

Case Name:

**Dunn v. Condominium Plan No. 89PA14638**

Between

Frank Dunn, appellant, and  
The Owners: Condominium Plan No. 89PA14638,  
respondent

[2003] S.J. No. 76

2003 SKQB 53

Q.B. No. 452 of 2002 J.C.P.A.

**Saskatchewan Court of Queen's Bench  
Judicial Centre of Prince Albert  
Rothery J.**

January 31, 2003.  
(11 paras.)

**Counsel:**

C.D. Neely, for the appellant.  
N.C. Raas, for the respondent.

---

**JUDGMENT**

¶ 1 **ROTHERY J.**— The appellant, Frank Dunn, appeals the judgment against him awarded by the learned provincial court judge under the provisions of s. 99 of The Condominium Property Act, 1993, S.S. 1993, c.C-26.1. The appellant submits that the learned trial judge erred in law in finding that the board of directors of the respondent condominium corporation had complied with the notice of penalty provision required by the corporation's Bylaw 42(e). Furthermore, the learned trial judge erred in concluding the board's decision to impose a penalty was unanimous as required by Bylaw 42(d).

¶ 2 The appellant purchased a condominium unit, and proceeded to make certain additions and alterations to the common property of the owners. Dunn installed wiring and speakers in the soffit above his deck, installed a natural gas line for his barbeque, and installed a fireplace in his unit with a chimney through the roof. Because he did not receive the prior written consent of the corporation to make these changes, Dunn breached Bylaw 3(d), (e) and (f). The trial judge concluded Dunn was in violation of the Bylaws and the corporation was entitled to impose a penalty on him for these violations. The trial judge awarded judgment for the respondent in the sum of \$200 for each of the three violations, totalling \$600 plus \$60 for costs.

¶ 3 The issue is whether the respondent was permitted to commence an action against the appellant. On the plain and ordinary reading of the legislation and the respondent's bylaws, I find that it was not entitled to do so.

¶ 4 The relevant legislation for seeking judgment against a person who resides in a condominium unit for contravention of the corporation's bylaws is found in s. 99 of The Condominium Property Act, 1993, (the "Act") which states:

- (1) If an owner, tenant or other person who resides in or on a unit contravenes a bylaw of the corporation, the corporation may take proceedings pursuant to The Small Claims Act, 1997 to recover from the owner, tenant or other person or any combination of them a penalty of not more than \$200 with respect to that contravention.
- (2) In an action pursuant to subsection (1), the corporation must establish to the satisfaction of the judge of the Provincial Court of Saskatchewan who hears the matter that the bylaw:
  - (a) was properly enacted; and
  - (b) was contravened by the owner, tenant or other person residing in or on the unit.
- (3) On hearing the matter, the judge may:
  - (a) dismiss the action or give judgment against the defendant in the amount being sued for or any lesser amount that appears proper in the circumstances; and
  - (b) may make any award as to costs that is permitted by The Small Claims Act, 1997.
- (4) A corporation may not commence an action pursuant to this section unless it is authorized by bylaw to do so.
- (5) For the purposes of subsection (2), a copy of a bylaw that is certified by the Director as a true copy of the bylaw filed in accordance with this Act is, in the absence of evidence to the contrary, proof:
  - (a) of the contents of the bylaw; and
  - (b) that the bylaw was properly enacted.
- (6) The commencement of an action against a person pursuant to this section does not limit or derogate from a remedy that an owner or the corporation may have against that person.

¶ 5 The sections of the respondent's bylaws applicable to this matter are Bylaws 42, 43, and 44:

42. Any owner who is in violation or default under these bylaws or any rules or regulation established pursuant to these bylaws, shall be liable to a penalty not exceeding \$1,000.00 for each day the violation or default exists, subject to the following:

- (a) the Board shall be (sic) ordinary resolution determine if an owner has violated or defaulted in compliance with the bylaws or any rules or regulations established pursuant to these bylaws;
- (b) the Board shall give notice to the owner describing the nature of the violation or default and requiring that such violation or default not be repeated or that such violation or default be remedied within 30 days of delivery of such notice;
- (c) on receipt of such notice, an owner may within 30 days make written or oral submission to the Board concerning such violation or default. The Board may as a result of such submission, by ordinary resolution, cancel or amend its determination of violation or default;
- (d) in the event that the violation or default is not remedied within 30 days of the delivery of the notice, on unanimous resolution of the Board, a penalty of \$200.00 shall be levied for the first violation or default, and if within 90 days of the delivery of the aforesaid notice, there is a second violation or default then on unanimous resolution of the Board an additional penalty of \$500.00 shall be levied, and if within 90 days of the delivery of the aforesaid notice further violation(s) or default(s) beyond the second violation or default occur, then on unanimous resolution of the Board, a penalty of an additional \$1,000.00 for each such subsequent violation or default shall be levied against the subject condominium unit owner and subject condominium unit; and
- (e) such penalty shall not come into effect until written notice of such penalty is delivered to the owner.

43. Any owner who has been penalized by a unanimous resolution of the Board, may appeal the Board's finding of default or violation or the amount of penalty to a properly convened meeting of the corporation subject to the following:

- (a) the penalized owner must give written notice of his intention to appeal to the Board within 30 days of delivery of the notice of penalty;
- (b) until such time as the appeal is determined, all penalties are suspended;
- (c) upon receipt of such notice, the Board shall place the matter on the agenda for the next properly convened meeting of the

corporation;

- (d) the owners on the ordinary resolution shall dismiss or allow the penalized owner's appeal and if allowed in whole or in part, either extinguish or decrease the penalty imposed by the Board;
- (e) the decision of the corporation shall be final.

44. Any penalty imposed on an owner shall be payable forthwith and in default of such payment, such penalty shall be charged to such owner for the month next following the date of the notice of penalty and shall become due and payable on the date of payment of such monthly assessment and shall bear interest at the rate of 18% per annum until paid.

¶ 6 The trial judge found that the board of directors notified Dunn of the violations as required by Bylaw 42(b). The trial judge found that Dunn did not remedy the violation within 30 days of the delivery of the notice. Therefore, the board of directors, on unanimous resolution, was entitled to levy a \$200 penalty for each of the three violations, as permitted by Bylaw 42(d).

¶ 7 The only notice of penalty received by Dunn in accordance with Bylaw 42(e) was the three statements of claim commenced under s. 99(1) of the Act. The trial judge ruled that service of the statements of claim constituted written notice of penalty, as contemplated by Bylaw 42(e). It was up to Dunn to appeal the decision to the owners of the corporation within 30 days of service of the statement of claim.

¶ 8 Dunn did not appeal to the owners of the corporation. His position at trial, and his counsel's position on this appeal, is that the statement of claim is not notice of penalty, and this action is improperly before the courts.

¶ 9 The appellant is correct in his position. The corporation is entitled to commence an action under s. 99(1) of the Act once it is authorized by bylaw to do so, as required by s. 99(4) of the Act. The respondent's bylaws require that a notice of penalty be delivered to the defaulting owner, and that the owner be provided 30 days from the delivery of the notice of penalty to give written notice of his intention to appeal to the board. Until that 30 day period has lapsed, the corporation is barred by its own bylaws from commencing an action against the defaulting owner. The service of a statement of claim cannot constitute notice of penalty because the corporation has no entitlement to bring the action, and serve the statement of claim, until 30 days after the delivery of the notice to the owner. The notice of penalty and statement of claim cannot, on the clear reading of the corporation's own bylaws, be one and the same.

¶ 10 Furthermore, it is stated in the corporation's bylaws that an appeal procedure is permitted. That procedure must be concluded, either by the effluxion of 30 days or the meeting and decision of the corporation, prior to the corporation being authorized to commence an action under s. 99(1) of the Act.

¶ 11 Therefore, the appeal is allowed. The judgment awarded by the learned trial judge is set aside. Because of my conclusion, it is unnecessary for me to deal with the second ground of appeal. No costs.

ROTHERY J.

QL UPDATE: 20030210  
cp/e/nc/qw/qlebh