

**CITATION:** Berman v. YCC No. 99, 2021 ONSC 6500  
**COURT FILE NO.:** CV-20-653236  
**DATE:** 20211001

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**BETWEEN:** )  
 )  
JEFFREY BERMAN )  
 )  
 ) Applicant ) *Michelle Kelly, for the Applicant*  
- and - )  
 )  
YORK CONDOMINIUM )  
CORPORATION NO. 99, MICHAEL )  
YANG, MICHELLE GRAHAM, E. )  
HELEN JENNINGS, KANDIAH )  
MYLVAGANAM, AND LESLIE )  
ROHINI )  
 )  
Respondents ) *Megan Mackey, for the Respondent*  
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 )  
 )  
 )  
 ) **HEARD:** September 29, 2021

2021 ONSC 6500 (CanLII)

**FL MYERS J**

**REASONS FOR DECISION**

- [1] The oppression remedy starts by someone having an expectation.
- [2] Mr. Berman expected that his bedroom window would be replaced by the condominium corporation when he said it needed replacement. That is his subjective feeling or desire.
- [3] But, to be actionable at law, a person’s feeling of expectation must also be objectively reasonable. In addition, even if a reasonable expectation is not met, the applicant also needs to show that he has been oppressed, unfairly prejudiced, or unfairly disregarded.

- [4] In this case, I have no doubt of the sincerity of Mr. Berman's expectation. He had a drafty window that deteriorated over time, might have leaked at some points, and had peeling paint. The temperature in his bedroom was 19 or 19.5 degrees C when the living room was 21. He felt he needed and was entitled to a new window.
- [5] The condominium corporation does not deny its obligation to replace windows that need replacement. But it has 160 units. The building is 50 years old. Everyone wants new windows. The condominium corporation says it replaces the windows as needed. It says that it replaces windows in priority depending on the amount of age and wear. It told Mr. Berman in February 2020 that his window was in the budget for replacement in 2021. Nevertheless, Mr. Berman sued in November, 2020. The window was replaced in March 2021 as promised.
- [6] Mr. Berman seeks damages of \$50,000 plus costs from the condominium corporation and the members of its volunteer board of directors personally for oppression for making him endure 13 years until they replaced his window.
- [7] For the brief reasons set out below, the application is dismissed. There was no basis for Mr. Berman to hold a reasonable expectation other than that the board of directors would manage the condominium corporation honestly, in good faith, and with due diligence required by the statutory standard of care in s. 37 (1) of the *Condominiums Act, 1998*.
- [8] The condominium corporation has an economically responsible and sensible window replacement policy. It inspected Mr. Berman's window multiple times over the years. It did not ignore him or his unit. It replaced his bathroom window when it needed replacement. It re-caulked a skylight when it needed to be re-caulked. And it re-caulked the bedroom window twice when it needed to be re-caulked.
- [9] Mr. Berman cannot show that the corporation behaved unreasonably let alone oppressively. He has no objective evidence that his window failed or needed replacement before it was replaced. Moreover, having a bedroom a degree or two cooler than a living room is not a sign to me that a window has failed or needs replacement. The number of external walls in a room and any number of other factors may affect the ambient heat room to room. It is an inconvenience perhaps that could suggest one needs to turn up the heat a degree on going to bed or put an extra blanket on the bed.

- [10] Asking for tens of thousands of dollars damages for a draft and a two degree temperature gradient between different rooms in a condominium unit is itself unreasonable and gives credence to the allegations of bullying and aggressive misbehaviour by Mr. Berman toward condominium personnel.
- [11] The application should not have been brought against the members of the board of directors personally. There is no allegation against any of them to implicate him or her in their personal capacities. Counsel owes it to clients to tell them that they have no grounds to sue and to decline to commence a claim when grounds cannot even be pleaded.
- [12] The baldest pleading that the directors violated their duties to the corporation to manage the corporation to the requisite standard of care is not a basis for suing a director personally for oppression. This is not a secret or an esoteric principle. The Supreme Court of Canada made it clear that to support an oppression claim against a director personally, there generally must be something like personal benefit obtained by the director or bad faith. Neither is even claimed here. *Wilson v. Alharayeri*, 2017 SCC 39 (CanLII).
- [13] Mr. Berman also questions the qualifications of two of the directors. He seeks no relief against them based on this issue. He does not seek to unseat them. He is just throwing mud.
- [14] In my view suing the directors in this application was vexatious i.e. intended to punish and vex them. Civil proceedings are not to be brought for those ends.

## **Facts**

- [15] In 2004, Mr. Berman replaced the bottom portion of his bedroom window.
- [16] In 2008, a new board took over management of the condominium corporation. It advised members that the corporation was broke.
- [17] Mr. Berman approached the new board and asked to be reimbursed for the cost of replacing his window four years earlier. He said that management had promised to pay him. The new board had no basis to doubt Mr. Berman and agreed to pay him. The corporation was so tight for cash however that it had to pay him in four instalments and it did so.
- [18] Barely a few months after paying Mr. Berman for replacing one-half of his window in good faith, he approached the board to ask that the entire window be replaced including the new piece.

- [19] At the AGM in 2010, the board announced a policy to replace windows on a priority list based on age and necessity. This has remained the policy which the corporation says it follows. There is no evidence that the corporation has replaced windows otherwise than in accordance with its policy.
- [20] Mr. Berman complains about a lack of disclosure by the corporation. He had it within his ability to bring the right kind of proceeding to obtain documentary discovery or to ask for production of documents on cross-examination or to serve summonses to witnesses if he wished to do so. If the corporation failed to produce required documents, Mr. Berman could have asked the court for an order compelling production of documents if he could have shown that they were relevant to the issues.
- [21] But lawsuits are not supposed to be fishing expeditions. You don't sue first and hope to luck into finding some evidence later.
- [22] Mr. Berman complains that the corporation only inspected his window from the outside in 2012. In his complaint that led to the inspection in 2012, Mr. Berman said:

The window is very old, hard to see through and lets cold air in in winter and warm in the summer and the wood between the two panes is all chipped and rotted.

- [23] Management acted and reported back five days later:

As per the inspection conducted on Wednesday April 25, 2012 along with two other board members, your windows show no deterioration from the outside. An interior inspection of your windows is not required as there was no complaint of a current leak. There are no cracks on the exterior glass or on the exterior wall around the windows. There are no wet spots on the concrete outside and no cracks on the wooden frame of the windows.

However the corporation is currently replacing damaged and worn windows around the property. Window replacement is a costly procedure but all damaged windows will be taken in consideration one at the time. Thank you for your patience and consideration.

- [24] Mr. Berman says that they should have inspected the inside because his window did leak from time to time. But his complaint did not mention that and he did not respond to correct that information. The condominium re-caulked the bedroom window at that time. There is no basis to say that his interest were disregarded.

- [25] In his chronology, Mr. Berman then jumps to 2016. He ignores that in 2014, the condominium corporation had the window inspected by an external consultant. The consultant found the window to be “in good working condition”.
- [26] In 2016, Mr. Berman says he was misled. He was told that he would be contacted by a contractor about the replacement of his window and he never was. He says he was put on the priority list and then taken off.
- [27] But in 2016, the condominium corporation replaced Mr. Berman’s bathroom window. There is no indication that it was speaking about the bedroom window that it had yet to agree to replace. It said it was replacing a window in his unit and it did so.
- [28] In 2017, the corporation offered to replace Mr. Berman’s bedroom window if he paid 50%. The corporation’s standard at that time was not to replace windows less than 20 years old. The bottom piece of the window was 13 years old and the corporation had already paid for it to be replaced in 2004. So the offer of 50% would have seen the corporation take responsibility for replacing the original top half of the window and if Mr. Berman wanted to replace the window that he had installed 13 years earlier, it would be on his own dime.
- [29] In 2018, an inspection found Mr. Berman’s bedroom window to be in reasonable functioning condition.
- [30] In February, 2020, the condominium advised Mr. Berman that it had budgeted to replace his bedroom window in 2021. Mr. Berman sent a lawyer’s letter in June threatening to sue if the window was not replaced by September, 2020. The letter did not even mention that the window was already scheduled to be replaced in 2021.

## **The Law**

- [31] The parties do not disagree on the applicable standards. A breach of the duty to repair might found a basis for an oppression claim if the treatment of the applicant is oppressive, unduly prejudicial, or if his interest are disregarded.
- [32] The issue here is that there is a disagreement as to whether a repair was required or not. This is not a case like *Ryan v. York Condominium Corporation No. 340*, 2016 ONSC 2470 where the condominium ignored an acknowledged problem requiring repair.

[33] At para. 34 of his factum, Mr. Berman submits:

YCC99 took very little action to investigate solutions. It says it inspected the window a handful of times in 15 years. The materials include several emails from the directors indicating this to be the case, but only one email from a contractor or professional. The email from 2014 simply says the window is "in good working order" and provided a quote to replace it. No water tests were performed. No air tests. No testing of any kind, Purely a visual inspection from outside the unit. There is no evidence that an engineer has inspected the windows. No recommendations from an engineer about phasing the window replacement in over a few years or options for funding the project. YCC99 has provided no evidence other than a few quotes from window company representatives, who admit the window is original and shows signs of disrepair.

[34] It is not objectively reasonable to expect a condominium corporation to call in engineers and perform water tests and air quality tests every time someone in a 160 unit building complains about a window – no matter how often or how loudly – when inspections do not disclose serious issues. Mr. Berman provided no evidence to the condominium corporation or to the court that would increase his repair priority other than his claim of a draft and a temperature gradient between rooms. Mr. Berman provides no evidence of any need for engineering inspections or testing and no basis to reasonably expect them to be done. Had he spent the money to do testing and they showed significant results, his position might have been enhanced. with some objective support.

[35] The board received his complaints, looked into them, brought in the window people when needed, and did routine maintenance as needed.

[36] There is no basis to find that the condominium corporation failed in its duty to repair or maintain. There is no breach of any objectively reasonable expectation based on the duty to repair on the factors set out by Perell J. in *Symonik v. Metropolitan Toronto Condominium Corp. No. 572*, 2021 ONSC 2494 (CanLII).

[37] Moreover, even if the window needed replacement earlier, which is not proven, there is no basis to say that the condominium corporation oppressed Mr. Berman by treating him harshly. It did not prejudice him or his interests and it did not disregard him or his interest.

- [38] As best as I can tell, the condominium corporation simply disagreed with Mr. Berman's feelings about the quality of his window. That is not the basis for an oppression remedy.
- [39] Mr. Berman also submits that the fact that he had to undergo chemotherapy with a drafty window made him fear for his health. He did not mention his chemotherapy to the condominium corporation at the time. Moreover, if the window was affecting his health and could not have been fixed with a blanket or otherwise, I would have expected Mr. Berman to fix the window himself and then sue for the cost of the window replacement in Small Claims Court. It is not reasonable to allow a window to impair one's health to add to a damages claim rather than fixing the window yourself. While I am sympathetic to Mr. Berman's health concerns, I do not give this claim much credence.
- [40] Were I called upon to quantify damages, I would have set them at \$5,000. Ms. Kelly submitted that damages are at large and depend on the degree of oppression. Even had I found that the corporation ought to have replaced the window earlier, this case has none of the arrogance or nastiness from the condominium corporation side that typifies oppression cases. Here, at most, it might have been seen to be too frugal so it was delaying necessary work. The delay, frustration, draftiness, and temperature gradient are at the lowest end of loss and harm. General damages of \$5,000 would be appropriate if I were finding liability.
- [41] The application is dismissed.
- [42] The respondents may deliver no more than five pages of costs submissions by October 8, 2021 by filing them through the Civil Submissions Online portal and uploading them to Caselines. The applicant may do the same by October 15, 2021. Both sides may also deliver copies of any offers to settle on which they rely. If they have not done so already, both sides shall file and upload to Caselines their costs outlines as well. The director respondents should particularize all costs that they incurred (whether indemnified or not) distinct from costs that would have been incurred by the corporation in any event.

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FL Myers J

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Applicant

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