CITATION: Metropolitan Toronto Condominium Corporation No. 673 v. St. George Property Management Inc., 2016 ONSC 1148
COURT FILE NO.: CV-14-516468
DATE: 20160216

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 673	)	*Matthew Morden* for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
ST. GEORGE PROPERTY MANAGEMENT INC.	)	*Rovena Hajdëri* for the Defendant
	)	
Defendant	)	
	)	
	)	**HEARD**: February 3, 2016

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] The Defendant, St. George Property Management Inc. ("the Property Manager"), was the property manager for the Plaintiff, Metropolitan Condominium Corporation No. 673 ("the Condominium Corporation"), and one of its responsibilities for the Condominium Corporation was issuing status certificates to purchasers of units.

[2] Under the Condominium Management Agreement, the Property Manager agreed that if a status certificate contained an error, then it would be liable for any costs incurred as a result of the error, and the Property Manager also agreed to hold the Condominium Corporation harmless from any claim or action.

[3] In this action, which was originally a proceeding by application, the Condominium Corporation sues for professional negligence, breach of contract, and to enforce the indemnity clause in the Condominium Management Agreement. The Condominium Corporation alleges that the Property Manager issued an incorrect status certificate to 673830 Ontario Limited ("the Unit 13 Purchaser") with consequent damages and loss to the Condominium Corporation.

[4] The Condominium Corporation now moves for a summary judgment against the Property Manager for $97,182.68 plus prejudgment interest.

[5] For the reasons that follow, I grant judgment to the Condominium Corporation as requested.

B. FACTUAL AND PROCEDURAL BACKGROUND

1. The Parties and the Condominium Management Agreement

[6] On June 1985, the Condominium Corporation was registered pursuant to the then *Condominium Act*. The condominium is comprised of three one-storey, flat-roof buildings, containing 56 commercial units.

[7] The Condominium Corporation is managed by a three-member Board of Directors along with a property manager, which has changed from time to time. In August 2006, the Condominium Corporation hired the Property Manager.

[8] Robert St. George, who has the designation of Registered Condominium Manager, is the President of the Property Manager, which provides its services to several different condominium corporations. Mr. St. George assigned Sid Moshenberg the task of managing the Condominium Corporation.

[9] In August 2006, the Condominium Corporation and the Property Manager signed a Condominium Management Agreement dated August 1, 2006. For present purposes, the relevant provisions of the Agreement are; (a) Article IV (Management Services); (b) Article V (G) (Status Certificates); (c) Article XII (Indemnification of Corporation), which are set out below:

> ARTICLE IV – MANAGEMENT SERVICES
>
> 1. The Manager represents that it shall utilize its experience, best judgment and to fully co-operate with the Board in order to carry out the management, supervision, control and administration of the property. …. The Manager shall perform its duties in accordance with the requirements of the Act, the Declaration, By-laws and Rules of the Corporation specifically, and, in general, consistent with federal, provincial and municipal laws and regulations as they pertain to the operation of the Corporation and of the Property.
>
> 2. Without limiting the generality of paragraph 1 of this Article, the Manager shall perform the following duties: ….
>
> (B) ANNUAL BUDGET
>
> (i) To prepare and present to the Board at least two (2) months before the commencement of each fiscal year during the term of this Agreement an estimated budge in writing for the following year and for the approval of the Board and to consult with the Board whenever it appears desirable or necessary to revise the Owner's contributions to the common expenses.
>
> (ii) The Manager shall prepare annually and for approval of the Board a reserve fund budget statement based on the approved Reserve Fund Study as prescribed in Sections 93, 94 & 95 of the Act.
>
> (G) STATUS CERTIFICATES
>
> (i) To prepare for execution by the appointed officer(s) of the Corporation or, where an appropriate resolution of the Board has been made, by the Manager, under corporate seal, Status Certificates in the form prescribed by the Regulation pursuant to the Act and to issue and provide Status Certificates together with the statements and information

> required pursuant to the Act to any person or persons entitled thereto pursuant to the Act, within the time permitted for the delivery of such certificates, statements and information prescribed in the Act.
>
> ...
>
> (iii) The Manager is responsible for the accuracy and completeness of all information contained in the Status Certificate and shall be liable for any costs incurred by the Corporation as a result of any errors by the Manager in its preparation; however the Manager shall not be liable for any information within the knowledge of the Board but not communicated to the Manager and which should be included in the Status Certificate.
>
> ...
>
> ARTICLE XII – INDEMNIFICATION OF CORPORATION
>
> The Manager shall, during and after the duration of this Agreement, indemnify and save the Corporation completely free and harmless from any and all damages or injuries to person or property, or claims, or actions by reason of any cause whatsoever if the Manager failed to carry out the provisions of this Agreement or if caused as a result of the negligence of the Manager or its employees or if caused as a result of the fraud or willful misconduct of the Manager or its employees.

2. The Knowledge of the Parties before the Issuance of the Status Certificate

[10] On October 28, 2010, the City of Toronto registered a Plan of Expropriation against the Condominium Corporation's title to its property. The expropriation was a partial taking of land for a Toronto Transit Commission ("TTC") project.

[11] Under the *Condominium Act* to ensure that there are adequate funds in a condominium's reserve fund to pay for anticipated major repairs, the directors of the condominium are obliged to periodically obtain a Reserve Fund Study and to implement a plan to fund the reserve fund. In this regard, the Condominium Corporation is obliged to complete a form is called a Form 15, Notice of Future Funding, and on December 15, 2010, the Board signed a Form 15. Their Funding Plan was based upon a summary of the Reserve Fund Study and a Cash Flow Table. The Board consulted with Mr. Moshenberg and Mr. St. George before implementing the Funding Plan.

[12] On May 12, 2011, the Condominium Corporation held its Annual General Meeting. Mr. Moshenberg was in attendance. At the meeting, the Board discussed its expectation that the Condominium Corporation would shortly receive a partial payment from the City of Toronto for the TTC expropriation and the Board discussed the prospect of using the expropriation funds to pay for an urgently needed roof replacement for the Condominium Corporation's three buildings.

[13] On August 10, 2011, the Condominium Corporation received $745,232 from the City of Toronto for the partial taking. The funds were deposited into the Condominium Corporation's Reserve Account in anticipation of using it to pay for the roof replacement.

[14] On August 23, 2011, the Board met, and, once again, Mr. Moshenberg was in attendance. At the meeting, the Board resolved that the TTC funds would be deposited to the Condominium Corporation's Reserve Fund and the Board continued its discussions about how to use the funds. Around this time, one of the issues being considered by the Board was the increasing occurrence of roof leaks and repairs. Mr. Moshenberg was aware of the state of disrepair of the roof because

he was responsible for retaining the trades that undertook the repairs. After consulting with Mr. Moshenberg, the Board asked him to obtain the report of an engineer, Peter Rohman Associates, about replacing the roof.

[15] Further, the Board directed Mr. Moshenberg to draft a newsletter to the unit owners for. On August 25, 2011, Mr. Moshenberg sent a copy of the draft newsletter to Howard Sheldon, the President of the Condominium Corporation. An exchange of emails followed to revise the newsletter and, once it was revised, it was distributed to unit owners on August 31, 2011. The letter discussed the imminence of the roof replacement and that the repairs had an estimated cost of about $1.2 million. The letter mentioned the prospect of reducing future common element fees.

[16] Into the late summer and early fall of 2011, Mr. Moshenberg was aware that there were not sufficient funds in the Reserve Fund to pay for the estimated costs of the roof replacement, which had increased to $1.3 million.

[17] By letter of September 8, 2011, Peter Rohman Associates provided its report. The report was addressed to Mr. Moshenberg. Among other things, the report concluded that: "The overall condition of the existing roofing is in poor to failed condition with significant discrepancies including deterioration of the roof surfacing and membrane, numerous repairs to ridges and splits."

[18] On September 26, 2011, the Unit 13 Purchaser made an offer to purchase Unit 13 conditional on receiving and approving a status certificate.

3. The Issuance of the Status Certificate

[19] On October 5, 2011, the Property Manager issued the status certificate to the Unit 13 Purchaser. The status certificate was prepared by Cheryl Moed, an employee of the Property Manager, and it was signed by Mr. St. George.

[20] The status certificate stated, among other things, that:

> Budget
>
> 12. The Corporation has no knowledge of any circumstances that may result in an increase in the common expenses for the unit, except due to the increased cost of utilities.
>
> Reserve Fund
>
> 13. The Corporation's reserve fund amounts to $1,247,133.05 as of August 31, 2011.
>
> 14. The most recent reserve fund study conducted by the Board was a study update with a site visit on November 4, 2010 and prepared by GENIVAR Consultants Limited Partnership.
>
> 15. The balance of the reserve fund at the beginning of the current fiscal year was $489,659. In accordance with the budget of the Corporation for the current fiscal year, the annual contribution to be made to the reserve fund in the current fiscal year is $99,200 and the anticipated expenditure to be made from the reserve fund in the current fiscal year amount is $70,943. The Board anticipates that the reserve fund will be adequate in the current fiscal year for the expected costs of major repair and replacement of the common elements and assets of the Corporation.

[21] It may be noted that the status certificate makes no mention of the expropriation by the

City, the monies received from the expropriation, the plan to replace the roof, or the anticipated costs of the roof replacement.

[22] After receiving the status certificate, the Unit 13 Purchaser waived the condition, firming up the agreement of purchase and sale, and it took title to Unit 13 on November 10, 2011.

4. The Special Assessments for the Roof Repair

[23] While the transaction between the Condominium Corporation and the Unit 13 Purchaser was proceeding, the Board was considering the report about repairing the roof. The Board consulted with Mr. Moshenberg and Mr. St. George. The Condominium Corporation decided that it would proceed with a roof replacement project.

[24] The Board anticipated that the TTC funds would be used for the roof replacement. Throughout the fall of 2011, the Board believed that the TTC expropriation funds would be sufficient to eliminate the need for an increase to common elements fees, but the Board and the Property Manager did not know for certain.

[25] On November 29, 2011, the Board issued a special assessment to unit owners in the amount of $1.0 million based on the estimated total cost of the roof replacement at that time. The special assessment provided for payment of $750,000.00 by January 1, 2012. This installment was to be funded by the TTC funds. The balance was to be paid by July 1, 2012 from either a further TTC payment or, if not, by contribution by the unit owners.

[26] The November 2011 special assessment, however, was cancelled when the Board determined that the price of the roof replacement price could be lowered.

[27] By letter dated January 20, 2012, Genivar, an engineering firm, delivered an updated Reserve Fund Study to Mr. Moshenberg. The study included a new Cash Flow Table which still called for, among other things, increases to common element expenses in the amount of 24% per year. This new Cash Flow Table included anticipated TTC contributions.

[28] On February 28, 2012, the Board called a Special Meeting of the unit owners and explained that it intended to use the TTC funds for the roof replacement to avoid an increase in common element expenses. However, at this Special Meeting, certain unit owners took the position that they wished to obtain their proportionate share of the TTC funds directly. The majority of unit owners, however, agreed that the TTC funds be used to pay for the repairs.

[29] On June 28, 2012, the Board was getting ready to enter into a roof replacement contract and it levied a special assessment in the exact TTC fund amount of $745,232.41. This special assessment formalized the use of the already received TTC funds.

5. The Dispute between the Condominium Corporation and the Unit 13 Purchaser

[30] On November 26, 2012, the Unit 13 Purchaser served an application seeking an order that it was entitled to its share of the TTC funds and for a declaration that it was not liable to pay the special assessment because of the misrepresentations contained in the status certificate. The Unit 13 Purchaser's Claim for Relief stated:

> 1. The Applicant, 673830 Ontario Limited, makes application for:
>
> (a) a declaration that the special assessment levied by the respondent, Metropolitan

> Toronto Condominium Corporation No. 673, dated June 29, 2012 (the "Special Assessment"), does not apply to the applicant's condominium unit ...
>
> (b) a declaration that the applicant was and is entitled to receive its proportionate share of any and all expropriation proceeds attributable to Unit 13 in respect of the City of Toronto's expropriation of a part of the common elements ...
>
> (c) a declaration that it was improper for the respondent condominium corporation to credit every other unit with its proportionate share of reserve funds and not credit the applicant with it proportionate share;
>
> ....
>
> (h) a declaration that the conduct of the respondent was oppressive contrary to s. 135 of the *Condominium Act, 1998;*
>
> (i) an Order that the respondents shall pay to the applicants the sum of $25,000 in exemplary, aggravated and punitive damages; ....

[31] The Condominium Corporation resisted the Unit 13 Purchaser's application. It did so without the involvement of the Property Manager, and in those proceedings the Condominium Corporation's position was that there was nothing wrong with the status certificate that had been issued on its behalf by the Property Manager.

[32] By Reasons for Judgment dated August 16, 2013, Justice Lederman dismissed the Unit 13 Purchaser's application. See *673830 Ontario Limited v. MTCC 673*, 2013 ONSC 5218. Justice Lederman awarded costs of $15,000 to the Condominium Corporation. See *673830 Ontario Limited v. MTCC 673*, 2013 ONSC 6267.

[33] The Unit 13 Purchaser appealed to the Divisional Court.

[34] By reasons dated March 18, 2014, the Divisional Court's granted the appeal. Justice Nordheimer wrote the reasons for the Court. See *673830 Ontario Limited v. M.T.C.C. No. 673*, 2014 ONSC 1720 (Div. Ct.) (unreported).

[35] Justice Nordheimer concluded that the status certificate did not make full and complete disclosure of the state of the Condominium Corporation's finances as it should have and that the status certificate was not accurate. Justice Nordheimer stated at paras. 15, 18 and 19 of his Reasons for Decision:

> 15. The contents of the status certificate are prescribed by statute. The form of status certificate is required to be in the form set out in s. 18 of the *Condominium Act, 1998*. Paragraph 12 of that form provides:
>
> > The Corporation has no knowledge of any circumstances that may result in an increase in the common expenses for the unit. [*If applicable add*: except (*give particulars of any potential increase, including any assessment levied by the board against the unit and the reason for it*)]
>
> ....
>
> 18. The fact is that the status certificate in this case did not make full and complete disclosure of the state of the condominium corporation's finances. It did not reveal that the condominium corporation was engaged in a planned project to replace the roofs of the condominium buildings and it did not reveal the potential costs of the replacement of the roofs. The status certificate also did not reveal that there was an expropriation under way by the City of Toronto of a portion of the

> common elements of the condominium and that the proceeds of that expropriation were going to be used to fund the costs of the roof replacement. I should add that it was not clear at the time that the status certificate was issued that the expropriation proceeds would be sufficient to cover all of the costs of the replacement of the roofs.
>
> 19. In my view, the status certificate ought to have contained information relating to the planning roof replacement and the expropriation in some fashion. The appellant was entitled to know that the current level of the reserve fund included the expropriation funds and it was entitled to know that the same portion of the reserved funds was committed to the costs of the replacement of the roofs. The appellant was also entitled to know that, while the condominium corporation was expecting to cover the full cost of the roof replacement through the expropriation funds (both the funds received and any additional funds expected to be received), the actual cost of the roof replacement was not then finalized. It remains the fact that, at the time that the status certificate was issued, there was a potential, despite the best efforts of the Board, that the common expenses might have to be increased to cover any additional costs over and above the total amount of the expropriation proceeds received.

[36] Having concluded that the status certificate did not comply with the requirements of the *Condominium Act, 1998*, Justice Nordheimer concluded, however, that the status certificate was binding on the Condominium Corporation with the result that the Condominium Corporation could not require that the Unit 13 Purchaser contribute to a special assessment for the roof repairs.

[37] That prohibition about a special assessment, however, did not entail that the Unit 13 Purchaser had any entitlement to a share of the proceeds from the expropriation or any claim for damages. Further, the Unit 13 Purchaser could not object to the Condominium Corporation adding the expropriation proceeds to the Reserve Fund for use for the roof replacement project.

[38] In the result, the Unit 13 Purchaser received costs of $15,000 for the appeal, and both parties were left to bear their own costs from the decision of Justice Lederman, which was reversed on appeal.

[39] From the perspective of the Condominium Corporation, it was required to pay the Unit 13 Purchaser $15,000 and it observed its own legal fees from its litigation with the Unit 13 Purchaser about the status certificate. In the aggregate these fees and expenses totalled $97,182.68.

[40] In this action, and most particularly in its motion for a summary judgment, the Condominium Corporation seeks to be indemnified in the amount of $97,182.68 plus prejudgment interest.

C. DISCUSSION AND ANALYSIS

1. Jurisdiction to Grant Summary Judgment

[41] Rule 20.04(2)(a) of the *Rules of Civil Procedure* provides that the court shall grant summary judgment if: "the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence."

[42] With amendments to Rule 20 introduced in 2010, the powers of the court to grant summary judgment have been enhanced. Rule 20.04(2.1) states:

> 20.04 (2.1) In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
>
> 1. Weighing the evidence.
>
> 2. Evaluating the credibility of a deponent.
>
> 3. Drawing any reasonable inference from the evidence.

[43] In *Hryniak v. Mauldin*, 2014 SCC 7, the Supreme Court of Canada held that on a motion for summary judgment under Rule 20, the court should first determine if there is a genuine issue requiring trial based only on the evidence in the motion record, without using the fact-finding powers enacted when Rule 20 was amended in 2010. The analysis of whether there is a genuine issue requiring a trial should be done by reviewing the factual record and granting a summary judgment if there is sufficient evidence to fairly and justly adjudicate the dispute and a summary judgment would be a timely, affordable and proportionate procedure.

[44] If, however, there appears to be a genuine issue requiring a trial, then the court should determine if the need for a trial can be avoided by using the powers under rules 20.04(2.1) and (2.2). As a matter of discretion, the motions judge may use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if their use will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

[45] *Hryniak v. Mauldin* encourages the use of a summary judgment motion to resolve cases in an expeditious manner provided that the motion can achieve a fair and just adjudication. Speaking for the Supreme Court of Canada, Justice Karakatsanis opened her judgment by stating:

> Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. ... Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.

[46] At para. 22 of her judgment in the companion case of *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, Justice Karakatsanis summarized the approach to determining when a summary judgment may or may not be granted; she stated:

> Summary judgment may not be granted under Rule 20 where there is a genuine issue requiring a trial. As outlined in the companion *Mauldin* appeal, the motion judge should ask whether the matter can be resolved in a fair and just manner on a summary judgment motion. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result. If there appears to be a genuine issue requiring a trial, based only on the record before her, the judge should then ask if the need for a trial can be avoided by using the new powers provided under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice.

2. **Is this Case an Appropriate Case for Summary Judgment?**

[47] In my opinion, the case at bar is an appropriate case for a summary judgment on the dispositive issue of whether or not as a matter of the law of contract, the Property Manager is liable to pay the Condominium Corporation $97,182.68 plus prejudgment interest, which is my conclusion.

[48] While there are genuine issues requiring a trial, those issues can fairly and justly be resolved on a summary judgment motion.

[49] Almost all of the facts in the case are admitted, uncontroverted, or incontrovertible and the few controversies, which focused on the extent of the Property Manager's knowledge, concerned the inferences to be drawn from those facts. A trial is not necessary to resolve any of these controversies.

[50] Because the action can be resolved as a matter of the law of contract, it is not necessary to consider the Condominium Corporation's alternative argument that the Property Manager was negligent and in breach of a duty of care owed to the Condominium Corporation, and I make no finding in this regard.

[51] Deciding the claim as a matter of contract law also obviates the need to consider the parties' arguments about *res judicata*, issue estoppel, and abuse of process. My determination of the facts for this summary judgment motion is based on the evidentiary record proffered for this action which was fully defended and fully argued by the Property Manager. I do not rely on any issue estoppels.

3. **The Breach of Contract Claim**

[52] Turning to the Condominium Corporation's breach of contract claim, a review of the evidentiary record in the case at bar presents a relatively straightforward breach of contract action.

[53] Coincidentally, and not as a matter of *res judicata* or issue estoppel, I make the same conclusions of law and fact that Justice Nordheimer made in the litigation between the Unit 13 Purchaser and the Condominium Corporation. They are amply supported by the evidence in the case at bar.

[54] Under the Condominium Management Agreement, the Property Manager undertook to prepare status certificates in the form prescribed by the Regulations. For the reasons expressed by Justice Nordheimer the status certificate delivered to the Unit 13 Purchaser was non-compliant with the Regulations.

[55] Under the Condominium Management Agreement, the Property Manager was "responsible for the accuracy and completeness of all information contained in the Status Certificate and shall be liable for any costs incurred by the Corporation as a result of any errors by the Manager in its preparation." Once again, coincidentally for the reasons expressed by Justice Nordheimer, the status certificate was not accurate and it was not complete.

[56] The costs incurred by the Condominium Corporation as a result of the non-compliant status certificate total $97,182.68.

[57] The Property Manager, however, points to the language of the Condominium

Management Agreement and relies on the words that state that it "shall not be liable for any information within the knowledge of the Board but not communicated to the Manager and which should be included in the Status Certificate." My finding, however, is that the evidence proves that there was no knowledge of the Board that was not communicated to the Property Manager. The Property Manager knew all it needed to know to prepare a compliant status certificate and failed to do so.

[58] Under Article XII (Indemnification of Corporation) of the Condominium Management Agreement, the Property Manager was obliged to "indemnify and save the Corporation completely free and harmless from any and all damages ... by reason of any cause whatsoever if the Manager failed to carry out the provisions of this Agreement ...".

[59] I find that the Property Manager failed to carry out its performance obligations with respect to the preparation of the status certificate for the Unit 13 Purchaser and that the Condominium Corporation was harmed to the extent of $97,182.68. The indemnification clause applies to the circumstances of this case.

[60] The Property Manager argues, however, that some of the legal expenses incurred by the Condominium Corporation are outside the indemnity clause and were incurred to defend the Unit 13 Purchaser's allegations that there was oppressive conduct entitling it to an oppression remedy and punitive damages.

[61] I disagree with this argument. The fallacy of it is that the Unit 13 Purchaser's allegations of oppression only arose because of the incompleteness of the status certificate.

[62] In my opinion, the Condominium Corporation has proved its breach of contract claim and there is no defence to it.

D. CONCLUSION

[63] Judgment accordingly.

[64] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the Condominium Corporation's submissions within 20 days of the release of these Reasons for Decision followed by the Property Manager's submissions within a further 20 days.

Perell, J.

Released: February 16, 2016

CITATION: Metropolitan Toronto Condominium Corporation No. 673 v. St. George Property Management Inc., 2016 ONSC 1148
COURT FILE NO.: CV-14-516468
DATE: 20160216

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 673

Plaintiff

– and –

ST. GEORGE PROPERTY MANAGEMENT INC.

Defendant

REASONS FOR DECISION

PERELL J.

Released: February 16, 2016

CITATION: Metropolitan Toronto Condominium Corporation No. 673 v. St. George Property Management Inc., 2016 ONSC 2156
COURT FILE NO.: CV-14-516468
DATE: 20160330

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 673 Plaintiff	*Matthew Morden* for the Plaintiff
– and –	
ST. GEORGE PROPERTY MANAGEMENT INC. Defendant	*Rovena Hajdëri* for the Defendant
	HEARD: In writing

PERELL, J.

REASONS FOR DECISION - COSTS

[1] To string the clichés, hindsight is 20:20 and, to make a long story short, had St. George Property Management Inc. ("the Property Manager") worn its mistake and taken its medicine, it would not have made a bad situation worse, and it would have saved itself from the following bitter pill of a costs award.

[2] In this action, which was originally a proceeding by application, Metropolitan Toronto Condominium Corporation No. 673 ("the Condominium Corporation"), sued the Property Manager for professional negligence, breach of contract, and to enforce the indemnity clause in the Condominium Management Agreement. I granted the Condominium Corporation a summary judgment for $97,182.68 plus prejudgment interest. See *Metropolitan Toronto Condominium Corporation No. 673 v. St. George Property Management Inc.*, 2016 ONSC 1148.

[3] The making the long story short part of this decision is that the Property Manager made a mistake when it issued a status certificate to the purchaser of Unit 13 (the "Unit 13 Purchaser"). The Unit 13 Purchaser tried to take advantage of the mistake, and litigation followed between the Condominium Corporation and the Unit 13 Purchaser. Justice Lederman dismissed the Unit 13 Purchaser's application. But, this decision was reversed by the Divisional Court; see *673830 Ontario Ltd. v. MTCC No. 673*, 2013 ONSC 6267 and *673830 Ontario Ltd. v. MTCC No. 673*, 2014 ONSC 1720 (Div. Ct.). The Divisional Court decision cost the Condominium Corporation $97,182.68 plus prejudgment interest, and it decided to sue the Property Manager because it had

made the mistake and it had promised to indemnify the Condominium Corporation for its mistake.

[4] The Condominium Corporation was successful in its lawsuit against the Property Manager, and it now seeks its costs. More particularly, it seeks full indemnity costs of $57,816 on the basis of the indemnity provision in the Condominium Management Agreement, or it seeks substantial indemnity costs of $47,683 on the basis that its success on the summary judgment motion ($97,182.68 plus prejudgment interest) exceeded a Rule 49 offer ($65,000) served on April 13, 2015, or it seeks partial indemnity costs of $38,073.

[5] The Condominium Corporation originally proceeded by application, but the Property Manager, rather than taking responsibility for its mistake and honouring its indemnity Agreement, resisted the application as being an abuse of process, as a matter of procedure, and as a matter of substance. It sought the dismissal of the application and it challenged the court's jurisdiction to deal with the matter by the procedure of an application, and in the alternative, it sought that the proceedings be converted into an action.

[6] I did not dismiss that action as an abuse of process (it wasn't), but I made that change of procedure, and I made the first order of business in the action to be a motion for summary judgment, which the Property Manager lost on its merits.

[7] The Property Manager argues that its success in having the application converted into an action deserves an offsetting costs order. That, however, does not work because its motion to convert the proceeding was not a genuine success, and I simply ordered costs in the cause.

[8] The action is now completely over, and the Condominium Corporation was the successful party. There is no reason not to apply the normal rule that costs follow the event. As for the scale, because of the indemnification provision in its Agreement, the Condominium Corporation is entitled to full indemnity of its reasonable costs.

[9] I emphasize the word reasonable because it is still the court that is awarding costs, and one of the guiding principles about awarding costs regardless of scale is that the costs be reasonable in the context of the particular case.

[10] In the immediate case, costs of $57,816 are excessive, but part of the excess is attributable to the fact that the Property Manager put up very stiff resistance and refused to concede that it was responsible for the mistake and in resolutely refusing to honour its agreement to indemnify. That said, $57,816 is too high and having regard to the usual factors that guide a court in the exercise of discretion with respect to costs, I award the Condominium Corporation $42,000, all inclusive.

[11] Order accordingly.

Perell, J.

Released: March 30, 2016

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ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 673

Plaintiff

– and –

ST. GEORGE PROPERTY MANAGEMENT INC.

Defendant

REASONS FOR DECISION – COSTS

PERELL J.

Released: March 30, 2016