



Civil Resolution Tribunal

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Chelsky v. The Owners, Strata Plan BCS 1138*, 2019 BCCRT 709

B E T W E E N :

SERGEY Chelsky

APPLICANT

A N D :

The Owners, Strata Plan BCS 1138

RESPONDENT

APPLICANT BY COUNTERCLAIM

A N D :

SERGEY Chelsky

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

Julie K. Gibson

INTRODUCTION

1. This is a small claims dispute between a former owner of a strata lot and a strata corporation over management of the strata's rental wait list.
2. In November 2011, the applicant Sergey Chelsky purchased strata lot 55 (unit 1405) in the respondent The Owners, Strata Plan BCS 1138 (strata).
3. At the time, Mr. Chelsky knew there were rental restrictions in the strata bylaws. In March 2013, he asked for his strata lot to be added to the existing wait list for rentals. He says the property manager told him his unit was number 8 on the wait list. Despite making several requests for updates on his status on the wait list, in March 2017 Mr. Chelsky was told that his unit had only moved up to number 7.
4. Mr. Chelsky says the strata must have mismanaged the rental wait list, given that more than thirteen strata lots sold between 2012 and 2017.
5. Mr. Chelsky says he reconstructed the wait list as it should have been, and presented it to strata council in June 2017, requesting that the strata council update the rental wait list and inform eligible owners that they could rent their strata lots "immediately." He says neither the strata council nor the property manager ever responded to his requests.
6. Mr. Chelsky sold his strata lot in September 2017. He says he lost a minimum of 8 months' rental income because of the strata's mismanagement of the rental wait list, which he estimates at \$20,000. Mr. Chelsky limited his claim to \$5,000, to stay within the tribunal's small claims monetary limit. Mr. Chelsky describes the \$5,000 as "partial compensation for having endured this ordeal."
7. The strata says the rental wait list was properly managed. The strata says that Mr. Chelsky did not have permission to rent unit 1405 while he was on the wait list.
8. On the counterclaim, the strata claims that Mr. Chelsky:
 - a. rented his strata lot out without permission,

- b. made alterations to his suite without approval, and
 - c. failed to file Form Ks as required when new people were living in the suite.
9. It says that the strata's bylaw penalty is \$500 per week, meaning it could claim \$26,000. The strata did not issue bylaw fines at the time but is effectively pursuing the fines at first instance through the counterclaim. The strata voluntarily limits its counterclaim to \$5,000.
10. Mr. Chelsky represents himself. The strata is represented by strata council member Jabeen Jussa.

JURISDICTION AND PROCEDURE

11. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act*. The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.
12. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear this dispute through written submissions, because I find that there are no significant issues of credibility or other reasons that might require an oral hearing.
13. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
14. Under tribunal rule 9.3(2), in resolving this dispute the tribunal may make one or more of the following orders:

- a. order a party to do or stop doing something;
- b. order a party to pay money;
- c. order any other terms or conditions the tribunal considers appropriate.

ISSUES

15. The issues in this dispute are:

- a. Did the strata mismanage the rental wait list such that Mr. Chelsky is entitled to the claimed \$5,000?
- b. On the counterclaim, is the strata entitled to fine Mr. Chelsky for renting his strata lot without permission, making alterations to his strata lot without permission and/or failure to file Form Ks required by the bylaws?

EVIDENCE AND ANALYSIS

16. Mr. Chelsky bears the burden of proving his claim, on a balance of probabilities. The strata bears that burden of proof in its counterclaim. I have reviewed all of the evidence and submissions but refer to them here only to the extent needed to explain my decision.

17. Section 141 of the *Strata Property Act* (SPA) says that a strata may restrict the rental of a strata lot by a bylaw that limits the number or percentage of strata lots that may be rented. The bylaw must set out the procedure to be followed by the strata in administering the limit.

18. In *Mathews v. The Owners, Strata Plan VR90*, 2016 BCCA 345, the BC Court of Appeal held, at paragraphs 44 to 46, that section 141(3) of the SPA allows for bylaws that mandate only a basic procedure governing administration of the rental limit. A wait list mechanism was held to be the only practical and permissible way to administer such a limit.

19. The parties agree, and I find that, at the relevant time, the strata bylaws specified that only 7 units in the strata could be leased at any one time. An owner wishing to lease their strata lot had to apply in writing to the Residential Section Executive.
20. If the number of strata lots leased at the time an owner requests permission to lease is at the limit, the bylaws require the Residential Section Executive to refuse rental permission, notify the owner in writing and place the strata lot's owner on a waiting list based upon the date of the request for permission. I find that the bylaw meets the requirements of section 141 of the SPA.
21. An owner who leases a strata lot in contravention of the applicable bylaws is subject to a fine of \$500.
22. I find that the bylaws do not require a copy of the wait list to be produced to a requesting owner. They do require a requesting owner's priority on the wait list to be communicated to him or her.
23. In 2011, Mr. Chelsky bought unit 1405. He and his spouse, Kate Chelsky, lived there until at least January 2013.
24. In January 2013, the Chelskys learned that Ms. Chelsky would be reassigned Toronto for a two-year work project. Mr. Chelsky decided to take an unpaid leave to care for their children.
25. In February 2013, the Chelskys applied for a hardship exemption to allow them to rent unit 1405.
26. On March 11, 2013, council wrote to Mr. and Ms. Chelsky informing them that their request for a rental exemption due to financial hardship was declined. Strata council said that there was insufficient evidence of financial hardship. Mr. and Ms. Chelsky were advised that they were in 8th place on the rental waitlist.
27. Mr. Chelsky did not argue that the decision on the financial hardship application was improper or wrongly decided, and so I have not addressed that issue here.

28. In April 2014, Mr. Chelsky says that a representative of the strata told him verbally that his suite was 5th on the rental wait list. As this is inconsistent with the written evidence, I find that he has not proven it occurred.
29. On May 26, 2014, Mr. Chelsky emailed the strata council saying that his friend A had moved out of the unit and it was “empty now.” On the evidence before me, the strata did not raise an objection at the time but has now referred to this as evidence that Mr. Chelsky was renting without permission.
30. On August 27, 2014, the strata emailed Mr. Chelsky saying he was currently in 7th place on the rental wait list.
31. In September 2014, Mr. Chelsky says a strata representative told him he was 7th on the rental wait list. This is consistent with the written information given to him a few days beforehand.
32. On May 11, 2015, Ms. Chelsky filed a Form K saying that her mother would be a tenant in the suite starting May 18, 2015.
33. On January 19, 2016, Mr. Chelsky filed a Form K indicating that his parents would be tenants in the unit starting January 15, 2016.
34. On February 26, 2016, Mr. Chelsky says the strata told him he was 7th on the rental wait list.
35. On February 28, 2017, the property agent emailed Mr. Chelsky, in response to a further request about his standing on the wait list, to say he was still 7th.
36. On April 15, 2017, Ms. Chelsky filed a Form K saying the strata lot would be occupied by her mother, starting April 15, 2017.
37. On April 27, 2017, the property manager, on behalf of the strata, wrote to Mr. Chelsky about a complaint of an unauthorized rental. The letter identifies Bylaw 56.2, prohibiting rentals without permission, asks for a response and offers an opportunity for a hearing.

38. Mr. Chelsky now admits that he rented out the strata lot without permission on April 16, 2017, after realizing the strata had mismanaged the rental wait list.
39. On May 17, 2017, the property manager again wrote to Mr. and Mrs. Chelsky saying it had a recurring complaint of an unauthorized tenancy. A response was requested by May 31, 2017.
40. On June 6, 2017, Dr. Jussa sent an email to the strata council saying that she had observed what appeared to be two different tenants at Mr. Chelsky's suite.
41. On June 6, 2017, the strata agent emailed Mr. Chelsky a copy of the rental waiting list and a list of "current rental" suites. Mr. Chelsky's suite is listed among those permitted for current rentals. Although Mr. Chelsky contests this, I find that, based on this email, Mr. Chelsky was told that he could rent out unit 1405, as of June 5, 2017.
42. Mr. Chelsky appeared before strata council on June 8, 2017.
43. Mr. Chelsky challenged the accuracy of the rental wait list dated March 1, 2017 and the one provided on May 19, 2017.
44. On September 27, 2017, Mr. Chelsky emailed the strata asking for a revised rental list.

Rental Wait List Management

45. The strata provided an Excel spreadsheet showing the units rented, by year, and corresponding movement on the rental waitlist from 2013 to 2019.
46. From 2013-2015, the spreadsheet shows the same 9 units as authorized rentals.
47. In 2016, unit 304 from the list sold around December 2016 and unit 902 sold in about September 2016. By my calculation, even if these two suites were removed from the rental list at that point, the strata would still be renting its maximum 7

suites, so no one from the waiting list would be permitted to move onto the rental list during this period.

48. In 2017, the list shows 8 units being rented. Units 504 and 1601 sold during the 2017 year. At this point, the 8 listed units permitted to rent include unit 1405.
49. The wait list chart shows that unit 1405 was in 7th position in 2013.
50. In 2014, Mr. Chelsky's unit is shown as being in 7th position again, even though a unit above it in the list had sold since 2013.
51. In 2015, unit 1405 is shown against in 7th position, with unit 704 still above it.
52. In 2016, unit 1405 is again shown in 7th position, with unit 704 still above it.
53. In 2017, Mr. Chelsky's suite is again listed in 7th position on the wait list. On June 6, 2017, Mr. Chelsky received the email specifying that he could rent his suite.
54. Mr. Chelsky says that, by his calculations, he should have been given an opportunity to rent unit 1405 no later than June 2016. Mr. Chelsky's chart says that he should have been allowed to rent as of June 2016 after "#904 changed the owner."
55. However, unit 904 is not shown on the strata's spreadsheet of rentals at all. Mr. Chelsky did not explain this discrepancy, nor why he contested the strata's spreadsheet showing the authorized rental suites over time.
56. Based on the strata's spreadsheet, I find that Mr. Chelsky was permitted to rent unit 1405 once there was available room for him to do so, in June 2017. Although some units could have been removed from the wait list more promptly after being sold, I find that the rental list would not have changed during that period.
57. Mr. Chelsky has the burden of proof. I find he has not shown that the rental permission list was mismanaged in such a way that he was deprived of an opportunity to rent suit 1405.

58. Mr. Chelsky also did not provide adequate evidence that he would have rented the suite during from June 2016-June 2017, nor has he proven the amount of rent he could have expected.
59. For these reasons, I dismiss Mr. Chelsky's claim to lost rental income and damages for having to "endure this ordeal".

Counterclaim

60. The strata did not file in evidence the bylaws that were in place at the times engaged by its counterclaim. However, as I find below that the strata failed to comply with section 135 of the SPA, it is not necessary for me to review those bylaws.
61. I also note that the tribunal's small claims jurisdiction does not include providing declaratory or injunctive relief, if the strata is trying to claim permission to fine Mr. Chelsky.
62. The strata provided limited evidence that the Mr. Chelsky may have rented it without strata permission. Even accepting that Mr. Chelsky admitted to renting the suite without permission, which he mentions in his submissions, the strata did not provide any evidence that it decided to fine Mr. Chelsky for the bylaw infraction.
63. Section 135 of the SPA requires a strata to give notice in writing of a decision to fine in respect of a bylaw contravention. I find that the strata did not do so. I dismiss this aspect of the counterclaim.
64. Similarly, with the allegation that Mr. Chelsky made unauthorized alterations to his suite, the strata relied on scant evidence about observations made by a site manager in 2014. The strata did not provide a statement from the site manager but said that the site manager noticed that Mr. Chelsky's shower had been converted into storage, and that a door closer to the suite was missing, but later re-installed incorrectly. No other documentation about these issues was filed in evidence.

65. Mr. Chelsky says there is no proof that he altered his suite without permission.
66. The strata did not prove it complied with section 135. I find it did not give Mr. Chelsky notice of these allegations, an opportunity to respond, an opportunity for a hearing, or a written decision about any bylaw contravention regarding unauthorized alterations. I dismiss this aspect of the counterclaim.
67. Turning to the claim that Mr. Chelsky failed to file Form Ks when renters were in his suite, I find that the strata again failed to comply with section 135. In particular, the strata did not file evidence that it issued a written decision to fine Mr. Chelsky for failure to file a Form K. As a result, I dismiss the strata's counterclaim on the issue of the failure to file Form Ks.
68. Under section 49 of the Act, and tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. There was divided success between the parties, with the strata succeeding on the claim and Mr. Chelsky succeeding on the counterclaim. For this reason, I order that each party bears its own tribunal fees and dispute-related expenses.

ORDERS

69. I dismiss Mr. Chelsky's claim and I dismiss the strata's counterclaim.
70. I order that each party bear its own tribunal fees and dispute-related expenses.

Julie K. Gibson, Tribunal Member