CITATION: Lozano v. TSCC 1765, 2021 ONSC 983
DIVISIONAL COURT FILE NO.: CV-19-00628257
DATE: 20210208

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Lederer Penny Sheard JJ

BETWEEN:	)	
	)	
CHARLES JOSEPH LOZANO and VICTORINA LOZANO Appellants	)	Gary Caplan for the Appellants
	)	
– and –	)	
	)	
TORONTO STANDARD CONDOMINIUM CORPORATION 1765 Respondent	)	Megan Mackey for the Respondent
	)	
	)	
	)	
	)	**HEARD:** December 7, 2020

Overview

[1] This is an appeal from the decision of J.E. Ferguson J. of July 28, 2020 (2020 ONSC 4583). In her decision, Ferguson J. found the Appellants liable for damages arising from a water leak that came from a toilet in the Appellants' condominium unit.

[2] Under the *Condominium Act*, if an insurance policy obtained by the condominium corporation contains a deductible clause, the portion of a loss that is excluded from coverage is deemed to be a common expense of the corporation. However, where an owner through an "act or omission" causes damage to their unit, the lesser of the cost of repairing the damage or the deductible limit of the corporation's insurance policy is added to the common expenses *payable by that owner*.

[3] The Appellants' condominium corporation by-laws contained a provision reiterating 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 or the deductible limit of the corporation's insurance policy.

[4] The corporation's declaration also contained a provision requiring each owner to carry sufficient insurance to cover any liability for damages of this kind up to the full amount of the deductible limit under the corporation's insurance policy.

[5] The corporation assessed damages against the Appellants of $10,022.33 arising from the water leak. This amount was less than the corporation's deductible.

[6] The Appellants had the required insurance. Their insurer, without prejudice, agreed to pay the outstanding amount pending the Appellants' application to the Superior Court of Justice.

[7] The application judge found that acts or omissions of the Appellants caused the damage and that the corporation was entitled to charge back the costs of the repairs in connection with the water leak together the legal costs and fees relating to the application, and interest, in the total amount of $10,022.33.

[8] The issue on this appeal is whether the application judge erred by:

(a) adopting the wrong legal test to determine whether an "act or omission" of the Appellants "caused" the damage; and/or,

(b) making factual findings that were not in evidence before her.

[9] For the reasons that follow, the appeal is dismissed.

Background

[10] About a year prior to the water leak in issue, the float in the toilet tank of the Appellants' ensuite toilet developed a crack. The Appellants replaced the float themselves by unscrewing the cracked float from the arm and screwing on a new float. The Appellants did not observe or encounter any other problems with the toilet.

[11] In November 2018, the Appellants travelled to the Philippines for about five months, scheduling a return in April 2019. During this time, their unit was unoccupied. However, the Appellants arranged for a friendto check the premises every two weeks to ensure the heat was on and to collect their mail. The toilet was not used during this period.

[12] Only days before the Appellants' scheduled return, their friend noticed that water was leaking from the toilet. This was reported to the corporation. The corporation retained a plumber. The plumber reported that the leak had occurred as a 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 the Appellants' unit as well as ceiling damage to the unit below and damage to parts of the third and fourth floor hallways.

The Condominium Act, 1998 and the Corporation's By-laws

[13] Section 105 of the *Condominium Act, 1998*, S.O. 1998, c. 19 provides:

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.

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.

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.

[14] The By-laws of the corporation provide, in relevant part:

12.03 Responsibility for Corporation's Insurance Deductible:
... if an owner, tenant or any other person residing in the owner's unit with the permission or knowledge of the owner, by or through any act or omission causes damage to owner's unit or any other unit, or to any portion of the common elements, in those circumstances where the damages was not caused or contributed by any act or omission of the Corporation, then the amount which is equivalent to the lesser of the cost of repairing the damage and the deductible limit of the Corporation's insurance policy shall be added to the common expenses payable in respect of such owner's unit.

[15] The corporations Declaration also provides, in s. 38 (a)(iii) that each unit owner must obtain and maintain:

Insurance covering any deductible amount under the Corporation's master insurance policy, that is payable by a unit owner, or for which a unit or order may be responsible for reimbursing the Corporation pursuant to the provisions of this declaration or any bylaws of the Corporation.

The Reasons of the Application Judge

[16] The application judge reviewed the language of s. 105 of the *Condominium Act*, the By-law and a number of judicial decisions on this issue from Ontario, Alberta and Saskatchewan. She concluded that proving causation by an act or omission did not depend

on a finding of negligent behaviour. She relied, in particular on the decision of Justice Demong in *Cornerstone Heights Condominium Corporation v. Payam and Sanaz Holdings Limited*, 2019 SKBC 70, considering the equivalent to s. 105 under the Saskatchewan legislation, where he held:

> 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 born 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…

[17] The application judge added that the reason for not imputing any notion of owner fault or negligence into the interpretation of s.105 was a matter of practicality pertaining to the nature of condominium living where the close proximity of units virtually ensures that physical problems in one unit can adversely affect the units of others as well. Placing too high an onus on the corporation to claim reimbursement for these deductible expenses would permit individual owners to offload the financial consequences of damage caused by their actions (or inactions) onto the corporation and thus to all the unit holders as a whole.

[18] She found, on the evidence, that the Appellants' omissions consisted of:

(1) failing to retain a plumber in April 2018 who could have made thorough repairs to their toilet; and

(2) failing to shut off the water in the unit during their lengthy absence.

She then concluded that these omissions had caused the damage, within the meaning of s. 105, such that the Appellants were liable for the loss.

Analysis

Standard of Review

[19] The parties agree that the standard of review on this appeal is correctness on matters of law and palpable and overriding error on matters of fact.

The Legal Framework

[20] The Appellants (or, more properly, their insurer, who has assumed carriage of this appeal under rights of subrogation) argue that the application judge applied the wrong test under

s. 105 and that this Court should adopt a more "robust" test. They propose that the appropriate test for liability under s. 105 should be as follows:

> A condominium corporation can only charge back the cost of repair to a unit owner if:
>
> (i) the loss and damage is the result of the failure of a component of a unit for which a unit owner or occupier is ordinarily and reasonably obliged or expected to regularly maintain, use, monitor, or repair;
>
> (ii) the failure to use, maintain, monitor, or repair a unit component foreseeably results in loss and damage;
>
> (iii) the failure to use, maintain, monitor or repair "causes" the failure of the unit component resulting in loss and damage; and
>
> (iv) the onus of proof with respect to the foregoing rests with the corporation not the unit owner.

[21] I am unable to give any credence to this argument. In my view, the test proposed by the Appellants seeks to import a negligence test into the s. 105 analysis. Their proposed test finds no support in the text, context or purpose of s. 105. Indeed, the Appellants invite this Court to perform a wholesale re-writing of s. 105. Further, the Appellants' proposed test is completely inconsistent with essentially all of the law developed in relation to s. 105 in Ontario and similar provisions in other Canadian jurisdictions.

[22] Section 105 does not import, on a plain reading, any concept or requirement of unit owner negligence. The reasonableness of the unit owner's conduct is, in fact, not mentioned or alluded to at all. A contextual and purposive analysis lends support for this conclusion as well. As found by the application judge, in part relying on the cited passage from Justice Demong in *Cornerstone Heights*, s. 105 represents a policy decision made by the Legislature 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. Further, the interplay of s. 105 and the corporation's governing documents demonstrates that the risk of loss is, in fact, an allocation of insurance risk. This is because not only is the corporation required to have insurance (albeit perhaps subject to a deductible) but the unit owner is also, by virtue of s. 38 of the Declaration, required to have insurance to support its obligations under s. 105 and para. 12.03 of the corporation's by-law to indemnify the corporation against the cost of the deductible if the loss is caused by the unit owner's act or omission.

[23] There is a suggestion, however, in some of the cases that the standard under s. 105 is one of "strict liability": see, for example, *Zafir v. York Region Condominium Corporation No. 632*, 2007 CanLII 4893 (ON SC). I do not accept this view. The introduction of this idea, in my view, confuses and complicates the nature of the analysis and is, again, not warranted by the straightforward language and policy of s. 105: see, for example, *Cornerstone Heights* at paras. 35 and 36 Even under strict liability, an owner could defend an assessment

for the cost of the deductible on the basis that they took "all reasonable care" to prevent the damage. This would still permit a role for an assessment of whether the owner's conduct met a reasonable standard of care in the analysis, a concept which, in my view, is entirely foreign to the language of s. 105. The reasonableness of the owner's act or omission is not part of the analysis under s. 105 at all; it is sufficient, to invoke liability, that the damage be "caused" by the owner's "act or omission".

[24] That is not the end of the analysis however. Theories of liability have long held that there are two components to the causation analysis: cause in fact; and, cause in law. Cause in fact is the more purely factual enquiry, sometimes described as the "but for" or the "necessary condition" test. "But for" the defendant's act (or omission), would the damage have occurred? Cause in law is the more vexed question, involving more "policy-oriented" considerations. These typically include questions like: was the alleged act or omission too "remote" from its purported effect; was the result abnormal when compared to what might otherwise have been expected; was the damage "unforeseeable", lacking in "proximity" or coincidental; and, were there other, intervening causes?

[25] In the circumstances of this case, however, the remoteness questions do not come into play. The facts are straightforward. A proper analysis of the cause in fact issues (the "but for" test) is sufficient to reach the appropriate result.

The Factual Analysis

[26] Before the application judge and before this Court, the Respondent relied on two omissions as the cause of the water damage: 1) the failure to hire a plumber to perform the original April 2018 repair; and 2) the failure to shut off the water during the Appellants' extended absence. The application judge agreed with the Respondent on both counts.

[27] There is much to be said for the Appellants' argument that the evidence does not support the conclusion that their failure to hire a plumber in April 2018 "caused" a leak in 2019. There was no evidence that the Appellants' DIY replacement of the cracked float in April 2018, was the cause of the leak in April 2019. Likewise, there was no evidence that, if a plumber had attended in April 2018, he or she would have found a defect or failure in the ballcock mechanism and replaced this entire mechanism with a new one, thus avoiding the damage. This is unlike the cases of:

- *Cornerstone Heights,* where there was a slow drip in a furnace that caused damage over time. A timely maintenance/inspection program would have discovered the leak and prevented the damage from occurring; and

- *Owners: Condominium Plan No. 7721985 v. Breakwell*, 2019 ABQB 674 (CanLII), where it was found that the owner's furnace was not in proper working order because there was a malfunctioning circuit-board and that, again, a timely maintenance/inspection would have discovered the malfunction such that preventive action could have been taken to the avoid the damage altogether.

[28] Here, while it may well have been the case that the problem with the ballcock mechanism in the Appellants' toilet would have been "discovered" on inspection by a professional in April 2018, there was simply no evidence to this effect, leaving the causal relationship between the Appellant's alleged omission and the resulting leak a year later, a matter of pure speculation. Thus, the application judge's conclusion on this issue, had it been the only basis for a finding of causation, might have been the result of a palpable and overriding error of fact.

[29] There is a second alleged omission, however – the failure to turn off the water during an extended absence. The uncontroverted facts are that: the Appellants left their unit uninhabited for five months; had someone look in only once every two weeks; the water was not turned off; and, if the water had been turned off, the failure of the ballcock mechanism would not have cause a leak. This evidence clearly establishes that the omission (failure to turn off the water) "caused" the leak; but for the omission, the damage would not have occurred. The application judge correctly assessed this evidence, making no error of fact of any kind.

[30] I would add that there is a second obvious act or omission disclosed in the uncontroverted facts: that the unit was completely unoccupied and "uninspected" for 13 of every fourteen days during the Appellants' five month absence. This act (or, if one prefers, omission) can also be unambiguously characterized as a cause of the damage because, as with the *Cornerstone* and *Breakwell* cases cited above, if the unit were occupied, or inspected daily, the leak would have been discovered and remedial action taken immediately, thus preventing the damage that occurred.

Conclusion

[31] For all these reasons, I would conclude that the application judge made no errors of law and no palpable and overriding errors of fact. I would, therefore, dismiss the appeal.

Costs

[32] The parties agreed that the costs of the appeal would be fixed at $3,500 plus HST, which amount shall be paid by the Appellant to the Respondent.

_____
Penny J.

I agree _____
Lederer J.

I agree _____
Sheard J.

Released: February 8, 2021

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REASONS FOR JUDGMENT

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