Case Name:

Carriero v. Carli

Between
Ruben Carriero, Plaintiff, and
John Carli and Anna Carli, Defendants

[2013] O.J. No. 1664

Court File No. SC-11-002106-00

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

M. Klein Deputy J.

Heard: February 11 and 19, 2013.
Judgment: April 8, 2013.

(30 paras.)

Counsel:

Terry Philp, paralegal, for the plaintiff.

Defendants, Self-represented.

Judgment

M. KLEIN DEPUTY J.:--

Facts

1 The facts in this case are fairly straightforward. The plaintiff was at all material times the owner of a condominium unit located on Lakeshore Road in Mississauga, Ontario. He had recently purchased the unit as an investment property. The defendants had also purchased a unit in the same building, but required some time before the renovations on their unit was completed. As a result, they entered into a month-to-month tenancy with the plaintiff, executing a residential lease on March 2, 2010.

2 On April 7, 2010, the property manager of the subject building sent a letter to the plaintiff indicating that it was alleged that the tenants had a dog in his unit. The plaintiff's attention was drawn to the "no pet rule." Confirmation was requested of the plaintiff, by April 16, 2010 - to confirm whether or not there was a dog on the premises and if there were, that it be removed.

3 The plaintiff immediately got in touch with the defendants, advising them of the notice he received. Their response was basically, "Don't worry. They are only trying to scare you." Alas, the defendants refused to remove the dog.

4 In a letter dated April 13, 2010 from the defendants' lawyer to the property manager, the property management company was advised that under section 58 of the *Condominium Act*, S.O. 1998, C. 19, the condominium corporation had no right "to make a blanket rule banning all pets." Additionally, the lawyer indicated that: "A complete prohibition against all pets can only be valid if it is contained in the declaration of a condominium corporation." Therefore, the defendants took the position that the "no pet rule" was unenforceable and the dog would not be removed.

5 Matters heated up with the solicitors for the condominium corporation writing the defendants' lawyers, stating that: "Section 58 of the *Condominium Act*, S.O. 1998, C. 19, allows a condominium corporation to make rules with respect to the use of the common elements and the units to promote safety, security or welfare of the owners and of the property and assets of the corporation or to prevent unreasonable interference with the use and enjoyment of the common elements, the units or the assets of the corporation." Finally, the lawyer indicated that should the dog not be removed from the property by May 7, 2010, the condominium corporation would commence immediate court proceedings for compliance of the order against the plaintiff and his tenants.

6 May 7, 2010 came and went and the dog was not removed from the property. One of the most useful remedies for a condominium is the "charge-back" fee. This allows a condominium corporation to recover its costs of enforcement from a unit owner where the unit owner, or his or her occupant, breached the *Act* or the condominium's declaration, by-laws or rules. Thus ensued a barrage of billings - "charge-back" fees from the condominium corporation's solicitors, sent to the corporation and then off to be collected from the plaintiff:

- May 31, 2010: $1,371.56
- June 30, 2010: $5,850.29
- July 31, 2010: $2,499.16
- August 31, 2010: $3,159.56

7 On July 19, 2010, the condo corporation registered a lien again the plaintiff's unit. By this time, I have no doubt that the plaintiff was "beside himself" with fear of the repercussions arising out of the registration of this lien.

8 It was not until after a ridiculously high amount of legal fees were expended by all parties, and after a Superior Court of Justice application at Brampton, brought by the condominium corporation against the defendants, when judgment was rendered, on consent, on November 9, 2010, wherein the dog was ordered to be removed and the defendants were ordered to pay $2,000 in costs.

9 I was told at trial that the plaintiff, himself, including the charge-back fees, spent over $23,000 with respect to this matter.

10 The defendants' position was simple: (a) When they entered into a lease agreement with the plaintiff, they told the plaintiff that they had a dog. The plaintiff said that there was no problem; that it was no concern of his. (b) There is a no dog rule that is unfairly applied at will and they were not going to be bullied by the property manger who was indiscriminately zeroing them out, as it was clear that there were always numbers of dogs in the building at all times.

11 The plaintiff denies ever telling the defendants that there was no issue with their having their dog in his unit. He takes the position that it was as a direct result of their defiant behaviour and attitude to the condo corporation and it's no dog rule, that caused the damages and that he ought to be entitled to full indemnification of all of his costs.

Discussion

12 There is no question that everyone - from the property manager, to the owner to the tenants, were clearly aware of the no pet rule. Whether the property manager chose to (as the defendants state) "bully" them or act with a bias towards them with respect to the removal of the dog, is really not the issue, and I make no make no finding on this. This is the point:

> There was a no dog rule and it was within the discretion of the property manager to apply it and to enforce it as he saw fit. This was his job - his responsibility. For example, there may be three cars following each other in a line, all exceeding the speed limit. There is a police officer standing at the side of the road with a radar device. All three cars are travelling at the same speed - all exceeding the speed limit. Yet, it is only the middle car that is "chosen" by the police officer and pulled over. The driver of the middle car cannot come to court and argue that it was unfair that he was the chosen one to bear the ticket and that the police officer indiscriminately charged him only. The fact is, he was speeding, he was caught and he now has to pay the penalty.

13 Pursuant to subsection 17(3) of the *Condominium Act*, a condominium corporation has a duty to "take all reasonable steps to ensure that the owners, the occupiers of units, lessees of the common elements and the agents and employees of the corporation comply with this Act, the declaration, the by-laws and the rules." According to section 119(1) of the *Act*, every director, officer, employee, declarant, owner, occupier of a unit, and mortgagee shall comply with the *Act* and the condominium's declaration, by-laws and rules. Also, section 119(2) requires a unit owner to take all reasonable steps to ensure that a tenant, or any other unit occupant, complies as well. Thus, the obligation to comply extends well beyond the unit owners and includes directors, employees, the developer and unit occupants. If a condominium corporation fails to do so, the corporation and the individual members of the board could be exposed to liability.

14 Although the plaintiff does appear to be the "victim" here, one has to ask what obligation, if any, was there upon the plaintiff to step up and take action to "mitigate" his damages (so to speak) by:

a. Ousting the defendants from his unit. Although the plaintiff had no right to seek a remedy under the *Residential Tenancies Act* unless the dog disturbed other tenants or damaged the premises, etc., he did have a right to seek redress against the defendants in the Superior Court, and

b. Challenging the solicitors' accounts to condominium corporation's, which the plaintiff readily paid - upon receipt.

15 Section 134(5) of the *Condominium Act*, provides an extraordinary remedy to condominium corporations: If a corporation obtains an award of damages or costs in an (compliance) order made against an owner or occupier of a unit, the damages or costs, together with any additional actual costs to the corporation in obtaining the order, shall be added to the common expenses for the unit. If these amounts go unpaid, the condominium corporation then has a right to register a lien against the unit.

16 The purpose of Section 134(5) is to protect condominium corporations (and, indirectly, all innocent unit owners) from the high costs of litigating against the few wayward unit owners who chronically or blatantly refuse to abide by the *Act* and/or the terms of the condominium's declaration, by-laws, rules and agreements. Section 134(5) is intended to allow the successful condominium corporation to recoup all of its actual costs incurred in dutifully enforcing the condominium's declaration, by-laws, rules and agreements.

17 Though certainly mute at this stage in the proceedings, it is worthy to mention that before the trial of this action, Peel Condominium Corporation No. 110 was removed as a defendant - on consent. I think this was a grave error on part of the parties. The plaintiff ought to have challenged the solicitors' fees rendered to the condominium corporation. It was clear when the property manager gave evidence at trial, that as the lawyers' accounts came in, the accounts were paid without question and then passed onto the plaintiff, who again, without question, paid them. I believe that there is an obligation on property managers to act wisely and prudently in their position of trust, with respect to paying accounts, whether it be for the plumber, the roofer and even the lawyers. In my review of the accounts rendered by the condominium corporation lawyers, I find that they were excessive and simply out of line. These accounts ought to have been challenged.

18 In the Toronto Superior Court of Justice case of *Metropolitan Toronto Condominium Corporation No. 744 v. Michael Bazilinsky and Margarita Bazilinsky*, [2012] O.J. No. 731, the Bazilinskys, who were the owners of a condo unit, were contacted in November 2010 by their condominium corporation demanding that they remove a parrot they had in their unit, being in breach of a no pet rule. Ultimately, a $3,330 lien was placed on the for legal fees incurred in attempting to evict the bird.

19 The corporation then brought a court application alleging that the Bazilinskys were in violation of the "no pet" provision of the corporation's declaration and rules. The condominium asked the court for an order forcing the Bazilinskys to comply with its declaration and rules, as well awarding its legal costs of over $16,000. The court only allowed $3,000 for the legal fees.

20 Ultimately, the Bazilinskys consented to the removal of the bird, but disputed the amount of the legal costs claimed by the condo corporation, which, less than six months later had escalated to a whopping $41,599.45. The Bazilinskys finally brought the case back to court seeking a discharge of the lien and the removal of any

claim for legal costs beyond the $3,000 previously ordered.

21 The condominium board based its claim on section 134(5) of the *Condominium Act* which entitles the corporation to recover legal costs of obtaining a compliance order against an owner.

22 Justice Nancy Backhouse ruled: "Section 134(5) is not an invitation to counsel to aggressively work a file or unreasonably build up costs ... This was a simple application, the substance of which was consented to before the court date. In my opinion, the value of legal work performed on a solicitor and client basis is no more than $6500 (inclusive of the $3000 costs award of August 17, 2011)."

23 Justice Backhouse awarded $5,000 in costs against the condominium corporation, ordered the lien discharged and ruled that the owners did not have to pay interest on the outstanding common expenses which the condo board refused to accept. In the end, the condo corporation actually owed the Bazilinskys $1,800 in legal fees.

24 This case really has little to do with parrots, since the principles could have applied equally to the enforcement of any provisions of a condominium's declaration, bylaws or rules. The real issue is the extent to which condominium boards can recover their legal costs against unit owners. There are other cases that surmount to a *warning* to condominium managers and their boards that they can't undertake litigation so recklessly and/or aggressively, and then expecting the courts to bless their tactics which attract unreasonable and disproportionate legal bills.

25 Another point worth mentioning, concerns subsection Section 132(4) of the *Condominium Act* which states:

Disagreements between corporation and owners

(4) Every declaration shall be deemed to contain a provision that the corporation and the owners agree to submit a disagreement between the parties with respect to the declaration, by-laws or rules to mediation and arbitration in accordance with clauses (1) (a) and (b) respectively.

Interestingly, I heard no evidence in this case that this procedure was attempted or followed.

26 There is no question that all of this (as stated by the plaintiff's agent) would have ended in April 2010, had the defendants complied with the demand for the removal of the dog. Had that happened, both litigants would have saved themselves countless hours of aggravation and thousands of dollars in legal fees.

27 The plaintiff seeks indemnification and places the blame squarely on the defendants. He is right and he ought to be compensated. However, as referred to above, there has to be some responsibility placed upon the plaintiff to mitigate in these circumstances. Aside from the fact that he took no action to remove the defendants from his premises, he never objected to these "overly aggressive" lawyers' fees. It appears that he did not seek legal advice until October of 2010. Had he done so sooner, those fees may very well have been drastically reduced. Therefore, although I am placing fault on the defendants, I am not going to place the full brunt of the liability upon them, and am therefore ordering, indirectly, that the plaintiff share in part of the "burden."

28 Again, I express my concern that the condominium corporation was removed as a party to these

proceedings, for as in *Bazilinsky*, I would not have had any issue with drastically reducing the condominium's recovery on its legal fees.

Judgment

29 The plaintiff shall have judgment against the defendants in the amount of $13,000.

30 The plaintiff shall have costs fixed in the amount of $750.

M. KLEIN DEPUTY J.

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