IN THE SUPERIOR COURT OF JUSTICE
TORONTO SMALL CLAIMS COURT
SC-10-00096335-0000

BETWEEN:

Heather Suttie
(Plaintiff)
and
Metropolitan Toronto Condominium Corporation No. 683
(Defendant)

Appearances:

Rachel Somers, counsel for plaintiff

Kalin Stoykov, counsel for defendant

Hearing Dates:
August 26th and December 13th, 2010

M. O. Mungovan D. J.:

I. Cause of Action

[1] The plaintiff, Heather Suttie, is the owner of a condominium unit (# 803) on Metropolitan Toronto Condominium Plan No. 683. A pipe inside her dishwasher, located in her unit, broke causing water to flow out onto her hardwood floor. As the water damaged her floor, she claimed against her property insurance policy for the cost of replacing the floor and for other expenses. Aviva Insurance Company of Canada (hereinafter referred to as "Aviva"), the Insurer, paid for replacing the floor and for other expenses. The Insurer then subrogated to an alleged right of action of the Insured, Ms. Suttie, against Metropolian Toronto Condominium Corporation No. 683 (hereinafter referred to as "MTCC", the "Corporation" or the "Condominium Corporation"). Aviva and MTCC have agreed on damages in the amount of $10,000.

[2] Aviva is claiming that MTCC was responsible for repairing or replacing Ms. Suttie's hardwood floor and consequential losses on the basis of s. 89(5) of the Condominium Act, 1998[1].

II. Issues

[3] The issues are the following:

[1] S.O. 1998, c. 19

1. Is Aviva barred from bringing this action on the ground of the "waiver of subrogation" clause set forth in the Declaration[2]?

2. Does s. 89(5) of the Condominium Act, 1998 apply to the facts of this case?

III. Facts

[4] MTCC was created some time in 1985. Ms. Suttie became an Owner of one of the units which was described as #803. She was not the first Owner. Originally, the floors were mainly covered with broadloom but there was vinyl cushion flooring in the kitchen[3].

[5] In 1998 Ms. Suttie installed hardwood flooring.

[6] On February 29th, 2008 water from a broken pipe in Ms. Suttie's dishwasher flooded her unit damaging the hardwood floor. On March 3rd, 2008 she reported this incident to her insurance broker who represented the Insurer, Aviva. The hardwood floor was replaced with proceeds from her insurance policy. Aviva now has brought a subrogated action in the name of Ms. Suttie, its Insured, against the Corporation on the ground that the Corporation, and not Ms. Suttie, was obligated to replace the hardwood floor and pay other expenses.

IV. Analysis

Issue #1: Is Aviva barred from bringing this action in the name of its insured on the ground of the "waiver of subrogation" clause in the Declaration?

[7] In the Declaration where Owner's insurance is dealt with, there is a waiver of subrogation against the Corporation and others in these terms: " ... insurance on any additions or *improvements* made by the Owner to his Unit and for furnishing, *fixtures* ... contained within his Unit ... which policy or policies of insurance *shall* contain waiver of subrogation against the Corporation, its manager, agents, employees and servants, and against the other owners and any member of their household, except for vehicle impact, arson and fraud."[4] [Emphasis is added.]

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[2] Exhibit 5, tab 1, pp. 13 to 14

[3] Exhibit 5, tab 8, page 3, Features Sheet

[4] Exhibit 5, tab 1, pp. 13 to 14

[8] Despite this waiver, Aviva, in the name of its Insured, Heather Suttie, who is the Unit-Owner, is bringing this action against the Corporation to obtain reimbursement for, inter alia, the cost of replacing the hardwood floor. The question, is, What are the rights of Ms. Suttie because the Insurer cannot enjoy any greater rights? For it stands in the shoes of Ms. Suttie. Does not the "waiver of subrogation" clause, expressly set forth in the Declaration, bar Ms. Suttie and her Insurer from bringing this action?

[9] S. 119 of the Condominium Act, 1998 is relevant here.

Compliance with Act

119. (1) A corporation, the directors, officers and employees of a corporation, a declarant, the lessor of a leasehold condominium corporation, *an owner*, an occupier of a unit and a person having an encumbrance against a unit and its appurtenant common interest *shall comply* with this Act, the *declaration*, the by-laws and the rules. 1998, c. 19, s. 119 (1). [Emphasis is added.]

[10] The Act imposes an obligation on an Owner to comply with the Declaration. The Declaration in this case contains a waiver of subrogation by an Insurer to the rights of its Insured against the Corporation. In other words, Ms. Suttie has surrendered or waived her right to have Aviva sue the Corporation for damages in her name. Aviva has to respect that waiver, because it possesses no greater rights than its Insured.

[11] A similar situation arose in *MacDonald v. Halifax County Condominium Corp. NO.* 9[5]. The Declaration for this Condominium Corporation also contained waivers of subrogation against the Corporation and the other Owners in the context of Unit-0wner's insurance "on any additions or *improvements* made by the owner to his unit and for furnishings, *fixtures*, equipment, decorating and personal property and chattels of the owner contained in his unit". [Italics are added.]

[12] Ms. MacDonald was a Unit-Owner whose hot water tank, located in her unit, leaked. The water damaged her new floor. Her Insurer, Unifund, paid for the costs of repair, and then, despite the waivers of subrogation set forth in its Insured's Declaration, commenced this

[5] [2008] N.S.J. NO. 161 (Nova Scotia Small Claims Court)

subrogated action in its Insured's name against the Condominium Corporation. Adjudicator W. A. Richardson decided to bar the Insurer's action in these terms:

26 ... Unifund, which in this subrogated action stands in the shoes of Ms. MacDonald, is bound by the provisions of Article 4.18(3)(C)(a), as is Ms. MacDonald. Her policy of insurance (that is, the Unifund policy) must contain a waiver of subrogation. If it doesn't, it should. And if it should or if it does, the result remains the same: Unifund is barred from making this subrogated claim against the corporation.[6]

[13] Likewise, this action is barred because of the "waiver of subrogation" clause in the Declaration, even though Ms. Suttie's policy of insurance did not contain a waiver of subrogation - indeed, quite the opposite, for under the heading "Subrogation" there appears this statement: "We will be entitled to assume all your rights of recovery against others and may bring action in your name to enforce these rights when we make payment or assume liability under this policy." If Aviva had read its insured's Declaration, it would have understood that the policy should have contained a waiver of subrogation against the Corporation in respect of the cost of the hardwood floor. However, the absence of a waiver of subrogation in Ms. Suttie's policy of insurance does not change matters, because Aviva can only enforce its Insured's rights, and she has waived subrogation against, among others, her Condominium Corporation.

Issue #2: Does s. 89(5) of the Condominium Act, 1998 apply to the facts of this case?

[14] However, assuming Aviva is not precluded from bringing this action in the name of its insured by virtue of the "waiver of subrogation against the Corporation" clause in the Declaration, the next question that arises is whether the *Owner of the unit* (Ms. Suttie) or the *Corporation* (MTCC) is obligated under the Condominium Act, 1998 and the Declaration to repair or replace the hardwood floor? If the Corporation is so obligated, then, this action can succeed against it, assuming there was no waiver of subrogation against the Corporation.

[15] The case for the Unit-Owner, Ms. Suttie, depends on whether or not s. 89(5) of the Condominium Act, 1998 applies. As ss. 89 and 91of the Act are relevant to whether or not the Corporation has responsibility to repair units after damage, I will reproduce them here for ease of reference.

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[6] ibid. at para. # 26

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).

Transition, existing corporations

(5) A corporation that was created before the day this section comes into force and that had the obligation of repairing after damage improvements made to a unit before the registration of the declaration and description shall continue to have the obligation unless it has, by by-law, established what constitutes a standard unit for the class of unit to which the unit belongs. 1998, c. 19, s. 89 (5).

Provisions of declaration

91. The declaration may alter the obligation to maintain or to repair after damage as set out in this Act by providing that,

(a) subject to section 123, each owner shall repair the owner's unit after damage;

(b) the owners shall maintain the common elements or any part of them;

(c) each owner shall maintain and repair after damage those parts of the common elements of which the owner has the exclusive use; and

(d) the corporation shall maintain the units or any part of them. 1998, c. 19, s. 91.

[16] Reading ss. 89(1) and (2) of the Act together, the result is that the *Corporation, not the Unit-Owner*, is responsible for repairing or replacing after damage the unit but the Corporation

does not have the obligation to repair or replace after damage "improvements made to a unit". But subsection (1) (and subsection (2) as well because it *extends* the meaning of "*repair* after damage" to include "*replace* after damage") is expressly made subject to s. 91.

The Effect of s. 91

[17] Now, as regards the cross-reference to s. 91, that section authorizes the framer of the *Declaration* to "alter the obligation to maintain or to repair after damage as set out in this Act by providing that, (a) ... *each owner* shall repair [or replace][7] the owner's unit after damage".

[18] That alteration did occur in the Declaration that applies to this Condominium Corporation. Article VI (MAINTENANCE AND REPAIRS), paragraph #1 (Repairs and Maintenance by Owner) provides: "Each *Owner* shall ... repair[8] his Unit after damage, all at his own expense."[9] [Italics are added.]

[19] Stopping here, it would seem that Ms. Suttie as opposed to MTCC had the obligation to replace the water-damaged hardwood floor in her unit, even though it falls into the class of "improvement". Accordingly, at this juncture it would appear that she was right to make a claim on *her insurance policy* issued to her by Aviva. As well, the Corporation was right to assert that it was not obliged to replace Ms. Suttie's hardwood floor.

The Interplay between s. 89(2) and (5) and s. 91

[20] However, s. 89(2) went further. It accomplished two objectives, viz. (1) it defined the Corporation's obligation to repair the unit after damage to *include* replacement after damage, and (2) it made it clear that the Corporation had no responsibility to repair or replace any improvements made to the unit *unless subsection (5) applied.*

[21] Subsection (5) provides:

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[7] S. 89(2) extends the obligation to repair after damage to replace after damage. Accordingly, the reference to "repair after damage" in s. 91 includes "replace after damage".

[8] I find that "repair" has the extended meaning of "replace", because Article I (Introductory), paragraph#1, of the Declaration states: "The terms used herein shall have ascribed to them the meanings contained in The Condominium Act." I take that to include the successor to the Condominium Act, 1980, which is the Condominium Act, 1998.

[9] Exhibit 5, tab 1, page 8

Transition, existing corporations

(5) A corporation that was created before the day this section comes into force and that had the obligation of repairing after damage improvements made to a unit before the registration of the declaration and description shall continue to have the obligation unless it has, by by-law, established what constitutes a standard unit for the class of unit to which the unit belongs. 1998, c. 19, s. 89 (5).

[22] This subsection (5) deals with "existing" corporations like MTCC, that is, corporations that were created before May 5th, 2001 (the date when s. 89 was proclaimed in force). If these existing corporations had *originally* (i.e. before registration of the declaration and description) the obligation of repairing or replacing after damage *improvements* made to a unit before registration of these two documents, then, they shall continue to have that obligation.

MTCC has no continuing obligation to repair after damage improvements.

[23] However, MTCC has no such continuing obligation for this reason. The Declaration at the time of creation of MTCC in 1985 did *not* assign to the Corporation any obligation to repair or replace *improvements* made to the unit before registration of the Declaration and the Description. On the contrary, the Declaration did assign to the *Unit-Owner* the obligation to repair his *unit* which included replacement. That, in my opinion, would encompass any improvements to the unit that needed repairs or replacement. To find that only a s. 89(3) by-law can create improvements is to ignore the fact that there was no such thing as a s. 89(3) by-law in 1985 when this Condominium Corporation was created. The requirement that there must be this by-law cannot have been in the contemplation of the Ontario Legislature.

[24] Placing on the Unit-Owner the obligation to repair and replace after damage the unit including improvements made to the unit makes practical sense. The Unit-Owners as a group surely did not, and do not, want to pay for repairs to units by way of higher monthly fees, especially if the repairs or replacements involve expensive improvements. S. 91 of the Act is there to enable the Declarant to implement a system which most Unit-Owners would probably want to support.

[25] As further evidence to support the position that, pursuant to the Declaration, the *Unit-Owner's* obligation is to repair or replace after damage the unit, which would include improvements to that unit, is Article VII where it describes the various types of insurance that the *Condominium Corporation* must have. Paragraph 1 – a) on page 12 of the Declaration deals with "All Risk Insurance insuring ... iii) the Units, but *excluding any improvements made by the Owners thereof*".[10] [My emphasis is added.] That exclusion underlines the point that repairing or replacing improvements remains the responsibility of the Unit-Owner, not the Corporation.

[26] Paragraph 3 – a) on page 13 of the Declaration is additional support for the proposition that improvements are the responsibility of the Unit-Owner in respect of repairs or replacement. This paragraph explains to Unit-Owners that they *may* obtain "insurance on any additions or *improvements* made by the Owner to his Unit".[11] [Italics are added.]

[27] It is indeed significant that Aviva actually insured Ms. Suttie's "unit improvements and betterments"[12], and yet they take the position in these proceedings that the Corporation is responsible for repairing or replacing these improvements. The Insurer cites as examples of "unit improvements and betterments" "items such as wall-to-wall broadloom, light fixtures and wallpaper"[13]. No doubt hardwood floors would be included in the examples of items that would receive coverage under Aviva's property insurance policy.

D'Alessandro v. Carleton Condominium Corp. No. 43[14]

[28] I have reviewed *D'Alessandro.* That case also involved water damage to hardwood floors in a condominium unit. A pipe that supplied hot water to a radiator in a bedroom in the unit broke resulting in water damage to the floor. The plaintiff had to replace the hardwood floor at her expense. When the Corporation would not pay for that expense, she sued the Corporation to recover it.

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[10] Exhibit 5, tab 1, page 12

[11] Exhibit 5, tab 1, page 13

[12] Exhibit 6, page 6 of 17 (Ms. Suttie's property insurance policy)

[13] Exhibit 6, page 6 of 17 (Ms. Suttie's property insurance policy)

[14] 2006 CarswellOnt 6651 (Ottawa Superior Court of Justice)

[29] The court found against the Corporation on two grounds. First, as in our case, the Declaration in *D'Alessandro* placed the obligation to repair the unit on the Unit-Owner. The court, however, thought that improvements were not included in the obligation to repair the Unit. At paragraph #26, Deputy Judge Houlahan stated: 'The Declaration addresses the obligation to repair the "unit" by which I understand relates to the repair of the physical structure comprising the unit. It does not address the issue raised by the Plaintiff which is the obligation to repair an "improvement" to the unit after damage.' Accordingly, the judge held that the Declaration did not succeed in imposing on the Unit-Owner an obligation to repair the improvements to the unit. Secondly, he referred to s. 89(2) of the Act which provides:

> (2) The [Corporation's] 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.

[30] It would appear from this subsection that, since the Corporation has no duty to repair damaged *improvements* made to a unit, the Corporation in *D'Alessandro* should not be responsible for the cost of replacing hardwood floor. Yet, the court found against the Corporation and in favour of the Unit-Owner on the ground that the hardwood floor, which the Unit-Owner installed, was *not* an "improvement", because there was not in existence a s. 89(3) by-law defining the "standard unit" for the unit in question. The court refused to classify as an "improvement" anything done to the unit to improve its appearance or function after the creation of the Corporation. For instance, the new hardwood floor was not an "improvement" requiring the Unit-Owner to take care of it. Accordingly, the court found the Corporation "liable to repair the Plaintiff's floor" and, as a consequence, must pay the cost of that repair.

[31] However, I think that "improvements" must not be determined solely by a s. 89(3) by-law when the Corporation has passed none and its existence pre-dates the date when s. 89 came into force. The court in *D'Alessandro* did not expressly make reference to s. 91, to which s. 89 was made subject. S. 91 allows the Declaration to alter s. 89's assignment of repair and replacement obligations. In particular, subject to s. 91, the Corporation shoulders the responsibility to repair or replace the unit when damaged, but not if the thing damaged is an "improvement". In that case the Unit-Owner assumes responsibility. In subjecting s. 89 to s. 91, the Legislature is

saying to the condominium developer who knows the market that the statutory scheme can all be changed by the Declaration. The whole scheme is permissive with the Declaration taking the lead. So the Declaration is key to *D'Alessandro* as it is to the case in question.

[32] Accordingly, after reviewing ss. 89 and 90 of the Condominium Act, 1998, relevant parts of the Declaration, I have reached the conclusion that Ms. Suttie had the obligation under the Act and the Declaration to repair or replace her hardwood floor. It was an improvement which under the Declaration was her responsibility, and not her Corporation's. The subrogated action must, therefore, be dismissed.

Is D'Alessandro binding on this Court?

[33] Before leaving Issue #2, the plaintiff's Memorandum of Law states that "[*D'Alessandro*] is directly on point, and it is binding authority on the Small Claims Court".[15] Law reports of relevant decisions were part of this Memorandum. I have read these decisions with some considerable care. However, I do not think that *D'Alessandro* forecloses any disagreement with that judgment.

[34] I have looked at other sections of the Condominium Act, 1998, viz. ss. 89(1), 89(5) and 91, which have played a role in my decision. As well, I have used various provisions in the Declaration pertaining to the case in question, which do not appear in the judgment n *D'Alessandro*. Finally, the "waiver of subrogation" clause in our Declaration was not an issue in *D'Alessandro*. Consequently, I think that I was entitled, and indeed, obligated to take a view that contradicted the outcome and some of the thinking that comprised *D'Alessandro*.

V. Disposition

[35] Hence, this action is dismissed with *costs to the defendant*, Metropolian Toronto Condominium Corporation No. 683 ("MTCC"), of **$1,690.00** comprising the following components: (1) $40.00, the cost of filing the Defence per Rule 19.01(1) of the Rules of the Small Claims Court; (2) $50.00 for preparation and filing of the Defence per Rule 19.03; (3)

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[15] Memorandum of Law of the Plaintiff, tab A, 2nd page, 2nd. paragraph under "Case law - *D'Alessandro*

$100.00 for photocopying of document briefs and statement of law per Rule 19.01(1); and (4) $1,500 for counsel fee per Rule 19.04(1).

Dated at Toronto this 14th day of January, 2011

M. O. Mungovan D.J.