Case Name:

Apaloo v. Durham Condominium Corp. No. 169

Between
Edoh Apaloo, Catherine Rosetta Apaloo, Plaintiffs, and
Durham Condominium Corp. No. 169, Defendant

[2012] O.J. No. 2850

Court File No. 75457/11

Ontario Superior Court of Justice
Small Claims Court - Oshawa, Ontario

S. Baker Deputy J.

Heard: April 25 and June 6, 2012.
Judgment: June 22, 2012.

(24 paras.)

Counsel:

No counsel mentioned.

S. BAKER DEPUTY J.:--

THE CLAIM

1 The Plaintiff spouses own residential unit #26 managed by the Defendant and seek a $4,481 refund for plumbing repair costs to the unit.

THE BACKGROUND

2 On October 25, 2005 the Board of Directors authorized expenditure to address a recurring plumbing backup problem unique to the Plaintiff's dwelling.

3 But the Board was unable to garner sufficient funds in the reserve account to address the long-term ongoing issue.

4 A new Board and property manager (Tracey McLennan, the Defendant's representative throughout this proceeding) eventually took over and sought to free the Defendant of this responsibility.

5 Under the current Presidency of Rick Sierechon they took the position that the sanitary issue - confined to pipes within the Plaintiffs' unit - was not a common element and thus beyond the jurisdiction of the Board to approve.

6 The matter festered for some time. The Plaintiffs' anger and frustration with the process is evident from written correspondence. Eventually they ran out of patience and paid Mr. Rooter plumbers $4,481 for sanitary repairs effected in July 2011.

7 But the Board of Directors rejected the claim for refund, hence this claim.

THE ISSUES

Was the resolution of October 25, 2005 valid?

8 A decision of the Directors made in good faith and on reasonable grounds is binding (sec. 37 of the *Condominium Act, 1998*). Thus payments historically disbursed pursuant thereto are valid. However, the Defendant does not seek to assail *past* expenditure.

Does the repair pertain to the Plaintiffs' unit only or is it a *common element expense*?

9 Sec. 90 of the *Condominium Act* states

> "... the corporation shall maintain *the common elements* and each owner shall maintain the owner's unit."[my italics].

10 Schedule "C", governing this condo development, deems *non*-common "all pipes ... and those portions of the water, storm, sanitary and natural gas services extending from the shut-off valve or main line tee, that provides services that particular Dwelling Unit only."

11 Mr. Rooter Plumbers confirmed that

> "... the service lateral to unit 26 is a service solely for that unit. Utilized electronic video camera to confirm there are no other connections."

12 The plumber's repair bill of July 10, 2011 confirms that the repair work took place in the Plaintiffs' front yard, i.e. *within* their unit.

13 The plumber identified a gradient issue as *between* the Plaintiffs' sanitary pipe and the Town (general) connection sanitary supply, a design fault stemming from the time of building. This needs to be addressed.

14 But the repair was not for a common element. It is unique to the Plaintiffs. It was clear that their witnesses (who participated in the 2005 decision) lacked an empirical basis for their belief that the problem was common (to four - out of forty - unit owners).

15 Their assertions were motivated more by a well-meaning sympathy for the Plaintiffs' plight than hard facts.

16 It is the *Plaintiffs'* responsibility to convince this court on a balance of probabilities that the repair expenditure pertained to common elements. Yet the balance of evidence is to the contrary.

17 Granted, it results from a design fault as *between* their connection pipes and the main (common) supply line. But the $4,481 expenditure affected their pipe only.

Can the 2005 *decision be amended by a later decision*?

18 Of course it can.

19 Just as a prior Board of Directors can reach a good faith reasonable decision, so can a later Board - armed with the wisdom of better hindsight and research - overrule it in the best interests of all unit owners. In that the July 2011 repair pertained to the owner's unit exclusively, not the common elements, it would have been contrary to the best interests of the other owners - and jurisdictionally flawed - to commit them to fund such a repair.

20 Both sides relied upon precedent that upholds the right of a decision-making entity to make its decisions reasonably and in good faith. See *BCE Inc. v. 1976 Debentureholders*, [*2008*] 3 S.C.R. 560; *Rogers Cable* v *Carleton Condo et* al., [2005] O.J. No. 921 (05-CV-030376, *March 7, 2005*); *Campbell* v *Peel Condo. Corp #28*, [*1977*] *O.J. No. 234*; *Dykun* v *Cravenbrook Condo Corp.*, [2009] A.J. No. 165. This principle applies *both* to the 2005 and 2011 decisions.

21 The 2011 decision, however, in my view, was better researched, with greater benefit of hindsight. It is not irrelevant that the 2005 Board, having committed itself to funding the Plaintiffs' repair, realised very quickly that the Corporation's budget simply could not handle it. Consequently the repairs remained unresolved for years.

22 It cannot seriously be argued that a decision made reasonably and in good faith is forever - and under all circumstances - binding. The Plaintiffs knew full well when they undertook the repair that the Board was unwilling to reimburse. The Board was entitled to amend its earlier decision *prospectively*. But it would have been in muddier waters if it attempted *retrospectively* to assail payments *already* disbursed to the Plaintiffs, something it has - wisely - never sought to do.

DECISION

23 The claim is dismissed.

COSTS

24 Given the history and the fact that the Plaintiffs had grounds to believe that the 2005 resolution applied, I have decided not to award costs.

S. BAKER DEPUTY J.

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