of this Part of the Act in relation to the whole of the Act) it is apparent that the legislators made a policy decision. That decision was, effectively, to place the burden of paying the insurance deductible on the person (unit owner) that caused the loss, without consideration of whether that unit owner's actions were negligent or otherwise... It recognizes that the cost of the deductible should not be borne pro rata as a common expense by all of the unit owners when they did not individually or collectively cause the loss by any act or omission on their part… .

[23] Indeed, in this case, the Lozanos appear to be advocating for a system based on proving negligent act or omission; absent which, no unit owner could be held financially responsible for the cost of repairs. However, the case law definitively indicates that the negligence standard is not to be applied in condominium disputes of this kind; rather, the standard is between negligence and strict liability and is perhaps closer to the latter.

[24] The reason for this is a matter of practicality which pertains to the nature of condominium living. Particularly in cases such as this where the costs of repair do not exceed the insurance deductible, the arrangement sought by the Lozanos would impose great expense on collective unit owners, as the threshold for proving owner liability would be higher, and communal fees would have to be applied against repair costs more regularly. To echo Justice Demong, sections 105(2) and (3) of Ontario's *Condominium Act* reflect a policy decision intended to protect all condominium unit owners against recurring repair costs. The cost of the insurance deductible (or the lesser cost of repairs) should not be covered as a common expense; a principle which TSCC No. 1765 has chosen to affirm in its by-laws.

[25] This is not a case where the unit owners were negligent in their care and upkeep of the Unit. Rather, this is a case where the failure to retain a plumber who could make thorough repairs constitutes an omission for which the Lozanos must be held responsible. Further, while the Lozanos were conscientious in arranging family and friends to check on the Unit during their prolonged absence, it would have been additionally prudent to have shut off the water to the Unit during their trip. Doing so would presumably have mitigated against any damage of the kind suffered here and is reflective of the level of care and diligence that is expected of condominium owners.

[26] In summary, I find that the Lozanos committed an act or omission in failing to maintain their ensuite toilet unit and have it attended to by a plumber. The Corporation is therefore lawfully entitled, by virtue of s. 105(3) of the *Condominium Act* and the Corporation's by-law

no. 1 to charge back the cost of repairs to the Lozanos. The application is dismissed. Lozanos are liable to pay the lesser of the costs of repair or the insurance deductible, per s. 105(3) of the *Condominium Act* and TSCC No. 1765's by-law no. 1. The application is dismissed.

[27] If the parties cannot agree on costs, they may provide brief written submissions by August 31, 2020 delivered to my assistant at lorie.waltenbury@ontario.ca.

J.E. Ferguson J.

Released: July 28, 2020

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