

Rao v. Toronto Standard Condominium Corp. No. 1764, [2016] O.J. No. 3810

Ontario Judgments

Ontario Superior Court of Justice
Small Claims Court - Toronto, Ontario
J. Prattas Deputy J.
Heard: April 15, July 30, November
6, 2015; January 12, 2016; written
submissions, February 16, 2016.
Judgment: April 7, 2016.
Court File No. SC-12-15327-00

[2016] O.J. No. 3810

Between Jagat Rao, Plaintiff, and Toronto Standard Condominium Corporation No. 1764, Defendant

(55 paras.)

Counsel

George Brown, paralegal, agent for the plaintiff.

Alexandra Peng, Counsel for the defendant.

REASONS FOR JUDGMENT

J. PRATTAS DEPUTY J.

- 1 The claim arises from a water leak to the ceiling of a condo unit immediately below the unit owned by the plaintiff and raises the question as to who is responsible for the payment of the resulting damages.
- 2 The plaintiff originally claimed the amount of \$7,000 which was increased to \$9,516.01 at trial consisting of \$5,000 for general damages, and the balance for special damages related to the water leak, and already paid by the plaintiff, including \$1,217.77 for legal fees, \$2,464.65 for a lien and \$775.74 for the plumber.
- 3 The defendant denies liability and states that the plaintiff was responsible for the payment of all water leak related damages since he failed to properly maintain his unit. All amounts have been paid already to the defendant.
- 4 The parties provided written closing submissions which I received by February 18, 2016.

Background facts

- 5 The plaintiff Jagat Rao ("Rao") is the first owner of condominium Unit #602 ("602") located at 5 Mariner Terrace, Toronto, being part of a 41-storey building in downtown Toronto close to the Skydome (the "Property"). He moved into his unit in December 2005.

Craig Robson

6 602 is a two-bedroom condo with two full bathrooms, main and ensuite, each consisting of a shower stall and a bath tub with a shower. Unit #502 ("502") and Unit #702 ("702") immediately below and above 602, have the same configuration.

7 The defendant Toronto Standard Condominium Corporation No. 1764 (the "Condo Corp") is a non-profit corporation registered in 2006 pursuant to the *Condominium Act, 1998*, as amended, S.O. 1998 c. C19 (the "Act"). It is charged with the duty to control, manage and administer its assets, including the common elements of the Property, which it does through a property management company.

8 Rao is a writer and teacher of English who spends much time overseas usually from mid-September to about the end of May. For the last few years he has generally been at his condo only from June to September.

9 Sometime towards the end of August 2011 the owner of 502 reported water leaks to his ensuite shower ceiling.

10 Following an investigation (see below) the Condo Corp determined that the water escape was from 602, specifically from the ensuite shower stall (the "Ensuite Shower").

11 The plaintiff disputes such determination by the Condo Corp on several grounds:

- a) He did not use the Ensuite Shower at the time of and during the leak and only sporadically in the previous four years;
- b) The Property was about four and one-half years old at the time of the leak and there was no reason for such leakage to occur from his unit;
- c) Because of his extensive travels he had very limited use of his entire unit, including the showers generally and only for the months of June to September;
- d) When in Toronto, for about four years prior to the leak, he used the main shower of the unit and a couple of times the bathtub shower in the ensuite bathroom after he obtained permission from the property manager;
- e) He instructed any house sitter not to use the Ensuite Shower;
- f) Several other units, the garage, the gym and other facilities on the Property had experienced similar water leaks which would indicate faulty workmanship of the condominium common elements.

12 The Condo Corp repaired 502 and charged the plaintiff for such repairs, as well as the repairs to 602.

13 A lien in the amount of \$2,464.65 was registered against 602 on March 27, 2012.

14 On March 29, 2012, TD Canada Trust, the plaintiff's mortgagee, paid the total amount of the lien.

15 On April 10, 2012, plaintiff's agent forwarded a cheque for the lien in the amount of \$2,464.65. Counsel for the Condo Corp returned that cheque to the plaintiff since the amount had been paid previously by TD Canada Trust.

The investigation

16 The defendant called Mainline Plumbing Services Inc. ("Mainline" or the "plumber") to investigate the source of the leak. Mainline does the plumbing work for the Condo Corp on the Property.

17 Mainline's first visit was on August 31, 2011 when it inspected 502 and 602. The following comments were made on its work order #18418:

The ceiling of 502 shower stall has mould stains. Open the shower ceiling in 502 and found the drywall wet and water leaking off the shower trap of 602. Removed the fire stop & insulation from the cored hole and found more water above the rubber fire stop. Ran all the fixture[s] in 602 bathroom an[d] no leaking came from any plumbing. Left ceiling open to monitor for more leaking. Cleaned up drywall.

18 On September 9, 2011 Mainline made the following comments on its work order #18531:

- Apt 502 water leaking from ceiling of Ensuite shower stall.
- traced leak to 602, tested drain, fine, tested shower, fine, ran water onto wall of spout, leak began
- silicone around spout
 - * caulking at base of shower in very bad shape, informed resident to replace

[added in different writing]: owner responsible D-602

19 On September 16, 2011 on its work order #18632 Mainline set out the following:

Water leaking into shower ceiling

Arrived on site. Access 502 with security escort. Inspect situation. Access 602. Ran all fixtures in bathrooms. Unable to recreate leak. Cut hole in ceiling of 602 shower. Ran all fixtures in 702. Still unable to recreate leak. Did find 602 shower to be passing in the off position. Possibilities that drain is leaking as per management, replaced cartridge and they will monitor if water stops. Re-tape plastic to holes in ceiling. [emphasis added]

20 On October 17, 2011 on its work order #18909 Mainline set out the following:

- Apt 502 complaining of water still coming from their ceiling in the Ensuite shower stall
- checked 502 no water leaking at this point
- tested all fixtures in 602 Ensuite bathroom other than the shower stall, nothing leaking.

Please call back when leak is occurring

21 On November 29 and December 4, 2011, the Condo Corp had Taysham Home Renovation ("THR") repair the damages created by the plumbers in 502 (\$519.80) and 602 (\$649.75) for a total amount of \$1,169.55, which amount became part of the lien.

22 In their invoices THR noted the following:

502: we believe we have solved the unit owner leak problem and ready to carry out necessary repairs to the ceiling hole created by the plumber.

602: Management believe they have solved the unit owner water leak problem and we can close the holes created by the plumbers.

[emphasis added]

Analysis

23 The thrust of the defendant's position was expressed by its counsel who submitted (para. 21 of his submissions) that "the lack of silicone in the [Ensuite [S]hower was the cause of the damage", based on the Mainline investigations described above -- something which the plaintiff strongly refuted.

24 According to the defendant, since the plaintiff had a duty to maintain the silicone in and around his shower, he is therefore liable for all the damages resulting from the leak pursuant to his obligations under the Condominium Declaration, including section 9.1(e) which provides:

Each owner shall maintain his Unit and the Exclusive Use Common Elements associated with his Unit, at his own expense... [and] shall: (e) maintain and repair bathtub enclosures, piping seals and gaskets, tiles, shower stalls...

25 Were it clear cut that the source of the water leak emanated from 602, I would agree with the defendant's submissions that the plaintiff would be liable.

26 However, taking the totality of the evidence into consideration I am not persuaded on a balance of probabilities that the source of the leak was definitively determined to be from 602.

27 Nor am I satisfied that the defendant established that the leak was the result of any act or omission of the plaintiff or any failure of the plaintiff to maintain his unit.

28 Since the defendant took the position that the source of the leak was 602, it was incumbent upon the defendant to prove in an unambiguous and straightforward fashion the source of the leak and how it was stopped, something which the defendant failed to do.

29 Despite the various attendances by Mainline, there was never any final report produced detailing exactly the source of the leak and how or when it was determined or how and when it was stopped or repaired.

30 Understandably there were trials and errors during Mainline's investigations. But the defendant failed to produce any credible evidence or a reasonable explanation why the leak continued notwithstanding the silicone and caulking applications (as done and recommended by Mainline).

31 And most important of all, the defendant failed to reasonably explain -- other than that it did not believe Rao -- why the leak continued in the face of the plaintiff having stopped using the Ensuite Shower altogether, evidence which I accept on a balance of probabilities.

32 Other than for the above work orders from Mainline and subsequent invoices related to these work orders, no other invoices were tendered by the defendant to indicate what precise work was done to stop the leak.

33 On the September 9, 2011 work order Mainline states that the leak was coming from the spout, to which it applied silicone, which should have stopped it. Yet the leak continued in October, notwithstanding Mainline's silicone and the plaintiff's caulking.

34 The plaintiff states and I accept that he applied caulking around the Ensuite Shower stall sometime after September 9, 2011, confirmed in an email dated September 27, 2011 to the property manager. Despite this application the leak continued well into October 2011.

35 Based on the Mainline September 16, 2011 work order, it seems that the Condo Corp may have been prompting or presuming the source of the leak when Mainline states: "Possibilities that drain is leaking as per management" -- how did management determine this and without Mainline?

36 Similarly with the THR invoice relating to 602 where it is stated: "Management believe they have solved the unit owner water leak problem".

37 It is also interesting to note that for 502 THR states: "we believe we have solved the unit owner leak problem".

38 Given these two contradictory statements by THR ("Management believe..." and "we believe..."), who then, if anyone, really "solved" the water leak problem? Management or Mainline or THR or anyone? In my view the evidence presented by the defendant on this point was ambiguous at best.

39 THR failed to explain how they for 502 and management for 602 arrived at that determination and what steps, if any, were taken by them first to determine the leak and secondly to stop it. All that THR did was to repair the damages created by the plumbers in conducting their investigations -- no mention was made of any work being done by THR to determine or to stop the leak.

40 I also note with interest that even Mainline -- the Condo Corp's own plumber -- in their several attendances were unable to find any leaking emanating from 602 after running the fixtures. For example, though they found the 502 ceiling wet on August 31, 2011, after "running the plumbing equipment in 602 there was no leak". Again on September 16, 2011, Mainline "ran all fixtures in bathrooms. Unable to recreate leak". Even on October 17, 2011, Mainline stated that it "tested all fixtures in 602 Ensuite bathroom other than the shower stall, nothing leaking. Please call back when leak is occurring".

41 I also accept on a balance of probabilities the evidence of Bir Flora ("Flora") who has done plumbing, albeit without a license, and bathroom and kitchen renovations for about 20 years, that he visited 602 sometime during the period of the leaks. Unlike Mainline, Flora found that the grout, the silicone and the tiles in the stall were all fine, there were no cracks or gaps in the caulking and the tiles or any other indications that would suggest that the water could leak from the Ensuite Shower stall. As far as he was concerned the stall did not need any repairs or replacing of the tiles or the silicone or the caulking and in his view the water leak could not have emanated from that stall. I prefer his evidence over that of Mainline on this point.

42 There was also telling evidence, which I accept on a balance of probabilities, that several other units on the Property experienced similar leaks, as did the garage which remained closed for at least two months. According to Rao it is a well known fact that water leaking has been an issue in the Property. Even in the summer of 2014 there was water leaking into the gym.

43 I also accept the evidence of the plaintiff, who I found to be a credible witness, that he used the Ensuite Shower sparingly when he was in Toronto prior to the leak and that he stopped using it altogether once he was told about the leak -- he had other showers to use in his unit.

44 Considering all of the evidence in this case I am unable to conclude on a balance of probabilities that the leak started from the plaintiff's Ensuite Shower. The leak continued even after the plaintiff had stopped using the Ensuite Shower altogether after the discovery of the leak and it continued notwithstanding that Mainline had applied the silicone and the plaintiff the caulking on the recommendation of Mainline.

45 I therefore conclude that the plaintiff is not liable for the expenses that he was obligated to pay to the Condo Corp in relation to the leak (including the lien amount) and all amounts that he paid and expenses that he incurred in this regard should be paid back to him by the defendant.

Damages

46 At trial the plaintiff sought the amount of \$9,516.01 for damages. This included \$5,000 for general damages, about \$3,240.39 (there's a \$4 discrepancy) for special damages paid to the defendant related to the leak, which includes the lien amount of \$2,464.65 and the amount of \$775.74 to Mainline, and \$1,217.77 for legals that the plaintiff paid to his own legal representative regarding the lien issue.

47 Other than testifying that he paid the Mainline invoices after the lien was registered and the lien which was paid by the plaintiff's mortgagee, the plaintiff did not produce any documentary proof that he paid these amounts.

48 On the other hand the defendant did not dispute at trial that these amounts have not been paid or that they are still owed to it. I therefore conclude that they have been paid.

49 In assessing damages I would be prepared to award the plaintiff the amount of \$5,958.16 consisting of the following amounts to be paid by the defendant:

- a) The lien amount of \$2,464.65;
- b) The Mainline amount of \$775.74;
- c) The legals of \$1,217.77 for the improperly registered lien;
- d) The amount of \$1,500 for general damages for the general inconvenience of the open holes in his bathroom, for the length of time of the investigation, and for causing the plaintiff to delay his trip. Because of the position taken by the defendant regarding the leak, the plaintiff who is a professional writer and educator that travels out of the country had to delay his trip as he did not wish to leave the leak issue unresolved or any money outstanding before his departure.

Disposition

50 In the result there shall be judgment for the plaintiff against the defendant as follows:

- a) \$5,958.16 for the Claim;
- b) \$175 for court disbursements;
- c) Prejudgment interest at the court rate on and from April 16, 2012. I accept the defendant's submission for this date;
- d) Postjudgment interest at the current court rate.

Costs

51 The parties provided sealed costs submissions which I opened after rendering my above judgement.

52 There were no formal offers to settle in accordance with Rule 14.

53 I have carefully reviewed the submissions. Costs generally follow the cause. The plaintiff has been successful in his Plaintiff's Claim.

54 The plaintiff is seeking costs of \$2,100 and disbursements in the amount of \$2,303.66, which disbursements include air fare in the amount of \$1,551.39 for the plaintiff to travel from Vietnam, and \$442.90 for the transcript of the first day. I am not prepared to award these disbursements.

55 This was more than a two-day trial, as we dealt with the admittance of an email on the third day. In considering all the circumstances of this case, including proportionality, and in exercising my discretion I find that it is appropriate to award costs and disbursements to the plaintiff in the amount of \$1,800 all inclusive and I so order.

J. PRATTAS DEPUTY J.