CITATION: Benmergui v. YRSCC No. 1510, 2025 ONSC 545
COURT FILE NO.: CV-24-00730433-0000
DATE: 20250127

ONTARIO SUPERIOR COURT OF JUSTICE

RE: ESTHER BENMERGUI**,** Applicant/ Moving Party

-and-

YORK REGION STANDARD CONDOMINIUM CORPORATION NO. 1510, Respondent/ Responding Party

BEFORE: L. Brownstone J.

COUNSEL: *Shawn Pulver* and *Breanna Needham*, for the Applicant/Moving Party

Katrina Paray, for the Respondent/ Responding Party

HEARD: January 10, 2025

2025 ONSC 545 (CanLII)

ENDORSEMENT

Introduction

[1] The applicant recently purchased a condominium unit at 10 Gatineau Drive in Vaughan, Ontario, in respect of which the respondent is the registered condominium corporation. The applicant has suffered four sewage back-ups in her unit since closing the purchase in July 2024. She commenced this application after the third sewage back-up, seeking various relief from the respondent. On November 19, 2024, Chalmers J. scheduled the application to be heard on an urgent basis.

[2] At the return of the application, counsel advised they were proceeding with an interim motion, with the balance of the application to be heard in due course. The parties provided the court with a consent order appointing an engineer and setting out its reporting obligations. With some revisions, I signed that order.

[3] The applicant sought further interim relief, primarily that the respondent pay for her alternative accommodations until the sewage issue was remedied. In her factum, the applicant sought those orders on the basis of an oppression claim under s. 135 of the *Condominium Act, 1998*, S.O. 1998, c. 19. However, a reply factum filed shortly before the return of the motion argued the issue as a compliance matter under s. 134 and s. 117 of the Act. The oppression determination, and other outstanding relief in the application, are adjourned to a later date.

[4] The respondent denies it has not complied with its obligations under the Act, claiming it has acted reasonably to address the sewage backups. It therefore denies the applicant is entitled to any relief under s. 134.

Facts

[5] The basic facts are not contentious, but the chronology is important to the characterization of whether those facts constitute non-compliance on the part of the respondent. I therefore set them out in some detail here.

[6] The applicant closed the purchase of her condominium unit on July 3, 2024. On July 6, 2024, before she had moved into the unit, there was a significant sewage backup in the unit. The applicant advised the respondent that the plumbers who were sent to repair the issue caused damage caused to the fixtures in the washroom. She further advised that she incurred cleaning fees. The respondent told the applicant it was impossible for there to be another sewage backup so further investigation was not required.

[7] Unfortunately, on July 18, 2024, a second sewage backup occurred. The applicant had to leave her unit and advised the respondent that her unit was flooded, the sewage was fast-moving, and all rooms in her unit were affected. The applicant asked for financial assistance while she was displaced. She advised the respondent that the situation was dire and that she had nowhere to go. The plumber attended on July 19, 2024, but did not report on the work right away due to an emergency elsewhere. The applicant inquired whether cleaning had been arranged for the unit that day.

[8] On July 21, 2024, after advising of her concern that matters were not being handled quickly enough, the applicant communicated the urgency to the respondent, in part as follows:

> Thanks for replying today. When we spoke on Friday, you'd said the cleanout was temporary and would only be done for the camera test. Just want to confirm form [*sic*] that it will still be immediately fixed/removed and the bathroom professionally restored as soon as the test is done, right?
>
> A bit of context from me: I have no where to live and every day that the plumber delays is another day that I'm displaced. I keep hearing that lldi [the plumber engaged by the respondent] is going to follow up in a couple hours, but I still don't have the documents for the insurance company. They can't start to help me without them. I spoke with the insurance company on Friday and they can't do anything for me until after their review and investigation in the meantime, I literally have no home to be in right now. That's why [I'm] so desperate to make sure the plumber finally does what he has been saying he'll do, but has put off instead.
>
> An idea: If Ildi cannot or will not prioritize my emergency, can you find a different plumber who has the capacity to come in immediately and get the work done? I suggest this because without the test, the fixes to the common

2025 ONSC 545 (CanLII)

> elements portions of the plumbing and the work you'll be coordinating to have my bathroom wall fixed to restore it to the original appearance (without the cleanout), my insurance company can't even begin to fix my unit (major sanitation, deep cleaning of all surfaces, gutting and rebuilding). There's this chain of events that has to take place in this order before I can even begin to have my unit fixed (and that's a huge and lengthy project on its own).
>
> Full disclosure: I feel completely powerless and I'm struggling to get by right now.

[9] On July 23, 2019, the respondent advised that repairs to the pipes were being undertaken on July 24. On July 24, the corporation advised the repairs would be undertaken the next day. The plumber did attend on July 25, 2024. Discussions about co-ordinating with the applicant's insurance company ensued. On July 25, 2024, the respondent advised "As you know, we have been dealing with this matter and several contractors have been into your unit to investigate the matter and we are waiting for their final review and recommendations."

[10] The applicant pointed out that she had asked for an investigation at the time the first backup occurred, but was told it was "impossible" for a second backup to occur. She reiterated that the delay was causing her harm.

[11] On July 25 she was advised that preliminary investigations from the plumber indicated that the drain had been clogged due to certain products like hand wipes being disposed into the toilets from units sharing the same drainpipes as the applicant.

[12] On August 18, 2024, a third backup occurred. The applicant advised the respondent of her view that it was imperative that they "immediately gather a group of professionals that will be needed to fully investigate the ongoing sewage flooding into my unit as well as the required repairs/ changes (plumbers, engineers, etc)."

[13] The respondent replied: "It's very unfortunate the backup happened once again. At this point, this is not a simple fix and we have called in the corporation engineers for an investigation and a report. You and I have been involved in many discussions and to say you have been ignored is not correct. We are doing what we can to address this unusual circumstance."

[14] The applicant felt the respondent was not taking the matter seriously or acting with sufficient urgency. She was unable to live in her unit, and she was concerned that the reason for the backups was not being sufficiently investigated or dealt with.

[15] In September 2024 the applicant engaged counsel, who wrote the board asking for information about its engagement of engineers, including its scope of work, confirmation that contractors had been retained, confirmation of the cause of the back-ups, confirmation that the corporation would be responsible for costs of any further back-up, and the timeline for completion of the work. Counsel's letter also advised that the application would seek compensation for all of the applicant's out-of-pocket costs that have not been compensated by her insurer, and indicated

2025 ONSC 545 (CanLII)

the amount would be confirmed once the applicant received confirmation of the requested information.

[16] The letter closed: “This is an extremely serious matter. My client is not living in her Unit and the Corporation has an obligation to work with their engineer and the developer to solve this problem. If we don't receive the requested information, then I expect my client to instruct our office to commence litigation. Please forward this letter to the Corporation's legal counsel.”

[17] No substantive response was received.

[18] The engineering report ultimately provided to the applicant indicates that the engineer reviewed the conditions in the applicant’s unit and discussed the backup history with her. It recommended that the builder continue to investigate.

[19] On September 16, 2024 the respondent advised the applicant:

> “Please be advised that the corporation's engineers from WSP provided a report dated September 6th, 2024 and suggested in it that the Developer are to investigate the drain pipe installation for a possible explanation of the back-ups. Fernbrook performed their inspection from suite 304W, below yours, on Friday September 13th, 2024. Their preliminary report says that everything in looking as it should and here are no visible problems with the pipe or it's (*sic*) slope. They also tested the toilet in your unit and confirmed it flushes/drains properly.”

[20] On October 25, 2024, the applicant commenced this application.

[21] On October 30, 2024, she was advised that the invoices pertaining to the sewage back-up was charged back to her suite. She was asked to make payment by November 11, 2024. The respondent concedes this should not have been done and has retracted the chargeback.

[22] On November 15, 2024, a fourth sewage back-up occurred.

[23] On November 19, 2024, the date for the urgent hearing of the application was set.

[24] Prior to the return of the application the parties agreed to an order, referenced above, for the appointment of an agreed-upon engineering firm to take all necessary steps to identify the cause of the sewage backup, identify its cause, and prepare a detailed scope of work enumerating the steps to be undertaken to address the issue.

Governing Law and Analysis

[25] As stated above, the matter was argued in the applicant’s factum under the oppression provision of the Act. At the hearing, the applicant advised she is seeking relief under ss. 117 and 134 of the Act. Those sections provide, in relevant parts:

2025 ONSC 545 (CanLII)

117 (1) No person shall, through an act or omission, cause a condition to exist or an activity to take place in a unit, the common elements or the assets, if any, of the corporation if the condition or the activity, as the case may be, is likely to damage the property or the assets or to cause an injury or an illness to an individual.

(2) No person shall carry on an activity or permit an activity to be carried on in a unit, the common elements or the assets, if any, of the corporation if the activity results in the creation of or continuation of,

(a) any unreasonable noise that is a nuisance, annoyance or disruption to an individual in a unit, the common elements or the assets, if any, of the corporation; or

(b) any other prescribed nuisance, annoyance or disruption to an individual in a unit, the common elements or the assets, if any, of the corporation.

134 (1) Subject to subsection (2), an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of a leasehold condominium corporation or a mortgagee of a unit may make an application to the Superior Court of Justice for an order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules or an agreement between two or more corporations for the mutual use, provision or maintenance or the cost-sharing of facilities or services of any of the parties to the agreement.

…

(3) On an application, the court may, subject to subsection (4),

(a) grant the order applied for;

(b) require the persons named in the order to pay,

(i) the damages incurred by the applicant as a result of the acts of non-compliance, and

(ii) the costs incurred by the applicant in obtaining the order; or

(c) grant such other relief as is fair and equitable in the circumstances.

[26] There are mediation requirements in s. 134(2) that the parties agree do not apply to this circumstance.

[27] The onus is on the applicant to establish the respondent has violated the Act.

2025 ONSC 545 (CanLII)

[28] The applicant argues that a sewage backup is a dangerous condition, and that the condition of the unit, which now has flooring removed, and open walls, make an injury likely. The current unit is uninhabitable. The respondent does not appear to dispute that the unit is uninhabitable but denies that it has failed to comply with the Act or violated s. 117. The corporation is required to act reasonably, not perfectly. It argues it has taken all necessary and reasonable steps to comply.

[29] The corporation is required to repair units and common elements after damage and to maintain the common elements (s. 89). It may not permit a condition to exist that is likely to damage the property or injure an individual.

[30] The corporation is not suggesting it is not responsible for the repairs. It says that it has been effecting those repairs reasonably.

[31] I disagree. I accept the respondent is not to be held to a standard of perfection. An assessment of reasonableness depends on the facts. In this case, there is no doubt the unit is uninhabitable. It poses a danger to the applicant's health. She cannot live there. She purchased and pays the mortgage on a home in which she cannot live. She cannot instigate or oversee the necessary repairs by herself. She must rely on the respondent to do that. Certainly by the time the third sewage backup occurred in August 2024, the respondent ought to have engaged in a "full court press" to determine the cause of the backups. It did not. It moved in a manner and at a speed that was more consistent with a situation that had created an annoyance than one that created a danger to health and a recurrent cause of property damage.

[32] The respondent relies on the following holding of the court in *Brasseur v York Condominium Corporation No. 50*, 2019 ONSC 4043 at para 128:

> For similar reasons, I find that YCC 50 did not breach s. 117 of the *Act.* It did not permit the mould to exist in the Unit. When looked at contextually, YCC 50 did endeavor to deal with the problem. However, while their response was not timely enough, I find that it has not been proven that they "permitted" the condition to exist.

[33] The court in *Brasseur* found that the corporation was not "dragging its feet"; it was attempting to deal with a complex situation of mould remediation. In the context of the case before me, however, the corporation has permitted the unreliable and, frankly, dangerous sewage system to persist. It was not until this application was started that the respondent agreed to the order appointing engineers to identify the cause of the backups and prepare a detailed scope of work enumerating the steps to be undertaken to address the sewage backups and prevent further backups, and to provide the report concurrently the applicant and respondent. While it had engaged an engineering firm previously, that firm's report indicated its methodology had been limited to inspecting the applicant's unit and speaking to the applicant. Subsequent investigations have not been comprehensive. No plan for moving forward was made.

[34] The respondent's lack of urgency in its response to what should be seen as a crisis was illustrated by its conduct related to helping the applicant find alternative accommodations. The

2025 ONSC 545 (CanLII)

respondent had offered the applicant use of its guest suite, a small room with no kitchen or living room, and unsuitable for a pet, for a single night after the second backup in July 2024. On January 10, 2025, at the hearing of the motion, the respondent indicated it was "looking into" whether it had suitable interim accommodation it could offer the respondent. This was the respondent's position after six months had passed from the first sewage backup, five months from the third, and two months from the fourth. Its response demonstrates to the court that the respondent is not taking the matter as seriously as the situation warrants. In the context of the facts and the seriousness of the applicant's situation as detailed above, the respondent has not acted reasonably and has not complied with its obligations under the Act.

[35] I find the respondent has breached s. 117 of the Act.

[36] The applicant asks for orders under s. 134(3)(b) or (c) that the respondent pay $5,000 per month for the applicant's alternate accommodation until the matter s resolved, as well as any first and last month's rent deposit she will have to pay.

[37] The Act is remedial legislation and should be interpreted in a liberal manner that gives effect to its intent and purpose. Section 134(3)(b) allows the court to require a person to order damages incurred by the applicant as a result of the acts of non-compliance. The wording of the Act clearly contemplates damages already incurred. However, s. 134(c) permits the court to grant "such other relief as is fair and equitable in the circumstances". The applicant has provided evidence about her current circumstances. She is not in a financial position to front the cost of rental accommodation and then seeking the damages for the cost incurred. Her funds are tied up in paying the mortgage and common expense fees on a condominium unit she cannot inhabit.

[38] In my view, in these circumstances, fair and equitable relief is for the corporation to pay for the applicant's comparable alternate accommodation until the sewage issues affecting her unit are resolved. The uncontested evidence is that the applicant used up her insurance coverage for a short-term rental in the summer. She made temporary arrangements with a family member for the months following the expiry of that coverage, but that arrangement is no longer available to her. Her evidence demonstrates that she has been unable to locate a short-term rental and that she is unable for financial reasons, given her current constraints, to enter into a long-term lease.

[39] There is no evidence before the court of what a comparable property would cost to rent. Accordingly, I order that the respondent, acting reasonably, shall pay for the applicant's comparable accommodation until the necessary repairs are completed and she is able to reside in her unit. This will include a deposit for first and last month's rent, if necessary.

[40] I am confident the parties, through their counsel acting reasonably, can agree on this alternate accommodation. Should any dispute arise, they may seek an attendance before me by emailing my judicial assistant at linda.bunoza@ontario.ca.

Costs

[41] The applicant seeks costs on a full or substantial indemnity basis of costs she has incurred to date. The applicant argues that she only was able to obtain relief, even the consent order, by

2025 ONSC 545 (CanLII)

commencing the application. She argues the application should not have been necessary, and notes the importance of the issue to her. The respondent argues that some credit should be given to it for agreeing to the order appointing the engineer. It argues it was acting in good faith and has spent time and money hiring experts to try to fix the issue.

[42] Fixing costs is a discretionary exercise under s. 131 of the *Courts of Justice Act*, R.S.O. 1990 c. C. 43. Rule 57 outlines, in a non-comprehensive list, factors that guide the exercise of this discretion. Relevant factors include the results of the proceeding, the principle of indemnity, the amount an unsuccessful party could reasonably expect to pay, the complexity of the proceeding and the importance of the issues. In addition, offers to settle may have costs implications.

[43] Ultimately, I must fix an amount of costs that is proportionate, and that is fair and reasonable for the unsuccessful party to pay: *Boucher v. Public Accountants Council for the Province of Ontario*, 2004 CanLII 14579 (ONCA) at para. 26. A costs award should "reflect what is reasonably predictable and warranted for the type of activity undertaken in the circumstances of the case, rather than the amount of time that a party's lawyer is willing or permitted to expend": *Apotex Inc. v. Eli Lilly Canada Inc*., 2022 ONCA 587 at para. 65

[44] While I have found the respondent has failed to comply with its obligations under the *Condominium Act*, this does not equate to a finding that it has acted in a manner that attracts substantial indemnity costs. I find that partial indemnity costs are warranted. The proceeding is obviously of extreme importance to the applicant. The respondent has not delayed the proceedings or taken unnecessary steps. It had a different view of what was required to comply with its obligations, one that I have rejected. That does not render its actions "grave positive misconduct" of a nature to warrant substantial indemnity costs.

[45] The applicant asked whether it could update its costs outline to address the post-hearing submissions I requested on the applicability of s. 134(2) of the Act. That request was only necessary because the applicant's initial materials, before its reply factum, focused on s. 135, not s. 134, of the Act. I decline to add any costs for time taken to provide the court with those submissions. Similarly, the applicant's reply factum was not contemplated in the CPC schedule and was filed very shortly before the hearing. Its contents were not proper reply. It ought to have included the arguments contained therein in the original factum. I decline to order the costs of its preparation.

[46] I order the respondent to pay costs to the applicant in the amount of $14,500 inclusive of disbursements and HST.

L. Brownstone J.

Date: January 27, 2025

2025 ONSC 545 (CanLII)