



Civil Resolution Tribunal

Date Issued: July 10, 2019

File: SC-2018-007920

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Tam v. Evolution Owners' Association et al*, 2019 BCCRT 830

B E T W E E N :

Diane Tam

APPLICANT

A N D :

Evolution Owners' Association and The Owners, Strata Plan BCS 2881

RESPONDENTS

A N D :

Diane Tam

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

Sarah Orr

INTRODUCTION

1. The applicant and respondent by counterclaim, Diane Tam, previously owned a quarter share of a residential strata lot in the respondent strata corporation, The Owners, Strata Plan BCS 2881 (strata) in Whistler. Each owner in the strata has a sublease with the respondent and applicant by counterclaim, Evolution Owners' Association (Evolution), which provides that all rentals are managed through Evolution's rental pool.
2. On March 19, 2018 Evolution charged the applicant \$3,400 in fines for renting her strata lot outside of its rental pool. Ms. Tam wants Evolution or the strata to reimburse her the \$3,400 in fines. Both the strata and Evolution say Evolution issued the fine in accordance with its bylaws, which they say are permitted under the *Societies Act*, and they say there is no basis for reimbursement. Evolution counterclaims against Ms. Tam for \$5,000 in contractual damages.
3. The applicant is self-represented. The strata and Evolution are represented by D.G., a non-legal representative.

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. Some of the evidence in this dispute amounts to a "she said, they said" scenario. Credibility of interested witnesses, particularly where there is conflict, cannot be determined

solely by the test of whose personal demeanor in a courtroom or tribunal proceeding appears to be the most truthful. The assessment of what is the most likely account depends on its harmony with the rest of the evidence. In the circumstances here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Bearing in mind the tribunal's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary. I also note the recent decision *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, in which the court recognized the tribunal's process and that oral hearings are not necessarily required where credibility is in issue.

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

ISSUES

8. The issues in this dispute are:
 - a. Is Ms. Tam entitled to reimbursement of the \$3,400 in fines?
 - b. Is Evolution entitled to \$5,000 in contractual damages?

EVIDENCE AND ANALYSIS

9. In a civil claim like this one, Ms. Tam must prove her claim on a balance of probabilities. This means I must find it is more likely than not that Ms. Tam's position is correct. Likewise, Evolution is responsible for proving its counterclaim.

10. I have only addressed the parties' evidence and submissions to the extent necessary to explain and give context to my decision.

Is Ms. Tam entitled to reimbursement of the \$3,400 in fines?

11. Evolution's bylaw 18.5 (a) prohibits an owner from renting out their strata lot or advertising their strata lot for rent other than in accordance with their owner sublease. Under the owner sublease each owner agrees that Evolution or its manager will manage the rental of their strata lot and each owner appoints Evolution or its manager as its exclusive agent to manage rentals of each strata lot. Bylaw 18.5 (b) prohibits an owner from advertising their strata lot for rent through any medium not arranged by Evolution or its manager, including Craigslist.

12. Evolution's bylaw 18.5 (d) requires an owner in contravention of bylaw 18.5 (a) to pay Evolution the "rack rate" for the strata lot for each day it is rented in contravention of bylaw 18.5 (a). It also requires an owner to pay Evolution \$50 for each separate medium or service with which the owner advertised the strata lot for rent in contravention of bylaw 18.5 (b).

13. On March 19, 2018 Evolution wrote a letter to Ms. Tam indicating it had received a report that she had illegally rented her strata lot on the nights of December 15, 16, and 17, 2017 and advertised the rental of her strata lot in December 2017 and January 2018 in breach of all contracts, agreements and bylaws. Evolution said that in accordance with its bylaw, it imposed a \$50 fine per advertisement and a nightly rack rate of \$1,100 for each night Ms. Tam's unit was "removed from the rental pool and illegally offered for rent" for a total of \$3,400 in fines. The letter stated that the fines were due on April 1, 2018.

14. Evolution says it has authority to levy fines against its members under section 70 (1) of the *Societies Act*, which says the bylaws of a society may provide for the discipline or expulsion of members. Evolution says "discipline" must reasonably be interpreted to include fines, as there are limited ways to discipline members of a society.

15. The question of whether “discipline” in section 70(1) of the *Societies Act* includes fines has not been judicially considered, but I find it is unlikely that section was intended to allow societies to fine its members. Other sections of the *Societies Act* refer specifically to fines. If the legislature had intended fines to be a form of discipline under section 70(1) there is no reason it could not have specifically referred to fines in that section, which it did not do. However, because of section 70(3) of the *Societies Act* which I address below, I find it is unnecessary for me to make a finding as to whether fines are included in discipline under section 70(1) of the *Societies Act*.
16. Section 70 (3) of the *Societies Act* requires that before a society disciplines a member, it must send the member written notice of the proposed discipline with reasons and give the member a reasonable opportunity to make representations to the society respecting the proposed discipline. This is similar to section 135 of the *Strata Property Act*. For the following reasons, I find Evolution did not fulfil the requirements of this section before fining Ms. Tam.
17. I note Evolution’s March 19, 2018 letter does not provide a breakdown of how it calculated the \$3,400 fine, it does not explain how it determined the “rack rate,” nor does it refer to the specific bylaw or legal authority authorizing the fine. In the absence of these details, I find Evolution’s March 19, 2018 letter did not provide Ms. Tam with reasons for the proposed discipline as required by section 70(3) of the *Societies Act*.
18. On March 19, 2018 Ms. Tam sent Evolution an email stating her intention to dispute the fines. On March 21, 2018 she sent a letter to Evolution disputing the fines on the basis that they were not imposed in accordance with the provisions of the *Societies Act*, the *Strata Property Act*, or the *Strata Property Regulation*. She asked for written confirmation by March 26, 2018 that the fines had been removed from her account and said that if she did not receive the requested confirmation she would presume the fines were removed.

19. On March 22, 2018 Evolution told Ms. Tam in an email that it had levied the fines in accordance with its bylaw, the *Societies Act*, rental management addendum, and sublease agreement. It did not state the specific bylaw, section of the *Societies Act*, or clause of the rental management addendum or sublease agreement under which it levied the fines. Evolution reiterated that the fines were due on April 1, 2018.
20. On March 26, 2018 Ms. Tam wrote another letter to Evolution disputing the fines on the basis that section 70 of the *Societies Act* does not specifically allow a society to fine its members. She also said the term “rack rate” is not defined in Evolution’s bylaws and Evolution provided no explanation or evidence to support its \$1,100 per night rack rate for her strata lot. On April 4, 2018 Evolution responded to Ms. Tam by email stating that it would address her March 26, 2018 letter at its next meeting, which was scheduled for May 4, 2018.
21. In the spring of 2018 Ms. Tam sold her strata lot, with a closing date of April 30, 2018.
22. On April 29, 2018 Ms. Tam wrote a letter to Evolution and the Strata stating that they had failed to provide the specific sections of any act or bylaw they relied upon to levy the \$3,400 in fines.
23. On May 1, 2018, the lawyer and notary acting on behalf of the party buying Ms. Tam’s strata lot wrote an undertaking to the strata property manager to pay \$4,224.62 in “outstanding maintenance fees” on Ms. Tam’s strata lot, which included the \$3,400 bylaw infraction fines.
24. On May 9, 2018 the representative for the strata and Evolution told Ms. Tam in an email that the Evolution board had reviewed her appeal and “re-examined the circumstances surrounding the bylaw,” and upheld its original decision to impose the fines for the bylaw infraction. On the same day the buyer’s lawyer paid the strata \$4,224.62 in trust, which included the \$3,400 in bylaw fines. Ms. Tam submitted the Seller Statement of Adjustments which shows that she and her husband were held

responsible for the \$4,224.62 in “outstanding strata fees” which included the \$3,400 in bylaw fines.

25. The evidence before me indicates that Evolution received the undertaking to pay the fine on May 1, 2018, before it considered or responded to Ms. Tam’s March 26 and April 29, letters at its May 4, 2018 meeting. While Evolution did respond to Ms. Tam’s March 19 and 21 correspondence disputing the fines, I find Evolution’s lack of detail in its March 19 and 22 letters did not give Ms. Tam a reasonable opportunity to dispute the basis of the fines. For all of these reasons, I find Evolution imposed the fines on Ms. Tam before providing her with a reasonable opportunity to make representations to Evolution, in breach of section 70 (3) of the *Societies Act*.
26. Since Evolution issued the fines and the fines were paid to the strata, I find both Evolution and the strata are responsible for reimbursing Ms. Tam \$3,400, which is the amount of the fines. Ms. Tam is entitled to pre-judgment interest on this amount under the *Court Order Interest Act*, calculated from May 9, 2018 which is the date the fine was paid.

Is Evolution entitled to \$5,000 in contractual damages?

27. Evolution claims \$5,000 in damages for Ms. Tam’s breach of the owner sublease agreement by renting her strata lot outside of Evolution’s rental pool.
28. Ms. Tam says M.M., who rented her strata lot on the nights in question in December 2017, is a personal acquaintance, and therefore he was allowed to stay at the strata lot with her permission. However, the strata submitted communications between Ms. Tam and M.M. which show that M.M. responded to her Craigslist advertisement for the strata lot. I find it highly unlikely that someone staying at an acquaintance’s condominium would communicate through a Craigslist advertisement, and I find the correspondence in evidence does not indicate that Ms. Tam and M.M. knew each other before the Craigslist advertisement. Therefore, I find the strata has established that Ms. Tam breached the owner sublease agreement.

29. However, I find Evolution has not established that it suffered damages as a result of Ms. Tam's breach of the agreement. Evolution says it could have rented Ms. Tam's strata lot through its rental pool for the dates in December 2017 on which she rented it to M.M., but it provided no evidence to support this claim. While it did provide evidence of the "rack rate" for these nights, its submissions indicate that the "rack rate" is the maximum amount that can be charged per night, and on the balance of the evidence I find the "rack rate" is not reflective of the actual nightly rates charged for the strata lot. It is unclear from the evidence how Evolution calculated \$5,000 in damages.
30. Evolution is responsible for proving its counterclaims. I find it has not done so and I dismiss them.
31. 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. I see no reason in this case not to follow that general rule. Ms. Tam claims \$175 in tribunal fees and \$1,521 in dispute-related expenses, \$21 of which is for registered mail, which I find to be a reasonable dispute-related expense. However, the remaining \$1,500 is for recovery of staff expenses, but Ms. Tam provided no explanation or evidence to support this claim, and I dismiss it. Therefore, I find Evolution must reimburse Ms. Tam \$175 in tribunal fees and \$21 in dispute-related expenses. Since Evolution was unsuccessful in its counterclaim it is not entitled to reimbursement of its tribunal fees.

ORDERS

32. Within 14 days of the date of this order, I order Evolution and the strata to pay Ms. Tam a total of \$3,661.47, broken down as follows:
- a. \$3,400 as reimbursement for the bylaw infraction fines;
 - b. \$65.47 in pre-judgment interest under the *Court Order Interest Act*, and
 - c. \$196 for \$175 in tribunal fees and \$21 for dispute-related expenses.

33. Ms. Tam is entitled to post-judgment interest, as applicable.
34. I dismiss Evolution's counterclaims.
35. 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.
36. 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 passed. Once filed, a tribunal order has the same force and effect as an order of the Provincial Court of British Columbia.

Sarah Orr, Tribunal Member