

Case Name:

Demetriou v. Carleton Condominium Corp. No. 59

Between
Andreas Demetriou, Plaintiff, and
Carleton Condominium Corporation No. 59, Defendant

[2012] O.J. No. 465

Court File No. SC-108607

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

L. Gilbert Deputy J.

Heard: May 14, 2010; March 21-22, September 15, 2011.

Judgment: January 25, 2012.

(74 paras.)

Counsel:

For the Plaintiff: Thomas W. Curran.

For the Defendant: Qasim Ebrahimi, Student-at-Law.

REASONS FOR JUDGMENT
and JUDGMENT

L. GILBERT DEPUTY J.:--

PART 1
OVERVIEW

1 This case addresses what obligations a Condominium Corporation may have to a unit owner in the event the owner's unit suffers fire loss and consequential damages therefrom, and the extent of those obligations where the unit owner relies on the Condominium Corporation to repair and reinstate the unit.

PART 2
BACKGROUND and FACTS
NOT IN DISPUTE

2 The Plaintiff ("Demetriou") owned a unit in the Defendant's Condominium ("CCC"). He purchased it in the fall of 1992.

3 The basement bathroom was already there when he purchased it and it was an add on to the standard unit.

4 Demetriou did not have insurance.

- 5 CCC did have insurance.
- 6 A fire occurred in the unit on January 7, 2008.
- 7 The unit was totally uninhabitable and required repair and reinstatement.
- 8 Before the fire, the unit had been upgraded beyond the standard unit specifications as shown in the Declaration.
- 9 The unit was rented out to a tenant at the time of the fire and the tenant had to move out of the unit with no intention of resuming occupation once the repairs were completed.
- 10 The tenant left most of her property behind considering them unsalvageable while removing a few items that she considered were salvageable.
- 11 CCC through its management company instructed its insurer to look after repair and reinstatement of the unit.
- 12 The insurer undertook to complete the restoration of the unit under the insurance policy and it did so.
- 13 The building permit was applied for on April 24, 2008 and granted on May 6, 2008.
- 14 A building occupancy permit was issued on July 28, 2008.

PART 3
ISSUES

- 15 Does a Condominium Corporation have any obligation in the first instance to repair a unit owner's unit in the event of damage caused to it by fire?
- 16 If it does, what is the nature of that obligation?
- 17 If an obligation does exist, has that obligation been fulfilled on the facts of this case?
- 18 If it has not been fulfilled, are there any damages that flow from the breach and if so, how do you quantify those damages?

PART 4
EVIDENCE

FOR THE PLAINTIFF

PETER RYGUS

- 19 Peter Rygus testified for Demetriou. He is builder/consultant with extensive experience in design, specifications, costing and construction techniques. He was admitted as an expert.
- 20 He had reviewed the work that needed to be done and opined on the time frame needed for completion. Following what he described as industry standards, he stated that following a site visit you can do take offs in one-half to three-quarters of a day using one person. In this case, the presence of furniture and fire debris would not impede measuring the unit.
- 21 You then put the quantities into a computer program and get the pricing. There are programs for doing this task. Insurers then consult their preferred builders list and get prices to do the work. All of this is accomplished electronically. It should take no more than a week to get contractors' pricing.
- 22 As for the work itself on this project, he stated that the joist work should take no more than a day using a two man crew. In this case, there was no foundation work, no roof work and no truss work to be done. There was no significant structural damage to attend to. Also, given it was wintertime there was no impediment to doing the necessary work in that there was no exterior or roof damage.
- 23 In his opinion, it would take 2-3 months at a maximum to complete the work using an experienced crew of two to three. Since the home is 795 square feet, it can take 3 months to build from scratch.
- 24 As for obtaining a building permit, it would take about 10 working days once you have all your documents in order.

JANIS WATSON

25 Janis Watson, the tenant, testified that after the fire when she tried to get access to retrieve her belongings she found the place boarded up and it was impossible to get in. There was no heat or light. She did not speak to the landlord, Demetriou. When she finally got in and that was through her own resources, she was able to retrieve a couple of dressers, and a grandfather clock. She stated that what she left behind was not salvageable or healthy. She had no tenant's insurance. She was never able to find out what happened to her stuff until about a year later when she was told it had been put into storage.

ANDREAS DEMETRIOU

26 Demetriou did go in to inspect the premises after the fire but he could not stay due to the cold, dampness and smoke. He testified he probably went twice. What he did observe was as he put it, a pile of rubble. The upstairs bathroom was OK; the 2 bedrooms upstairs were smoke damaged; the family room and furnace room were rubble and after taking a quick look at the downstairs bathroom, it looked to him as if it were intact.

27 Demetriou testified that Shelly Glover, the insurance adjuster, called him and told him that the unit would be restored to the original specifications and it would cost him nothing. There was no discussion as to contents.

28 There was also no discussion about removal of contents prior to his receiving a letter stating that there would be costs associated with their removal.

29 He did receive a letter dated January 28, 2008 advising him that he had to sign off on the deductible, meaning that they wanted him to acknowledge responsibility for payment and to assure them it would be paid upon completion of the work. He was aware he would be responsible for the deductible payable by the CCC on their policy and he stated he never took issue with that. On cross examination he said that he did not recall being told by Glover on January 29, 2008 that they could not proceed with the work if the contents had not been removed.

30 Novatech advised by letter dated February 5, 2008 that they would go in to start packing the contents

31 He tried to get into the unit on February 12, 2008 and he could not get in as the locks had been changed

32 The next communication after that was a phone call on April 17, 2008 from Glover informing him they were starting the renovation and she needed him to sign off on that letter. He did so following that conversation.

33 Around the first or second week of August 2008 he received a call from the contractor asking him if he wanted to inspect the unit. He did so and pointed out some deficiencies that needed correction. As nothing was done over the ensuing 2 week period, he chose to lock them out and take back possession.

34 He testified that he did not get a copy of the occupancy permit until the first week of October and he had to get it himself.

35 He only got a bill for the storage after he put the house up for sale in September 2008, and had to pay the sum of \$7525.84 for the storage and \$2500.00 for the deductible on November 3, 2008 when the sale closed. No details were provided to him as to the \$7525.84. He never received a list of items taken from the house, an estimate of the storage fees or notification of disposal.

FOR THE DEFENDANT

DAVID DUNCAN

36 David Duncan is the President of Deer Park Management which is the property manager for CCC.

37 He described his job in the event of a fire loss as getting the insurer to act on the insurance coverage and get the unit ready for occupation. In the event the owner is insured, it should take between four and one-half to six months to complete the work and longer if the owner is not insured as he is his own adjuster. From his perspective once the claim is put in, he is no longer involved. He contacted Glover the day following the fire.

38 In dealing with the owner who does not have insurance it is their policy to require the owner to sign an undertaking before the work is authorized. It is not a written policy but he claimed it was Board policy. He could not say when it was first implemented.

39 With respect to removal of the tenant's belongings, he had no conversations with either the tenant or the owner.

40 With respect to the occupancy permit, he learned through Glover that the work had been completed.

41 In September 2008 he received Novatech's invoice for the removal and storage and simply mailed them out to Demetriou. He paid it without challenge. He acknowledged he had no idea what was removed; what was stored; where it was stored; nor what happened to the stuff at the end of the day. No inventory had been taken.

DEREK FINCH

42 Finch is with Novatech and he met with Glover on January 9, 2008. The initial plan was to deal with the emergency. He found the basement bathroom in very bad shape. The toilet was broken; the bathtub was damaged; the tub surround melted; smoke damage to the sink. In his view, nothing was salvageable and all had to be replaced. He came to the same conclusion with respect to the stove and refrigerator.

43 He told Glover that the contents had to be removed and by February 4, 2008 they still had not been removed. He was then told to pack, remove, and store the contents. It took 4 packers and 2 days to accomplish this. No inventory was taken as they were not instructed to do so. The lock was changed on February 4, 2008. About 8 months later, the contents were disposed of in landfill without notice to anyone.

44 On cross examination he not only acknowledged the contents were not salvageable but stated that Glover knew that. He went on to state that if removed it would have taken 3-4 days to do so.

45 Once the contents were removed, he went in to estimate. The estimate after receipt of the engineer's report on February 29, 2008. It usually takes a half day to estimate but it was delayed for weeks due to the volume of work. He gave his estimate on March 13, 2008.

SHELLY GLOVER

46 Shelly Glover is an adjuster with Cunningham Lindsay and has 20 years' experience. She represents the insurer. In her view, Mr. Duncan represents the CCC's interests.

47 In her view that it could take six to nine months to complete the work.

48 She got advice that the Corporation had the right to pack up the tenant's belongings but first notifying the tenant.

49 She got 2 estimates for the repair job and ultimately hired Lebrun after getting them to revise their initial quote.

GUY THERIEN

50 Therien is a subcontractor who worked for Lebrun which completed the repair work.

51 It took two and a half months with no delays to do the work without delays. There was about \$100,000.00 worth of work to be done.

PART 5
THE LAW, FINDINGS
OF FACT and ANALYSIS

Does a Condominium Corporation have any obligation in the first instance to repair a unit owner's unit in the event of damage caused to it by fire?

Repair after damage

89.(1) Subject to sections 91 and 123, the corporation shall repair the units and common elements after damage. 1998, c. 19, s. 89(1).

Extent of obligation

- (2) The obligation to repair after damage includes the obligation to repair and replace after damage or failure but, subject to subsection (5), does not include the obligation to repair after damage improvements made to a unit. 1998, c. 19, s. 89(2).

Determination of improvements

- (3) For the purpose of this section, the question of what constitutes an improvement to a unit shall be determined by reference to a standard unit for the class of unit to which the unit belongs. 1998, c. 19, s. 89(3).

Standard unit

- (4) A standard unit for the class of unit to which the unit belongs shall be,
(a) the standard unit described in a by-law made under clause 56(1)(h), if the board has made a by-law under that clause;
(b) the standard unit described in the schedule mentioned in clause 43(5)(h), if the board has not made a by-law under clause 56(1)(h). 1998, c. 19, s. 89(4).

Property insurance

99.(1) The corporation shall obtain and maintain insurance, on its own behalf and on behalf of the owners, for damage to the units and common elements that is caused by major perils or the other perils that the declaration or the by-laws specify. 1998, c. 19, s. 99(1).

Definition

- (2) In subsection (1),

"major perils" means the perils of fire, lightning, smoke, windstorm, hail, explosion, water escape, strikes, riots or civil commotion, impact by aircraft or vehicles, vandalism or malicious acts. 1998, c. 19, s. 99(2).

Exclusion ineffective

(3) An exclusion in the insurance required by this section is not effective with respect to damage resulting from faulty or improper material, workmanship or design that would be insured, but for the exclusion. 1998, c. 19, s. 99(3).

Improvements not included

(4) The obligation to insure under subsection (1) does not include insurance for damage to improvements made to a unit. 1998, c. 19, s. 99(4).

Determination of improvements

(5) For the purpose of this section, the question of what constitutes an improvement to a unit shall be determined by reference to a standard unit for the class of unit to which the unit belongs. 1998, c. 19, s. 99(5).

Standard unit

- (6) A standard unit for the class of unit to which the unit belongs shall be,
(a) the standard unit described in a by-law made under clause 56(1)(h), if the board has made a by-law under that clause;
(b) the standard unit described in the schedule mentioned in clause 43(5)(h), if the board has not made a by-law under clause 56(1)(h). 1998, c. 19, s. 99(6).

Amount of recovery

(7) Subject to a reasonable deductible, the insurance required under this section shall cover the replacement cost of the property damaged by the perils to which the insurance applies. 1998, c. 19, s. 99(7).

Breach of policy

(8) Despite anything in an insurance policy issued under this section, no act of any person shall be deemed to be a breach of the conditions of the policy if the act is prejudicial to the interests of the corporation or the owners. 1998, c. 19, s. 99(8).

Termination

(9) An insurance policy issued under this section shall be deemed to include a clause that the insurer shall not terminate the insurance contract unless the insurer gives the corporation and the insurance trustee, if any, at least 60 days notice by registered mail. 1998, c. 19, s. 99(9).

52 The plain meaning of section 89 dictates that a Condominium Corporation has a clear duty to its unit owners to repair a damaged unit to its standard unit type when first built. It excludes an obligation to repair improvements to the unit done by an owner.

53 The plain meaning of section 99 obliges the Condominium Corporation to maintain coverage for damage to the units caused by major perils which includes fire and to indemnify the owner up to replacement value. It specifically precludes indemnification for improvements.

54 Section 5 of the Condominium Act, states that its members are the owners.

55 As such, they are entitled to the benefits of Condominium ownership. Those benefits include the right to seek indemnity on the master insurance policy held by the Condominium Corporation.

56 CCC is like all condominiums run by a Board of Directors who are responsible to carry out the obligations of the Condominium. The Board speaks for the Condominium at large as well as the individual owners who make up its membership. It is implicit that it is obliged to protect all of these interests and balance them when necessary.

57 CCC has chosen to have the day to day management run by its agent, in this case, Deer Park Management. Accordingly, it has empowered its agent to manage its obligations that call for management such as supervising the progress of the unit repair work.

58 It is clear to me that in the circumstances of this case CCC owes Demetriou the obligation to protect his interests. Those interests include ensuring that his unit is repaired following a major peril.

If it does, what is the nature of that obligation?

59 The nature of the obligation is to act in good faith. In this case, that means to act expeditiously in ensuring the unit is repaired in a timely manner.

60 If there was no such duty, it would effectively render the duty worthless to whom it is owed thereby negating the duty completely.

61 How do you measure whether the duty to repair is being carried out in a timely manner? Quite simply, you look to industry standards and what is acceptable in the circumstances of each case.

62 In this regard, I am mindful of, prefer and categorically accept the evidence presented by Peter Rygus in this regard. He made it quite clear that the entire process should have taken at the most some 4 months. His evidence if it indeed needs corroboration was corroborated by that of Guy Therien who said that the work itself took 2 months to complete; and by Derek Finch who said it would take a half day to estimate, and three to four days to remove the belongings given they were not salvageable as testified to by him.

63 Allowing for the other matters to be accomplished, viz, the engineer's report, obtaining quotes on the take-offs, obtaining the building permit and lastly the occupancy permit, it is easy to see that the 4 months Peter Rygus opined it would take is corroborated by the Defendants' own witnesses.

If an obligation does exist, has that obligation been fulfilled on the facts of this case?

64 On the facts of this case, it took the better part of 9 months to complete all of the necessary steps to make the unit habitable again. The fire occurred on January 7, 2008. I find that Demetriou only became aware there was an occupancy permit in place around the first week of October 2008.

65 So what caused the delay?

66 The delay was not caused by any act or omission of Demetriou. The delay was caused by the following acts or omissions of CCC, its management company and its insurer in attending to its obligations owed to Demetriou in the following respects:

- a) The failure to remove and dispose of the tenant's property the bulk of which was not salvageable and wrongly went into storage;
- b) The failure of the property manager to push the insurer to complete the work in a timely manner. In this regard, he took a very laissez faire approach to its obligation to the unit owner by effectively doing nothing and leaving it all to the insurer. He simply washed his hands of the whole matter. As the Board's agent, the Board effectively is responsible for his conduct. He failed to recognize that the insurer was putting its own interests and those of the insured first but not that of the unit owner, who was entitled to indemnification;
- c) The insistence by the property manager of getting Demetriou and/or the tenant to remove the tenant's belongings when the Board had the authority to do so whether there was cooperation forthcoming or not. Section 19 of the Condominium Act states: "On giving reasonable notice, the corporation or a person authorized by the corporation may enter a unit or a part of the common elements of which an owner has exclusive use at any reasonable time to perform the objects and duties of the corporation or to exercise the powers of the corporation." The Board when it became obvious that there were delays in the removal of the tenant's belongings ultimately took steps to do so but by then had failed to act in a timely manner thereby causing excessive delay;
- d) The insistence by the Board to obtain a written acknowledgment that Demetriou was liable to pay the deductible. Simply put, such an acknowledgment was not necessary at all. The Act obliges the unit owner to pay the deductible and in any event, if not paid is subject to a lien. The Board waited until April 17, 2008 to get the acknowledgement and the work did not start until after then;
- e) The conduct of the insurer in delaying matters by not getting quotes in a timely manner and then asking one of the contractors quoting to revise its quote; and
- f) Once the work was effectively completed, the failure to follow up with correcting some minor deficiencies coupled with the failure to advise Demetriou that an occupancy permit had been obtained long before he actually found out using his own resources.

67 In the result, I find that the obligation cited above has not been fulfilled.

If it has not been fulfilled, are there any damages that flow from the breach and if so, how do you quantify those damages?

68 Demetriou has made a claim for lost rent, a claim for the cost of replacing the toilet, bathtub and sink, and the return of the amount paid for removal and storage of the tenant's property.

PART 6 CONCLUSIONS

69 Given my conclusion that there was unnecessary delay for completion of the project, it stands to reason that in consequence of the delay he has suffered loss of rental income for a period of 5 months at the monthly rate of \$1300.00 for a total of \$\$6500.00. Were it not for the delay, the loss would not have been incurred. No evidence to the contrary was proffered.

70 The Plaintiff is not entitled to damages for the bathroom fixtures or the kitchen appliances. With respect to the bathroom fixtures, these were not part of the original standard unit and therefore are not the Defendant's responsibility. In any event, as for the quantum of those damages, I did not have before me sufficient evidence to properly assess those damages. My only comment is that they were at least 20 years old, there was no evidence as to their condition at the time of the fire and they would have little or nominal value on an actual value basis. The same is true of the appliances.

71 The Plaintiff is entitled to the return of that portion of the charges relating to other than the removal and disposal costs for the tenant's property. In other words, since the property should not have been stored, he should only be liable to the reasonable cost of removal. From the evidence given, I can determine a reasonable cost. No evidence was presented as to the cost of dumping them. The evidence as to removal showed that it would likely take about 18 to 20 man hours to remove and dispose of the property into a dumpster. I would allocate a reasonable hourly rate for unskilled labour to perform this task at \$20.00 per hour. The total man hour cost would then come to \$400.00. I would then add on another \$600.00 for trucking and dumping fees, which would come to a total of \$1000.00. Accordingly, the Plaintiff should have judgment on this head of damages for the sum of \$6525.84.

72 The Plaintiff is not entitled to the return of the \$2500.00 paid for the Defendant's deductible.

PART 7
DISPOSITION

73 Accordingly, the Plaintiff shall have judgment against the Defendant for the sum of \$13,025.84 together with pre-judgment interest from November 3, 2008.

74 The Plaintiff shall also be entitled to his costs. If the amount cannot be agreed, then I may be spoken to.

L. GILBERT DEPUTY J.

cp/e/qllxr/qlvxw