

Claim #556[2011]

IN THE PROVINCIAL COURT OF SASKATCHEWAN
(CIVIL DIVISION)
SASKATOON, SASKATCHEWAN

UNDER THE SMALL CLAIMS ACT

B E T W E E N:

DENNIS TOFIN

PLAINTIFF

- and -

SPADINA CONDOMINIUM CORPORATION, BENJAMIN GOLDSTEIN,
ELAINE MALKIN, MAURICE DUVAL, TOM MCCLOCKLIN JR.,
TOM MCCLOCKLIN SR., and SANDY REES

DEFENDANTS

April 25, 2012

DECISION

Loewen PCJ

D. Tofin, appearing on his own behalf

N. Bardai and C.R. LePage, appearing for the Defendants

B. Goldstein, appearing on his own behalf

(A TRANSCRIPT OF A RECORDING)

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REGINA, SASKATCHEWAN
S4P 0J3

1 THE COURT: Good afternoon, gentlemen.

2 I'm a bit later than I hoped to be, but it's just
3 noon, so hopefully we can get out of here in fairly
4 short order.

5 This decision would have been
6 probably a bit more appropriate for a written
7 decision. The problem is I'm in Prince Albert, you
8 are here, and the gist of it would be the same in
9 any event, so I'm going to just give an oral
10 decision that can be transcribed if anybody wants a
11 copy of it at a later. I don't know why you may,
12 but it is possible.

13 In any event, this is an
14 application that has been brought by the solicitors
15 for the defendants who are Spadina Condominium
16 Corporation, Benjamin Goldstein, Elaine Malkin,
17 Maurice Duvall, Tom McClocklin Senior and Junior,
18 and Sandy Rees. There are three claims that are
19 being advanced by the plaintiff. The easiest two
20 are, of course, the ones of smaller monetary value.
21 They are claims numbered two and three in the
22 plaintiff's claim.

23 The plaintiff claims damages
24 under heading two for, it's in paragraph 7, "Liens
25 and interest charges wrongfully collected. My
26 payment of an installment on the original special

1 assessment was returned to me as being unacceptable
2 as I had specified that my payment was specifically
3 for the capital expenditures stated in the cash
4 call." That claim is for \$2,131.22.

5 The facts in support of that
6 claim are sketchy to say the least. I can infer, I
7 guess, from the bald statement in paragraph 7 of the
8 plaintiff's claim and some of the evidence that the
9 plaintiff paid money to the corporation, if not in
10 protest, at least to settle all of the call that had
11 been -- the cash call that had been made to him, but
12 there is virtually no evidence to support that
13 claim. And based on the balance of my decision, in
14 any event, I don't think that it's appropriate to go
15 any further, and therefore the non-suit is granted
16 with respect to that.

17 The claim, as it's worded,
18 and I will make comment on that on the other two
19 paragraphs as well, didn't really disclose a triable
20 action. It just said those bald words that I
21 indicated. It's a particular amount sued for with
22 not -- no real facts or allegations to support it.

23 Number three is the \$500
24 claim for damages to the vehicle. The evidence that
25 I heard was that the plaintiff never submitted an
26 invoice to the board for those \$500 in damages. No

1 proof of those damages was afforded to this Court.
2 Nothing was filed and truly that is very clearly
3 grounds for a non-suit, and I will therefore grant
4 it on number two.

5 The more difficult issue on a
6 non-suit application is in relation to the
7 plaintiff's claim for \$14,025 as contained in
8 paragraph 6 of his claim. Again, the stated claim
9 does not seem to disclose a cause of action. There
10 is no negligence alleged in the claim. There is no
11 bad faith by the board members alleged in the claim.
12 There is no allegation that the board acted
13 unreasonably. And the claim, itself, does not
14 contain an allegation that a two-thirds majority
15 would be required and that failure to meet that
16 two-thirds majority by a membership vote would be a
17 cause of the action.

18 On a bare assertion of those
19 facts, it seems to me that the claim could fail as
20 it is stated; however, through the course of pre-
21 trial and the trial itself and understanding of the
22 issues developed between the parties and by the
23 trial, very clearly, the issue had been defined for
24 me to consider. To boil the issue down, it seems to
25 me that the plaintiff is saying that the board, in
26 reversing a previous board decision, did so in --

1 sorry, did so not in accordance with the bylaws of
2 the corporation. The bylaws, which are appended as
3 schedule -- or tab item D to D1, give direction to
4 the board in certain circumstances. The change in
5 direction of the board that sort of precipitated
6 this action is that when Mr. Tofin was a member of
7 the board, there was a decision, and a valid
8 decision -- it's never been questioned -- that the
9 heating system be changed or be repaired and that
10 steam boilers be used again as steam had already
11 been a part of the system. Now, as I understand, it
12 was the original system.

13 On June the 10th, the
14 following year, that decision was overturned. In
15 the meantime, Mr. Tofin was removed from the board
16 and at the June 4th meeting of 2010, the board
17 decided, as they are entitled to, that the original
18 decision would be overturned and a hot water boiler
19 would be used instead of the steam boilers.

20 The actual decision was not
21 made by the board. It was made at a meeting of the
22 shareholders of the condominium corporation, and it
23 must have been a somewhat heated debate because, at
24 the end of it, a polled vote was called for and the
25 ballots were destroyed. Therefore, we're left not
26 knowing exactly what the vote was, whether it was by

1 two-thirds majority or one-third majority -- I'm
2 sorry, or a simple majority.

3 The definition of what would
4 cause the board some concern or the corporation some
5 concern as to whether a two-thirds majority is
6 required in the circumstances is contained in
7 Section 11.8 of the bylaws. That section says the
8 following:

9
10 Where expenditures are contemplated by the
11 corporation, which are for the purpose of
12 improving or adding to the common property
13 or common facilities, but are not for
14 repair, renovation, maintenance, or
15 replacement of common property or common
16 facilities, such expenditures may be
17 included in the budget and collected for in
18 the contributions for common expenses, if
19 the same are first approved by a special
20 resolution of unit owners and first
21 mortgagees or other persons entitled to
22 vote.
23

24 So, in other words, if this work would qualify as
25 that type of work, then a special resolution would
26 be required.

27 Section 10.1 of the same
28 bylaw reads as follows:

29
30 The corporation shall keep in a state of
31 good and serviceable repair and properly
32 maintain the common property. The
33 corporation shall additionally maintain and
34 repair including renewal, where reasonably
35 necessary, pipes, wires, cables, and ducts
36 for the time being existing in the parcel
37 and capable of being used in connection with

1 the enjoyment of one or more unit of the
2 common property.
3

4 The defendants say that this is a maintenance and
5 repair issue. The plaintiff says it is not, that it
6 is more than that as Section 11.8 contemplates.

7 In my view, this is
8 maintenance or repair. There is no addition to the
9 property as referred to in Section 11.8. In fact,
10 10.1 seems to contemplate exactly what occurred in
11 this case, namely a replacement of things that
12 include pipes, wires, cables, and ducts, so in my
13 view, this is a repair and maintenance issue.

14 Section 11.8 contemplates
15 something that might change some of the fundamentals
16 of the building. In this case, as it was, in my
17 view, a repair and maintenance item, the only issue
18 -- the only thing that needed to be done was changes
19 to the heating and air conditioning systems. When
20 you put in a heating and air conditioning system, it
21 has a shelf life, so to speak. It must fall on some
22 board, at some point in time down the road, to make
23 some decisions as to what to do when it fails or
24 when it's about to fail, and that is pretty much
25 exactly what happened in this situation. The board
26 had received reports that the boiler system was
27 failing or about to fail and took some good long
28 time, actually, and a reasonable length of time to

1 make a final decision as to how to repair it.

2 In any event, the evidence
3 otherwise does not disclose any reason to question
4 the board's decision, other than this two-thirds
5 special resolution sort of an issue. The board is
6 required, as I think is common ground among all of
7 us here today, to act in good faith and in the best
8 interests of the corporation. The board is entitled
9 to be wrong. In any event, if that was the case, I
10 don't know how that could attract any liability of
11 the board. In fact, in this case, the board were
12 not wrong.

13 The evidence of the
14 plaintiff's own experts was that the original
15 decision to put in hot water was something that was
16 supported by both of them. It was supported for the
17 reasons that it would save money for the corporation
18 in the long run and the evidence is that that indeed
19 did happen. Mr. Tofin offered his view of bills and
20 whatnot for the building, but I don't think I can
21 accept that in preference and contradiction to the
22 evidence of his own experts. It seems to me that
23 what was anticipated by the experts at the beginning
24 turned out to be quite right and the board was quite
25 prudent and reasonable in coming to their conclusion
26 and, therefore, there are no grounds, in my view, to

1 hold the board or any member liable.

2 It seems to me that the
3 plaintiff was offended because his original plan
4 when he was a board member was overturned. He was
5 removed prior to that from the board and perhaps his
6 feelings were hurt and he was bound and determined,
7 as it were, to stick to his guns. That doesn't, in
8 my view, afford him a cause of action.

9 Reference was made during the
10 claim to a second demand letter that is contained in
11 the defendants' Exhibit 1, the book of documents at
12 Tab I. It is -- the bulk of that demand letter
13 would have -- or was advanced on the basis of
14 "unapproved capital expenditures," which is the
15 exact wording that was used with respect to the
16 demand letter that preceded this law suit and, in my
17 view, would have offended Section 5 of *The Small*
18 *Claims Act*, which reads:

19
20 No person shall divide a claim or
21 counterclaim that exceeds the monetary limit
22 into two or more claims or counterclaims.
23

24 In my view, if the plaintiff
25 was aware of that and should have been aware of
26 that, it is, in any event, the law and it properly
27 -- if he is serious about bringing that claim, it
28 should have properly been brought in this action and

1 would have been dealt with in the same fashion.

2 The test for a non-suit --
3 I'm reading this a little later than would normally
4 be on a -- in a written decision, but the test for a
5 law suit is, indeed, as claimed in the *Kvello v.*
6 *Miazga* decision, and I want to read that in for the
7 record. Paragraph 16 reads:

8 The general legal test to be applied in
9 determining non-suit applications is well
10 established. It is whether a *prima facie*
11 case has been made out at the conclusion of
12 the plaintiffs' case in the sense that a
13 reasonable trier of fact could find in the
14 plaintiffs' favour on the basis of the
15 uncontradicted adduced evidence. Where the
16 nature of the case requires the drawing of
17 inferences of fact from other facts
18 established by direct evidence, the test
19 includes the question of whether the
20 inferences that the plaintiffs seek could
21 reasonably be drawn from the direct evidence
22 adduced if the trier of fact chooses to
23 accept the direct evidence of fact.

24 I'm -- in making -- drawing
25 my conclusion, speaking a bit more in the
26 vernacular, it seems to me that I have to look at
27 the defendants and say, is there a case for them to
28 meet? And, at the end of the day, on the basis of
29 the evidence I have heard, there is no such case.

30 If I am wrong in that, the
31 plaintiff, in any event, is enjoying the benefits of
32 the work. He had an opportunity at an earlier

1 occasion in his Queen's Bench suit that was
2 commenced to stop the work if he wanted to. He is
3 now living with the consequences of the repairs that
4 were done. The board, as I said earlier, acted in
5 good faith reasonably and the plaintiff, as an
6 owner, is enjoying the fruits of that labour, so to
7 speak.

8 So the application, I think,
9 is well-founded and the claim is dismissed as -- on
10 the basis of the non-suit application. I don't know
11 what to say further, gentlemen.

12 MR. BARDAI: Your Honour --

13 THE COURT: Yeah.

14 MR. BARDAI: -- I think that we all
15 understand. There was one issue that was raised in
16 the Statement of Claim dealing with reimbursement
17 for heaters, which wasn't addressed in your
18 decision. I just want to -- I think it's covered
19 off by the overall decision, but I didn't hear it
20 addressed specifically, so --

21 THE COURT: Yeah, I didn't say heaters,
22 but I did refer to the first -- or the second and
23 third heads.

24 MR. BARDAI: That is correct.

25 THE COURT: And one was the -- no, you're
26 right. I did miss the heaters, yeah. That was a

1 decision that Mr. Tofin made on his own and he did
2 so. I'm not sure why he would be -- just as a -- as
3 an owner in the building, be buying heaters for
4 other members. It just doesn't make a whole lot of
5 sense. And, in any event, that is not, in my view,
6 his proper place to do. Had it been just for his
7 own heater, there may have been some claim that he
8 could have advanced, but there was no evidence to
9 show how much his cost, and it's pretty much -- I
10 think the reasoning would apply to it as well, so
11 it's dismissed as well.

12 The only other issue I can
13 think of is costs, but, in a case like this, I don't
14 know whether it would be appropriate to address.

15 MR. BARDAI: Your Honour, we know the rule
16 on costs.

17 THE COURT: Yeah.

18 MR. BARDAI: It's a filing fee.

19 THE COURT: Yeah.

20 MR. BARDAI: It's --

21 THE COURT: It's almost trivial.

22 MR. BARDAI: It is.

23 THE COURT: Okay, so on that basis, the
24 plaintiff's claim is dismissed in its entirety and
25 we can all go home.

26 END OF PROCEEDINGS

AFFIDAVIT OF COURT TRANSCRIBER UNDER SECTION 31 OF THE
EVIDENCE ACT.

SWORN BEFORE ME at Regina,)
)
Saskatchewan, this _____) _____
)
day of May, 2012)

A COMMISSIONER FOR OATHS in and
for the Province of Saskatchewan.
My Commission expires: