

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
YORK REGION CONDOMINIUM)
CORPORATION NO. 922) Stephanie Sutherland, for the Applicant
)
Applicant)
)
- and -)
)
FRANK LU A.K.A. DENPING LU) Acting in person
)
AND CHUNLING LI) Acting in person
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Respondents)
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)
) **HEARD:** April 5, 2016

REASONS FOR DECISION

GILMORE J:

Overview

- [1] This is an application for a declaration that the respondents have breached section 117 and 119 of *The Condominium Act, 1998*, SO 1998, Chapter 19 (the *Act*) by failing to permit the applicant to enter the respondent's (Mr. Lu's unit) to carry out repairs required as a result of flooding in the unit, and an order permitting the applicant to enter the unit as necessary to:
- (a) inspect the unit and common elements and determine the repairs required as a result of flooding in the unit, and;
 - (b) to carry out the required repairs to the unit and common elements.

Background

- [2] The respondents are the registered owners of Unit 3A in York Region Condominium Corporation No. 922 (YRCC 922) located at 10 Cox Boulevard, Markham Ontario. On January 8, 2014 flooding was discovered in the basement of the unit and an emergency cleanup and repair was carried out that day. At that time the unit was occupied by a tenant, Chen Li.
- [3] On January 15, 2014, an email was sent to the owner providing a notice of entry for January 16, 2014. The notice related to a contractor attending at and inspecting the unit to determine the cause of damage for the flooding.
- [4] A contractor was permitted entry on January 16, 2014, to inspect the unit and provided a quote and an explanation for the cause of flooding.
- [5] A further notice was sent to Mr. Lu's counsel dated February 13, 2014, indicating that entry to the unit would be required on February 18, 2014, for repairs to be effected. On February 14, 2014, Mr. Lu was emailed directly about the contractor's attendance on February 18, 2014. Mr. Lu refused entry on the basis that he required information about the scope of repairs to be carried out. The entry date was re-scheduled for February 27, 2014. Emails were exchanged between Mr. Lu, the contractor, and the property manager for YRCC No. 922, Ms. Diana Yeh.
- [6] Mr. Lu refused entry on the scheduled date of February 27, 2014, indicating he had not received the contractor's bidding information. On March 5, 2014, a meeting took place at the unit with Mr. Lu, the tenant, the contractor, a representative of Mr. Lu's, and the condominium's insurance companies. The meeting was instigated by Mr. Lu. YRCC 922's insurance company confirmed it would cover the outstanding repairs for the basement flooding. It was also determined at the March 5th meeting that there was a leak in the bedroom in the unit. Mr. Lu refused entry to carry out the repairs in the basement until the matter of the bedroom leak was dealt with as well.
- [7] On April 4, 2014, Mr. Lu was given notice that the condominium's contractor would be attending on April 21-23, 2014 to carry out the repairs to the unit. Although invited to a meeting with the property manager and the operations manager to address his concerns, Mr. Lu refused entry to the unit on April 21, 2014.
- [8] On April 28, 2014, YRCC 922 was served with a Small Claims Court claim from Mr. Lu. Mr. Lu sought information with respect to the insurance policy of the condominium. While he had received a copy of the actual policy he had been denied other information related to the condominium insurance. At Mr. Lu's request a formal quote from Solid General Contractors for the repair of the flood damage was provided to Mr. Lu. That quote was provided on June 1, 2014. The small claims action was settled on July 10, 2014.

- [9] On June 20, 2014, the condominium gave notice to Mr. Lu that they would be entering the unit on June 30th to carry out repairs. Mr. Lu allowed the contractor to enter the unit on June 30, 2014 to inspect the attic but not to carry out repairs. As a result of Mr. Lu's continued refusal to fully cooperate, the condominium's insurance company closed its file and provided the condominium with the amount estimated for repairs. Mr. Lu was advised of this via a letter from the condominium's counsel on July 10, 2014.
- [10] On September 2, 2014, the condominium provided notice to Mr. Lu that the contractor would attend on September 8-11, 2014, for the purpose of carrying out repairs. Mr. Lu did not provide his permission for entry until questions were answered with respect to the contractor's crew members having the necessary WSIB clearance certificates and licenses to carry out the repair work. Once those questions were answered, the condominium's contractor was permitted entry to the unit on September 8, 2014 to carry out repairs. This was the first time that the condominium's contractor had entered the unit to carry out flood repairs since the flood occurred on January 8, 2014.
- [11] During the course of carrying out repairs on September 8, 2014, the contractor discovered black mould behind the drywall of the unit. It was not clear whether the mould was a result of the flooding in the basement or some other cause. Between September 8 and 11, 2014, the contractor installed new baseboards, a door, and a door jam in the basement where the flooding had occurred. However, outstanding work was required to be done including installing three other doors and dealing with the mould. A meeting was set up between the property manager, Mr. Lu, and the contractor for September 11, 2014, to discuss what was needed to be done regarding the mould. Mr. Lu requested that a mould specialist attend the meeting. Mr. Lu refused to attend the September 11, 2014 meeting because no mould specialist attended the meeting.
- [12] The condominium's contractor emailed Mr. Lu on September 12, 2014, advising that he was certified for applied microbial remediation and therefore able to take samples to determine if someone with more specific qualifications was required.
- [13] A second meeting was then arranged for September 16, 2014 on that basis. On September 17, 2014, mould tests were carried out within the unit.
- [14] A meeting was scheduled for October 2, 2014, with Mr. Lu, the contractor and a representative from the management company to discuss the mould testing results. Mr. Lu refused to attend the second meeting on the basis that he required a different mould specialist to attend at the unit along with the mould removal specialist's name and licence number.
- [15] At this point the condominium corporation emailed Mr. Lu warning that if repairs could not be carried out, the condominium may be required to commence court proceedings to obtain access to the unit. This warning was contained in an email dated September 30, 2014.

- [16] As a result of Mr. Lu's refusal to permit access for repairs the condominium retained counsel. The condominium's counsel, Ms. Kelly, wrote to Mr. Lu on October 11, 2014 requesting access on October 17, and 20, 2014, in order to assess the mould remediation cost. Mr. Lu was again warned that if he refused entry, the condominium would commence an application for an order to grant entry. Mr. Lu responded on October 16, 2014, requiring confirmation from the condominium that Ms. Kelly was authorized to act on behalf of YRCC 922. It should be noted that Mr. Lu made the same demands for confirmation of authorization of legal representation when the condominium's formerly retained law firm, Fine and Deo, had attempted to deal with the repair issue with Mr. Lu.
- [17] Ms. Kelly wrote to Mr. Lu on October 23, 2014, providing a copy of the retainer signed by the Board of Directors of YRCC 922 showing that her firm had been retained by the condominium. The letter also contained an offer to resolve the repair issue with a deadline of November 1, 2014, after which Mr. Lu risked the condominium commencing a court application for an order permitting access to the unit.
- [18] Mr. Lu responded on October 29, 2014, asking Ms. Yeh and the Board to confirm that the signed retainer was authentic and stating the retainer did not properly authorize Ms. Kelly to communicate with Mr. Lu regarding the flooding incident and repairs. On October 29, 2014, a member of the Board of Directors of YRCC 922 sent Mr. Lu an email confirming that Ms. Kelly and her firm had been retained by the condominium corporation for the purpose of communicating with Mr. Lu regarding the repair issues. Mr. Lu did not respond and the matter was not resolved by November 1, 2014.
- [19] On November 4, 2014, Ms. Kelly wrote to Mr. Lu providing a final notice of entry for November 11, 2014. Mr. Lu was advised that the condominium contractors would be attending the unit to inspect and carry out repairs. Again the letter warned that if access was not permitted, the condominium would commence a court application. Mr. Lu refused entry. The YRCC 922 has not made any further demands for entry since issuing this application.

The Position of the Applicant

- [20] The applicant's position is that Mr. Lu has repeatedly refused to comply with section 119 of the *Condominium Act*. Section 119 of the *Act* requires that owners must comply with the *Act*, the declaration, the by-laws, and the condominium corporation rules.
- [21] The *Act* does not contain a prescribed form for a notice requesting entry. The form of the notice need only be reasonable and in writing. As indicated by the lengthy background set out above, numerous notices were provided to Mr. Lu and on numerous occasions entry was refused.
- [22] The applicant's position is that Mr. Lu has been deliberately difficult and uncooperative which has prevented YRCC 922 from complying with its own obligations under the *Act*. For example, Mr. Lu insisted that he be provided with counsel's authorization to act on behalf of the Board of Directors. Even when provided with a copy of the Board's

resolutions and retainer agreement in that regard, he required further proof that the authorization was indeed validly signed by the Board's representative. He also required authorizations, licencing, and background material for contractors and other specialists engaged to do repairs notwithstanding that these contractors and other specialists had been hired based on the Board's approval.

- [23] Pursuant to section 117 of the *Act*, individuals occupying a condominium may not permit any activity in that unit if the resulting condition is likely to damage the property or cause injury to an individual. The condominium and its property management company were concerned about the mould that was discovered when the initial repairs took place. There was a concern that the mould could spread to other units and therefore would be in contravention of section 117 of the *Act*. It is the applicant's position that it is Mr. Lu's actions which have caused this matter to be drawn out and have created unnecessary expense and a potentially dangerous situation to other condominium owners and occupiers.
- [24] Mr. Lu did not file any affidavit material. His submissions were somewhat disjointed and focused significantly on his view that all of the damage had been caused by his former tenant and his indignation at being blamed for the damage by the property manager. Further, Mr. Lu minimized his multiple refusals for entry. In fact, he submitted to the court that he is open to the YRCC 922 coming in to his unit at any time and has told them so. However, Mr. Lu failed to provide any document confirming that this was the case.

Analysis and Orders

- [25] This is a case which invokes section 92 of the *Act*. That section requires that the condominium owner has an obligation to repair damage to their unit and if they fail to do so, the corporation must do the work necessary to carry out the obligation. Further, under section 92 (3) if the owner fails to carry out the obligation to repair within a reasonable time and it presents a potential risk of damage to the property, or potential risk of personal injury to persons on the property, the corporation may do the work necessary to carry out the obligation.
- [26] I reject Mr. Lu's submission that he has been compliant with the condominium's requests for permission to enter. He has refused such permission in the past for reasons which defy logic. After demanding and receiving various forms of information and proof about contractors and counsel, he demanded more information. He has then refused entry even when provided with the information he requested.
- [27] Mr. Lu was unable to provide any documentation or corroboration for his claims that he is open to YRCC 922 entering his unit to effect the repairs. As such, and most unfortunately, it appears that a court order is required given the condominium's obligation under section 92 of the *Act*. There is a valid concern that the mould discovered in September 2014 may well spread and has the potential risk of both damage to the property or personal injury to persons owning or occupying other units.

[28] I further find that Mr. Lu's failure to permit entry to the condominium results in him being in breach of sections 117 and 119 of the *Act*. That is, he has failed as an owner to comply with the *Act*, the declaration, the by-laws the condominium rules and he has allowed the mould situation to carry on such that it is likely to damage the property or cause injury to an individual.

[29] Based on all of the above, the relief sought in paragraphs 1 (a), (b), and (c) of the application is granted. Mr. Lu's consent to the form of the draft resulting order is not required.

Costs

[30] The applicant submits that the respondents were advised, on four separate occasions, that if entry was denied a court application would commence and costs would be sought. Proof of those warnings is contained in their application record.

[31] The respondents not only ignored the warnings, they demanded unnecessary and superfluous information with respect to the proper authority, licensing and qualifications for the contractor, mould specialists and counsel. It was solely the actions of the respondents and their conduct that caused the issuance of this application and the delay in effecting the necessary repairs.

[32] Pursuant to section 134 (5) of the *Condominium Act*, the condominium has the right to recover full indemnity costs. The applicant relies on *Metropolitan Toronto Condominium Corporation 1179 v. Chow* 2012 ONSC 587 paras, 5-7 for the proposition that a condominium should recover full indemnity costs in order to ensure that other owners are not saddled with the legal expense caused by a non-compliant owner.

[33] Mr. Lu points out that he had his counsel serve an offer to settle on April 17, 2015. A copy of that offer was produced. The offer indicates;

- (a) that at some point within the 30 days following April 17, 2015, a qualified contractor would enter and inspect the respondents' unit and common elements to determine the extent and cause of flood damage;
- (b) that the inspection would not take longer than two hours; that the respondents are entitled to monitor the inspection;
- (c) if the repair was reasonably necessary the respondent would allow a duly qualified contractor to attend at a later mutually agreed upon time to carry out the necessary repairs or, at the option of the respondents, may carry out the repairs on his own;
- (d) if the respondents elected to conduct repairs themselves, they would provide reasonable proof that the repairs were undertaken; and,
- (e) the application would be dismissed without costs on consent.

The offer to settle was open until one minute after the commencement of the hearing of the application.

[34] On May 20, 2015, the applicant served a counter offer. Essentially, the respondents' offer was accepted with the following changes:

1. The duly qualified contractor would be of the condominiums choosing and that documentation would be provided to confirm the contractor's qualifications;
2. The respondents would not be permitted to carry out repairs on any common elements portion of the units;
3. The respondents would acknowledge that Sutherland Kelly LLP were properly and duly authorized to act on behalf of the condominium with respect to the matter that the work to be carried out was originally assessed by the contractor at a value of \$1,441.29. Therefore if respondents had carried out the repairs and they had been done properly, the respondents would be refunded \$1,441.29;
4. If additional costs were required for further repairs, this cost would be the responsibility of the respondents;
5. Finally, the respondents would pay costs to the condominium in the amount of \$7,000 plus provide the insurance deductible in the amount of \$5,000 previously received by the respondents, to the applicant.

[35] Mr. Lu did not accept the applicant's counter-offer. He was provided with a copy of the applicant's costs submissions setting out their request for \$15,416.02 in substantial indemnity costs inclusive of HST. Mr. Lu did not agree to this amount on the basis that he has been, and will be, cooperative and has received no request for permission to enter from the applicants since November 2014.

Ruling on Costs

[36] Despite Mr. Lu's submissions to this court, I find that his lack of cooperation has been the sole reason for the applicant having to issue this application and all of its attendant costs.

[37] The applicant submitted a supplementary application record, dated March 20, 2016. This application record contained a 26 paragraph affidavit, sworn March 30, 2016, setting out all the various delays related to setting a date for the hearing of this matter and various other requests by Mr. Lu including his request for a notice of authority to commence the application on five separate occasions. Therefore, not only did Mr. Lu cause delay with respect to effecting necessary repairs to his unit, I find that he also caused delays with respect to this application moving forward expeditiously.

- [38] While it is true that the *Act* provides for substantial indemnity costs to be paid to ensure that compliant condominium owners are not made to pay for others who do not comply, it is often hard to justify the amount of costs sought given the actual amounts at stake.
- [39] However, in this case, if Mr. Lu was as amenable to YRCC 922 entering his unit to inspect and repair as he led this court to believe on April 5, 2016, the question begs as to why this has not occurred in the 17 months since the last request for entry was made by the condominium? If he was as co-operative as he would have this court believe, the repairs would have been effected long ago and this application entirely unnecessary.
- [40] In the circumstances I find that the respondents should be responsible for costs in the amount of \$12,000, payable immediately.

Madam Justice C.A. Gilmore

Released: April 15, 2016

CITATION: York Region Condo. Corp. No. 922 v. Frank Lu et al, 2016 ONSC 2565
COURT FILE NO.: CV-15-012249-00

2016 ONSC 2565 (CanLII)

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NO. 922

Applicant

– and –

FRANK LU A.K.A. DENPING LU
AND CHUNLING LI

Respondents

REASONS FOR DECISION

Madam Justice C.A. Gilmore

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