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File: SC-2018-007790

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Frank v. The Owners, Strata Plan LMS 355*, 2019 BCCRT 767

B E T W E E N :

John Frank

**APPLICANT**

A N D :

The Owners, Strata Plan LMS 355

**RESPONDENT**

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**REASONS FOR DECISION**

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Tribunal Member: Kathleen Mell

## INTRODUCTION

1. This small claims dispute is about whether the applicant, John Frank, should have been charged $3,675.00 for the cost of an engineer's report and $952.00 in legal fees, by the respondent, The Owners, Strata Plan LMS 355.

2. The applicant says the engineer’s report, which was set in motion when water appeared under the peel and stick panels or films he applied to the skylight of his condo, was a part of the strata’s duty to keep the building in a state of repair. He argues he should not be responsible for the cost of the report. He also argues he should not be responsible for legal fees incurred by the respondent for the purpose of determining its legal obligations in the circumstances. The applicant also says that the respondent did not have the right to charge-back the costs to him on March 9, 2018 in the manner they used.

3. The respondent says the peel and stick films were not authorized and created a situation which made it appear that there was a leak in the atrium. The respondent says that ultimately it was determined that this was just condensation under the films and the respondent had to pay for the engineer’s report and legal costs because of the applicant’s unauthorized alteration to the property. They say they were within their rights to charge-back these costs to the applicant. The applicant is self-represented. The respondent is represented by Lucy Guest, a strata council member.

## JURISDICTION AND PROCEDURE

4. 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.

5. 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.

6. 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.

7. 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.

## ISSUE

8. The issue in this dispute is whether the respondent properly charged back the cost of the engineer's report and legal fees to the applicant, for a total of $4,627.00.

## EVIDENCE AND ANALYSIS

9. In a civil dispute such as this, the applicant must prove his claim. He bears the burden of proof on a balance of probabilities.

10. I will not refer to all of the evidence or deal with each point raised in the parties' submissions. I will refer only to the evidence and submissions that are relevant to my determination, or to the extent necessary to give context to these reasons.

11. The applicant installed films to his skylight as a sun shield. In the evidence, these films are sometimes referred to as panels. For the sake of consistency, and to distinguish between the films and the window panels themselves, I will refer to the peel and stick films as films in this decision. The applicant argues that the films were authorized after he agreed in September 2017 to sign an expanded written indemnity which was being prepared by the respondent in relation to other renovations of the condo. However, the respondent never provided the indemnity to be signed and then took the position that the films were unauthorized once the

applicant noticed moisture along the edge of some of the films and told the respondent. The respondent says that it did not authorize the films.

12. The documents show that the applicant informed the respondent in July 2017 that he intended to install the films but that the respondent expressed concern that the films would somehow compromise the proper functioning of the window. The evidence does not establish that the respondent ever authorized the installation of the films and therefore I find that the films were an unauthorized alteration of the applicant's strata property.

13. However, this does not settle the dispute. The question is whether the applicant should be responsible for the costs the respondent incurred in investigating water issues regarding the films, as well as the skylight, whether the films were authorized or not.

14. After the applicant told the respondent that he observed moisture accumulating along the edges of the films, the respondent hired company X to inspect the building. On December 1, 2017, X stated that it went on site to inspect an active leak located at the glazed canopy over the applicant's suite. They said that there were some gaps and voids found at the rubber gaskets and explained that the gaskets' primary function was to fill the space between glass and flashing to prevent leakage under compression. They recommended a silicone based sealant be applied to all the rubber gaskets around the glass panels and to seal all the flashing joints.

15. The respondent then hired company Y, a glass company, to inspect the windows on December 1, 2017 who indicated that they noticed bubbles or what appeared to be air pockets facing the interior of the applicant's condo. They said that they believed that the films were not installed uniformly and that this created visible air pockets or bubbles that looked like water or moisture between the films and the interior glass.

16. Y said that they did not observe any fogging or moisture inside the sealed units and that all the sealed units seemed to be in good condition. They said that they could

not tell if the skylight system was thermally broken. They noticed moisture on the interior side at the base of the skylight but said they saw nothing unusual as normal condensation occurs and a proper dam was installed to retain any water accumulation.

17. On December 7, 2017, the applicant noted that the respondent had two opinions, one stating the need to seal the exterior window gaskets which had gaps in them and the second opinion from Y which suggested that the water was due to condensation on the interior of the windows. The applicant said if there were gaps in the gaskets they had to be fixed immediately. He disagreed that this was just minor condensation. He noted that the atrium structure was not in proper repair and had to be fixed. He gave the strata one week to do so or he would pay for the cost of the repair and claim all costs back to the respondent. The respondent then sought legal advice regarding its duty to repair.

18. In an email the respondent told Y that the applicant's contractor advised when he took down some of the films that they were full of water and asked if that was possible. The respondent noted that there were also some notations about gaps in the sealant on the exterior of the skylight panels. The respondent asked if it was possible that the frames were leaking or the skylight gaskets had run the course of their "useful life."

19. On December 11, 2017, Y sent a follow-up email to the respondent and said that it was possible that films had some water in them but that could be normal condensation. They said that it was possible that the exterior sealant and gasket had deteriorated over the years but they said that it seemed to be in good condition for the original skylight system.

20. It should be noted that although Y said the skylight was in good condition both adjacent penthouse owners sustained water damage, one in 2006 and one in 2017, according to the strata council minutes. The applicant argues that this is part of the reason there was a larger concern over the state of the skylight itself and not just that which related to the condensation under the films.

21. On December 22, 2017, the respondent hired an engineering firm to investigate. The engagement letter noted that recently a film was applied to the underside of the skylight and at present the skylight was reportedly leaking. The inspection took place on December 27, 2017, with an engineer hired by the applicant also in attendance. The applicant informed the respondent in early January that based on his engineer's opinion he accepted that the water under the films was due to condensation. On January 8, 2018, the respondent told the applicant that it was working on providing documents to the engineering firm. The email stated that the strata manager owed it to the respondent to provide them with a level of comfort in having a qualified professional confirm whether the moisture was condensation or another issue.

22. On February 1, 2018, the respondent's engineer's report stated that there was not active water leaking through the skylight so it was plausible that the water under the films was due to condensation. However, the report also considered the general state of the skylight. It noted that skylights on the roof of similar construction had leaked and that this type of skylight was prone to leakage. It concluded that if the skylight was not currently leaking it was reasonable to assume it would sometime in the future. It recommended the skylight be replaced.

23. Section 72 of the *Strata Property Act* (SPA) requires the strata to repair and maintain its common property. The respondent did not suggest that the roof, which consists of the skylights, was not common property. The respondent's argument is that since there has not been any further reporting of a water leak the issue related solely to the applicant's films. Following this conclusion, the respondent submits that all costs in investigating the water issue, including obtaining legal advice, are the applicant's responsibility.

24. I do not accept this position. The fact that there have not been further water issues does not negate the respondent's engineer's report that the common property skylight should be replaced. That required replacement does not arise from the applicant's films. Further, the respondent's decision to investigate was not just

based on the applicant's reporting of condensation under the films. Rather, the escalating need for investigation was set in motion by company X, who was hired by the respondent, stating that there was a larger problem with gaps and voids found at the rubber gaskets which necessitated the application of a sealant. I also infer that the legal advice the respondent received was that it had an obligation to investigate considering it ramped up the level of investigation after conferring with legal counsel.

25. The decision to then hire the engineering firm was one taken by the respondent and, as the strata manager stated, it was because he felt he owed it to the respondent to provide them with a level of comfort in having a qualified professional confirm whether the moisture was condensation or another issue.

26. Therefore, I do not find that the cost of the engineering report or the legal advice should have been charged back to the applicant. The respondent took these steps to fulfill its duty to keep the strata in a state of repair under the SPA.

27. Also, as noted, after receiving the engineer's report, the strata then came to the conclusion that the issue relating to the applicant's films was just condensation but decided to charge-back the applicant the cost of their engineer's report and legal fees. The respondent specifically referenced bylaws 5.3 and 5.4 as authority for the charge-back. Both of these bylaws deal with damage to the property. It has been established that the issue with the applicant's films was merely condensation. It has not been proven on the evidence that any damage was done to the property.

28. Bylaw 5.5 speaks of an indemnity regarding maintenance, repair, or replacement but does not reference reports or legal fees. I note that a decision of this tribunal, *Robertson v. The Owners, Strata Plan NW 87*, 2017 BCCRT 37, considered a similarly worded bylaw and decided that an indemnity relating to maintenance, repair, and replacement expenses does not extend to investigation expenses. Although I am not bound by decision, I consider it persuasive and place reliance on it.

29. Bylaw 9.5 deals with alterations to property but it addresses restoring the property to its condition prior to the alteration. It does not consider costs associated with investigative reports and fees. Therefore, the respondent cannot rely on these bylaws to charge-back the applicant the cost of the engineer's report or the legal fees.

30. I also note that the strata proceeded with the charge-back without following the procedure set out in section 135 of the SPA. The applicant was not given a reasonable opportunity to answer the complaint including asking for a hearing before the respondent held back the amount of the engineer's report and legal fees at the time of the title transfer during the sale of the applicant's condo.

31. In summary, I find the respondent did not have the authority to charge-back the applicant as it sought legal advice and obtained the engineer's report in order to fulfill its duty to keep the strata in a state of repair under the SPA. Further, the bylaws do not allow for this charge-back and the correct procedure under the SPA was not followed.

32. Therefore, the respondent will have to reimburse the applicant the $4,627.00 amount they charged back to him, plus interest.

33. 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. As the applicant was successful in his claim he is entitled to have his tribunal fees reimbursed.

## ORDER

34. Within 30 days of this decision, I order the respondent to pay the applicant a total of $4,900.28, broken down as follows:

    a. $4,627.00 for the amount charged back to him.

    b. $98.28 in pre-judgement interest under the *Court Order Interest Act* (COIA)

c. $175.00 as reimbursement of tribunal fees.

35. The applicant is entitled to post-judgement interest under the COIA.

36. Under section 48 of the Act, the tribunal will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The time for filing a notice of objection is 28 days after the party receives notice of the tribunal's final decision.

37. Under section 58.1 of the Act, a validated copy of the tribunal's order can be enforced through the Provincial Court of British Columbia. A tribunal order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and the time for filing a notice of objection has passes. Once filed, a tribunal order has the same force and effect as an order of the Provincial Court of British Columbia.

Kathleen Mell, Tribunal Member