Civil Resolution Tribunal

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Roberts v. The Owners, Strata Plan LMS 946*, 2020 BCCRT 477

B E T W E E N :

CHARLES ROBERTS

APPLICANT

A N D :

The Owners, Strata Plan LMS 946

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Micah Carmody

INTRODUCTION

1. This small claims dispute is about a) a strata corporation's duty to repair and maintain common property, and b) a chargeback to an owner for investigation costs.

2. The applicant, Charles Roberts, is the former owner of strata lot 40 (unit 40) in the respondent strata corporation, The Owners, Strata Plan LMS 946 (strata).

3. In December 2018, the applicant accepted an offer to sell unit 40. The applicant says water ingress caused the sale to collapse. In March 2019, he sold unit 40 for $4,000 less than the December offer. The applicant says in 2014 he notified the strata about water staining in his living room ceiling and the strata failed to adequately investigate. He says the strata was negligent in its duty to repair and maintain common property. He seeks damages of $4,000 for the difference in the sale price, plus $520.86 for 63 days of insurance, strata fees, property tax and utilities paid in the meantime. He also seeks $335.08 for the 2014 investigation cost that the strata "deducted" when he sold unit 40.

4. The strata says it did not breach its duty to repair and maintain common property. The strata denies there was a water leak in 2014 and says it addressed the 2018 leak as soon as it was notified. As for the 2014 investigation cost, the strata says the applicant is responsible for the cost because he agreed to pay it. The strata also says that there was no active leak and the water stains were not linked to common property.

5. The applicant is self-represented. The strata is represented by strata council member.

6. For the reasons that follow, I find the strata must reimburse the applicant $335.08 for the investigation cost chargeback. I also find that the strata breached its duty to repair and maintain the common property roof above the applicant's strata lot. However, I dismiss the applicant's negligence claim because I find he has not proved that the strata's negligence caused his losses.

JURISDICTION AND PROCEDURE

7. 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* (CRTA). 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.

8. 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.

9. 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.

10. Where permitted by section 118 of the CRTA, in resolving this dispute the tribunal may order a party to do or stop doing something or pay money. The tribunal may also order any terms or conditions the tribunal considers appropriate.

ISSUES

11. The issues in this dispute are:

    a. Did the strata breach its duty to maintain and repair common property, and did that breach cause the applicant's losses?

    b. Was the strata's $335.08 chargeback for the 2014 investigation valid?

    c. What remedies, if any, are appropriate?

EVIDENCE AND ANALYSIS

12. In a civil dispute like this one, the applicant must prove his claim on a balance of probabilities. I have considered all the parties' evidence and submissions, but only refer to what is necessary to explain my decision.

13. The strata comprises 42 residential townhouse strata lots in 3 low-rise buildings built in 1993. The applicant did not reside in unit 40, which was rented to tenants.

14. Unit 40 is a 2-level strata lot with strata lots below and on both sides, but not above. From the strata plan and other evidence, I find the living room is partially located below a bedroom and partially below unit 40's deck and the building's roof. The deck is shown on the strata plan as limited common property.

15. On July 7, 2014, the applicant reported 4 stains on his bedroom ceiling to the strata's property manager. The photos provided at the time showed small, dark water stains. The applicant told the property manager that he suspected there was a leak somewhere on the balcony. Although the strata's bylaws are not in evidence, there is no dispute that the strata was responsible for repairing and maintaining the common property roof and deck, other than routine deck cleaning.

16. The strata retained Circle Services (Circle) to investigate the ceiling stains. Circle attended on July 15, 2014 and later produced an invoice for $335.08 with a summary of the work and recommendations. Circle suspected that the "loss source" was the "upper deck in unit 44." As the strata only contains 42 strata lots and the strata says there is no unit 44, I find this was a typo and Circle intended to refer to unit 40.

17. Circle found no signs of moisture around the water stains, so it did not cut test holes or use drying equipment. Rather, Circle recommended further testing to determine the point of water ingress. There was no visible damage or source of water ingress on unit 40's deck. Circle said it would await approval from the property manager before proceeding with the recommended testing.

18. Contrary to Circle's recommendation, the strata decided not to investigate further because there was no moisture present and no clear indication of an active leak. The strata charged the $335.08 to the applicant's account. The applicant refused to pay the chargeback.

19. It is undisputed that from July 2014 December 2018 the strata received no reports of water ingress or staining in unit 40. It is also undisputed that the December 2018 water ingress in unit 40 was first noticed during a pre-purchase inspection. On December 24, 2018, the applicant emailed the strata's property manager about the water ingress.

20. The property manager dispatched a restoration contractor, Firstonsite, to attend unit 40. Firstonsite found that the living room ceiling and wall were wet. Photos showed damage to the ceiling and one wall. After opening the "patio hatch" (an access point from unit 40's deck to an attic-type area between the roof and unit 40's living room), Firstonsite confirmed a significant amount of water damage. They advised the property manager to send a roofer to address the leak.

21. The roofer's report said water ingress was occurring at the second-floor balcony. It said there was a small hole in the metal cap flashing, as well as caulking breaking down where the vinyl siding meets a wall. The report concluded that the cap flashing was the source of the water ingress.

22. The damage was substantial, including rotted ceiling joists. There is no dispute that the strata completed the repairs and the applicant sold unit 40 in April 2019.

Did the strata breach its duty to maintain and repair common property, and did that breach cause the applicant's alleged losses?

23. To be successful in an action for negligence, the applicant must demonstrate that the strata owed him a duty of care, the strata breached the standard of care, he sustained damage, and the damage was caused by the strata's breach: see *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27.

24. The strata's duty of care is set out in section 72 of the *Strata Property Act* (SPA), which says the strata must repair and maintain common property and common assets. It is well-established that the standard of care is reasonableness: see *Weir v. Owners, Strata Plan NW 17*, 2010 BCSC 784. The starting point for the analysis

is deference to the decision made by the strata council: see *Browne v. Strata Plan 582*, 2007 BCSC 206.

25. So, was the strata's decision not to further investigate the 2014 water staining reasonable? The strata maintains that the 2014 water staining was a strata lot "owner issue." The strata submits that when Circle attended unit 40 in 2014, "Circle determined there was no further work to be done at that time as there was no active water leak present." I find that this mischaracterizes the evidence. It is clear from the invoice that Circle recommended further testing and awaited the strata's approval to proceed. It was up to the strata council in carrying out the strata's duties under the SPA to decide whether or not to proceed with further testing. The strata decided against it.

26. In 2014 and 2015, the applicant made several documented attempts to obtain more information about the strata's decision not to investigate further. According to the property manager, the strata council's position was that there was no active leak and "the stains could have been from anything."

27. Although the ceiling was dry during testing, Circle confirmed unit 40's ceiling stains were water stains. Circle was not able to identify the precise source, but as noted above suspected unit 40's deck. The strata provided no alterative explanation. There are no strata lots above the applicant's, and the strata does not say that there are pipes or other sources of water in the applicant's living room ceiling.

28. The frequently quoted passage from *Weir* is that in resolving repair problems, there may be "good, better or best" solutions available, and choosing an approach to resolution involves consideration of the cost of each approach and its impact on the owners. Circle quoted $450 to $750 to complete the recommended water testing and investigation. The strata did not argue that it could not justify this modest expense. Moreover, this is not a case of a strata corporation choosing between remedial options of differing costs and scope. Rather, I find the strata ignored signs of water ingress from common property and disregarded the clear recommendation of the only professional who investigated the water stains. In the circumstances, I

find the strata's decision not to investigate further in 2014 was unreasonable. I find therefore find that the strata breached its duty to repair and maintain common property.

29. However, that does not end the inquiry. The applicant must also show, on a balance of probabilities, that had the strata conducted further testing in 2014, the water damage discovered in 2018 would not have happened. For the following reasons, I find the evidence does not support that conclusion.

30. First, the roofer's report confirmed the source of the leak was a small hole in the metal cap flashing near unit 40's deck. There is no evidence that the hole existed in 2014. While it is tempting to look at the extent of the damage in the attic area and conclude that the cap flashing hole must have existed for a long time, there is no evidence of the rate or volume of water entry through the hole. I find that expert evidence would be required to assess whether the extent of the damage indicated the hole existed in 2014.

31. Second, it is uncertain whether, if the cap flashing hole existed in 2014, testing would have eliminated the suspected deck membrane as a source of water ingress and led to further investigation and ultimate discovery of the cap flashing hole.

32. Third, the stains in 2014 and the water marks in 2018 were different. The stains in 2014 were small, discrete, well-defined, and limited to 4 spots on the ceiling. The water marks in 2018 were large and ran across the ceiling and down the wall. There was a period of over 4 years between the 2 incidents during which no leaks or water staining was reported. I find that weakens the apparent connection between the 2 leaks. On balance, I am unable to conclude that if the strata had taken reasonable investigation steps in 2014 it would have prevented the water damage in 2018.

33. The other aspect of causation is that the applicant must establish that his sale of unit 40 collapsed because of the water damage. The evidence shows that the applicant had an accepted offer on December 21, 2018, and the sale collapsed on

January 14, 2019. The applicant notified the strata about the water damage on December 24, 2018.

34. Other than the applicant's assertion, there is no corroborating evidence about the reason the sale collapsed. There are no reasons given in the "collapse of sale" document. The contract of purchase and sale was subject to a satisfactory inspection, but also to other conditions, including the buyer's arranging satisfactory financing and insurance. Although the applicant supplied a letter from his realtor about the water damage, the realtor did not say that the sale collapsed because of the water damage.

35. On balance, I find the applicant has not proved that the strata's 2014 breach of its duty to repair and maintain common property led to the 2018 damage in unit 40 or that the damage led to the collapse of unit 40's sale. It follows that I dismiss the applicant's claim for damages due to the strata's negligence.

Who is responsible for the 2014 investigation costs?

36. In 2014, the strata applied a charge of $335.08 to the applicant's strata lot account for Circle's August 14, 2014 investigation invoice. The applicant disputed and refused to pay the chargeback. The applicant says the chargeback "was deducted as an outstanding strata fee on the closing statement of adjustments April 12, 2019." The strata did not specifically dispute this statement and did not explain how it recovered the $335.08 chargeback. I infer that until the strata received payment it withheld its Form F, which is a certificate of payment the Land Title Office requires before transferring a strata lot to a new owner.

37. This may engage a limitation period issue under section 27 of the *Limitation Act*, which says limitation periods apply to non-judicial remedies as well as civil claims. However, I determined that it was not necessary to seek submissions from the parties about the *Limitation Act* because, for the reasons that follow, I find the strata was never entitled to charge back the Circle invoice.

38. A chargeback is a charge that cannot be included in a Certificate of Lien filed under section 116 of the SPA. In order to collect a non-lienable amount, the strata must have the authority to do so under a valid and enforceable bylaw or rule that creates the debt: see *Ward v. Strata Plan VIS #6115,* 2011 BCCA 512. The strata does not suggest it had this authority under its bylaws or rules, which it did not provide.

39. In the absence of authority under a bylaw or rule, a strata corporation may be able to rely on agreement with an owner about payment. The strata submits that it advised the applicant that unless the issue was "structural or a failure of common property," the applicant would be responsible for the investigation costs. However, the correspondence shows a different understanding. The strata's property manager, in a July 8, 2014 email to the applicant, said that if the issue was a failed membrane, it would be the strata's cost, but if it was caused by failure to clean unit 40's deck or blocking drains with planters, it would be the applicant's cost. The parties did not discuss what would happen if Circle did not determine the source of the water ingress. I find the applicant only agreed to be responsible for the cost of the investigation if it was caused by a failure to clean unit 40's deck or drains blocked by planters. The applicant did not agree to pay for the investigation if Circle could not identify the source. Given the strata made the decision to stop the investigation before any conclusions were reached, I find the applicant was not required to pay.

40. Accordingly, I find the strata must pay the applicant the $335.08 for the Circle invoice chargeback.

41. The *Court Order Interest Act* applies to the tribunal. The applicant is entitled to pre-judgement interest on the $335.08 from April 12, 2019, the date the applicant says he paid the strata, to the date of this decision. This equals $6.91.

42. Under section 49 of the CRTA 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. I find the applicant is entitled to reimbursement of $175 in tribunal fees. He did not claim any dispute-related expenses.

43. The strata corporation must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against the applicant.

ORDERS

44. Within 14 days of the date of this order, I order the respondent to pay the applicant a total of $516.99, broken down as follows:

    a. $335.08 as reimbursement of the chargeback,

    b. $6.91 in pre-judgment interest under the *Court Order Interest Act*, and

    c. $175.00 in tribunal fees.

45. I dismiss the applicant's remaining claims.

46. The applicant is entitled to post-judgment interest, as applicable.

47. Under section 48 of the CRTA, 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. The Minister of Public Safety and Solicitor General has issued Ministerial Order No. M086 under the *Emergency Program Act*, which says that tribunals may waive, extend or suspend a mandatory time period. The tribunal can only waive, suspend or extend mandatory time periods during the declaration of a state of emergency. After the state of emergency ends, the tribunal will not have this ability. A party should contact the tribunal as soon as possible if they want to ask the tribunal to consider waiving, suspending or extending the mandatory time to file a Notice of Objection to a small claims dispute.

48. Under section 58.1 of the CRTA, 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.

Micah Carmody, Tribunal Member