

Citation: ☀ The Owners, Strata Plan NW 1859 v. Tan  
2016 BCPC 0057

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Registry: Surrey

**IN THE PROVINCIAL COURT OF BRITISH COLUMBIA**  
Small Claims Court

BETWEEN:

**THE OWNERS, STRATA PLAN NW 1859**

CLAIMANT

AND:

**XU JUAN TAN**

DEFENDANT

**REASONS FOR JUDGMENT  
OF THE  
HONOURABLE JUDGE P.D. GULBRANSEN**

Counsel for the Claimant:

C. May

Appearing for the Defendant:

W. Rong

Place of Hearing:

Surrey, B.C.

Dates of Hearing:

February 1, 5, 2016

Date of Judgment:

February 26, 2016

**INTRODUCTION**

[1] The claimant Strata Corporation sues the defendant, the owner of unit 202 in the strata complex for money that the claimant spent on repairs for damage caused to unit 102 by a leak from the defendant's unit in November 2014. The claimant also seeks payment for some of its legal costs.

[2] The defendant denies that the water leak came from her suite. The defendant also counterclaims for repayment of money that she paid for water damage which occurred to unit 102 in February 2014. She says that she was not responsible for that damage either and that the payment was made by mistake.

[3] Mr. Rong appeared on behalf of the defendant, who is his wife. She is the registered owner of unit 202, and was unable to attend because she is now in China. He indicated that he had transferred his interest in the property to her name. He in fact, was the person with whom the Strata Corporation dealt over these two leaks.

**COUNTERCLAIM**

[4] I will deal with the defendant's counterclaim first. The parties agreed that there was a water leak into unit 102, which is directly below unit 202, on February 20, 2014. There was a hairline crack in the toilet in the bathroom of unit 202. Soon after the leak was discovered, a restoration company was retained to find the source of the leak and to dry out the affected areas.

[5] The claimant, through its management company contacted the insurer. An insurance adjuster examined the damage and approved the total amount to be paid for

the repairs. The repairs were done in unit 102 but the defendant declined to have the company do the repairs in unit 202.

[6] The deductible on the insurance policy was \$7500. The Strata Corporation requested that the defendant pay it. The defendant paid \$7200. (There may have been a miscalculation such that the defendant should have been asked to pay more, but the claimant has decided not to seek that amount at this late date.)

[7] Mr. Rong's argument was that there may have been another leak which caused more of the damage than the relatively minor leak that originated from unit 202. As well, he suggested that the cost of repairs was much too high.

[8] There was no evidence to support these arguments. Witnesses from the restoration company confirmed that the leak came from the bathroom of unit 202 and that there was no other apparent source of the leak anywhere else. I have no reason not to believe their testimony.

[9] As well, Mr. Rong's suggestion that the cost of repairs was too high is misguided. The Strata Corporation is required by law to insure common property. When damage occurs, the Council must refer the matter to its insurer. The representative of the insurer, the insurance adjuster, decides whether the insurance claim is valid and what amount of repairs will be covered. That is what happened in this case.

[10] I am confident that the insurance adjuster acted as most insurance adjusters do, to make sure that the repairs were done for a reasonable price. That does not mean the lowest price. The parties doing the repairs must be competent and have a proper record of good work. They must possess the proper equipment and must have the

confidence of the adjuster and the person whose property is being repaired. There is no evidence at all that these repairs were not done for a reasonable cost.

[11] The balance of the defendant's counterclaim is also unfounded. For example, the defendant seeks to be reimbursed \$100 imposed by the Strata Corporation as a fine for a late payment. The defendant suggests that the Strata Corporation sent a notice to him to the wrong address – that address being unit 202. He no longer lived there. The late delivery resulted in a fine. But, it was the defendant's responsibility to notify the Strata Corporation of any change in address and to have any mail sent to his older address forwarded to his new one. He did not do so.

[12] Therefore I dismiss the whole of the defendant's counterclaim.

### **STRATA CORPORATION'S CLAIM**

[13] The November incident involved a relatively minor leak onto the ceiling of the bathroom in unit 102. Probably because of the leak which occurred in February, the strata authorities decided to call a restoration expert immediately upon being notified of the problem. That person went to unit 202 and spoke to the tenant there. It turned out that the tenant had been taking a shower a few hours before and probably had left the shower curtain open. A fair amount of water ended up on the floor. When the tenant got out of the shower he noticed it and mopped up. The restoration person examined the floor and noticed that there was no caulking around the toilet and that the other caulking on the floor was of poor quality. He found no leaks in any part of the sink or shower or toilet. He believed that the water had leaked from the area around the toilet. He did not believe that the leak could have come from any other pipes anywhere in the building.

[14] In any event, he did some quick repairs in the bathroom of unit 202 to prevent any further leaks. The ceiling of the bathroom of unit 102 was also repaired. It was a minor leak, and only resulted in a stain.

[15] Once again, Mr. Rong took issue with the suggestion that the leak came from the bathroom of unit 202. However, he did not produce any evidence to establish that it could have come from somewhere else. I have no reason not to believe the witness for the claimant who examined the bathroom in unit 202 soon after the stain appeared.

[16] I find therefore that the claimant has proved, on a balance of probabilities, that the leak which caused the stain in the ceiling of the bathroom of unit 102 came from the bathroom in unit 202. The defendant is therefore responsible for that damage. The total cost of the repairs amounts to just over \$800, so this was not a case where the insurance company was involved.

### **LEGAL COSTS**

[17] The Strata Corporation seeks to be reimbursed for its legal costs incurred prior to issuing the statement of claim. This remedy is sought pursuant to Bylaw 36.1 of the Strata Corporation's bylaws. It states:

The strata corporation may proceed under the *Small Claims Act* without further authorization by the owners, to recover from an owner, by an action in debt in Small Claims Court money owing to the strata corporation, including money owing as administration fees, late charges, fines, penalties, interest or the costs, including legal costs, of remedying a contravention of the bylaws or rules and to recover money which the Strata Corporation is required to expend as a result of the owner's act, or omission, negligence or carelessness or by that of an owner's visitors, occupants, guests, employees, agents, tenants or a member of the owner's family.

[18] In the case at bar, the claimant relies on the bylaw to recover the legal costs incurred in trying to recover money that it was required to spend because of the negligence of the defendant's tenant - letting water accumulate on the bathroom floor.

[19] S. 19(4) of the *Small Claims Act* states:

(4) The Provincial Court must not order that one party to a proceeding under the Act pay counsel's or solicitor's fees to another party to the proceeding.

[20] There have been several cases in this court which have considered the application of this section. They have held that this section prohibited the court from ordering that a garnishee paying money into Small Claims Court was entitled to "solicitor and client costs" even though the *Court Order Enforcement Act* provided that a garnishee is entitled to such costs. In effect, a garnishee is only entitled to obtain such costs if the matter is in Supreme Court. *Canadian Imperial Bank of Commerce v. Washburn*, [1993] B.C.J. No.2706.

[21] Other cases, however, have held that where a party has agreed in a contract to pay lawyers' fees incurred in the enforcement of the contract, a court may award those fees on the basis that they constitute a debt. However, the courts have restricted the liability for such debts to only those services provided before the issuing of any process in Small Claims Court - *Wetterstrom et al v. Craig Management Enterprises Ltd.* 3009 BCPC 165 (CanLII); *Upcountry v. Heros International* 2013 BCPC 0109

[22] The underlying premise in these decisions is that awarding of lawyers' fees or costs (as that term is used in Supreme Court) would only make trials in Small Claims Court more complex and more expensive.

[23] In the case at bar, the claimant seeks to recover money paid to its solicitor for services rendered before this proceeding was commenced. But, those services were rendered only after the claimant had decided to take the matter to Small Claims Court. The claimant's lawyer took the steps preparatory to issuing a claim in Small Claims Court including the issuance of demand letters.

[24] Those services are exactly what in Supreme Court would be covered by an award of costs. See Appendix B of the Supreme Court Rules. This deals with Party and Party costs, and contains a Tariff which sets out the various items for which a party may claim costs. The very first category is as follows: "Correspondence, conferences, instructions, investigations or negotiations by a party until the start of the proceedings, for which provision is not made elsewhere in this tariff." The claimant in this case is in effect seeking an award of party and party costs.

[25] In these circumstances therefore, I find that section 19(4) of the *Small Claims Act* precludes this court from ordering that the claimant be reimbursed for its lawyer's fees.

### **CONCLUSION**

[26] The claimant has established on a balance of probabilities that water from the defendant's bathroom leaked on to the ceiling of the unit below. This occurred because of the negligence of the defendant's tenant.

[27] It is an unfortunate reality in Small Claims Court that while a successful party cannot be compensated for counsel's services, trials almost always proceed more efficiently and more fairly when counsel are involved. This case is a good example. Counsel for the claimant conducted the case in a very thorough and fair-minded way.

This in turn allowed the defendant to argue her case fully. As well, while the claimant cannot be compensated for its lawyer's fees, his effective presentation of the evidence established that the Strata Corporation did nothing wrong in its handling of the two incidents which were the subject of this trial.

[28] I therefore grant judgment to the claimant in the amount of \$845.43. The parties will bear their own costs for filing and service fees.

The Honourable Judge P.D. Gulbransen  
Provincial Court of British Columbia