Civil Resolution Tribunal

Date Issued: April 8, 2019

File: ST-2018-003849

Type: Strata

Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan NW 723 v. Gibson*, 2019 BCCRT 435

B E T W E E N :

The Owners, Strata Plan NW 723

APPLICANT

A N D :

Michael Gibson

RESPONDENT

A N D :

The Owners, Strata Plan NW 723

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member: Eric Regehr

INTRODUCTION

1. The respondent, Michael Gibson, is the owner of a strata lot in the applicant and respondent by counterclaim strata corporation, The Owners, Strata Plan NW 723 (strata). The strata claims $13,753.63 for costs they alleged they incurred cleaning his strata lot and for unpaid fines for breaching the strata's pet bylaw. Mr. Gibson says that the strata caused damage to his strata lot and counterclaims for $7,675.38.

2. Mr. Gibson is represented by a lawyer. The strata is represented by a member of strata council, Sean Hamilton.

JURISDICTION AND PROCEDURE

3. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over strata property claims brought under section 121 of the *Civil Resolution Tribunal Act* (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.

4. 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.

5. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Credibility of witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal proceeding appears to be the most truthful. In the circumstances of this dispute, I find that I am properly able to assess and weigh the evidence and submissions before me. I therefore decided to hear this dispute through written submissions.

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 section 123 of the Act and the tribunal rules, in resolving this dispute the tribunal may make order a party to do or stop doing something, order a party to pay money, order any other terms or conditions the tribunal considers appropriate.

8. Tribunal documents incorrectly show the name of the respondent as The Owners, Strata Plan NWS 723. Based on section 2 of the SPA, the correct legal name of the strata is The Owners, Strata Plan NW 723. Given the parties operated on the basis that the correct name of the strata was used in their documents and submissions, I have exercised my discretion under section 61 to direct the use of the strata's correct legal name in these proceedings. Accordingly, I have amended the style of cause above.

ISSUES

9. The issues in this dispute are:

    a. Did the strata impose fines in accordance with section 135 of the *Strata Property Act* (SPA)?

    b. Did the strata commence this dispute without providing proper notice under section 122(1) of the SPA?

    c. Is the strata's claim for recovery of expenses barred by the *Limitation Act*?

    d. Did the strata damage or destroy Mr. Gibson's personal property? If so, what remedy is appropriate?

    e. Did the strata fail in its obligation to repair and maintain Mr. Gibson's windows and patio doors?

BACKGROUND AND EVIDENCE

10. In a civil claim such as this, each party must prove their case on a balance of probabilities. While I have read all of the parties' evidence and submissions, I only refer to what is necessary to explain and give context to my decision.

11. The strata is a residential strata that consists of 66 strata lots in a 3 story building in Chilliwack.

12. The strata filed a complete set of bylaws replacing all previous filed bylaws in the Land Title Office on May 13, 2014. The following bylaws are relevant to this dispute:

    a. Bylaw 4.1 says that an owner or visitor must not use the strata lot in a way that causes a nuisance or hazard to another person.

    b. Bylaw 4.2 says that an owner is responsible for the acts of their visitors.

    c. Bylaw 4.4 says that if a visitor causes damage to common property, the strata will charge the cost of repairing the damage to the owner's strata lot.

    d. Bylaw 10.1 prohibits pets in the strata.

    e. Bylaw 13.1 prohibits the rental of a strata lot.

    f. Bylaw 17.1(c)(ii)(D) says that the strata must repair doors and windows on the exterior of a building.

13. Despite the bylaw prohibiting rentals, the strata previously allowed Mr. Gibson to rent his strata lot to the adult son (tenant) of another owner in the strata. Unfortunately, the tenant was troublesome and caused the strata considerable problems. It is not in evidence before me when the tenant moved into Mr. Gibson's strata lot. The strata provided several letters that the strata's property manager sent to Mr. Gibson in late 2015 about the tenant's bylaw infractions, which included noise infractions, storing items in the parking garage, hosting parties in the parking garage and other disruptive behaviour.

14. In November 2015, Mr. Gibson evicted the tenant. Unfortunately, this was not an easy task. On January 4, 2016, Mr. Gibson informed the property manager that the tenant had gained access to the strata lot, apparently by forcing entry through the patio door. Mr. Gibson and the strata cut power to the strata lot, so the tenant used an extension cord to steal power. The date that they were finally able to remove the tenant is not in evidence.

15. The tenant left Mr. Gibson's strata lot in a disastrous state. The strata hired a junk removal contractor to attend on May 31, June 1 and June 3, 2016. A strata council member took several photographs of the inside of the strata lot, which show that the tenant had left a considerable amount of garbage in the strata lot. According to the strata, the junk removal company encountered drug paraphernalia and human waste in their cleanup. There was also a portable toilet in the strata lot that the tenant had apparently used.

16. The strata provided 2 invoices from the junk removal company, dated June 1 and 3, 2016, respectively. The first invoice was for $2,914.80 and the second was for $304.50. The strata provided an invoice dated June 30, 2016, for $213.13 from a glass contractor to secure the patio door. The strata provided an invoice dated September 8, 2016, for $625.70 for the removal and disposal of the portable toilet. The total cost to the strata was $4,058.13.

17. On September 15, 2016, the property manager wrote to Mr. Gibson about his 2 dogs living in his strata lot. The date that Mr. Gibson moved back into the strata lot is not in evidence. Apparently, Mr. Gibson had previously informed the strata that he would be bringing his 2 service dogs into his strata lot. The strata demanded proof of certification of the dogs by September 30, 2016. There is no evidence that Mr. Gibson responded.

18. On March 31, 2017, the strata imposed a $200 fine for breaching the pet bylaw. The strata imposed a further $200 fine for breaching the pet bylaw on April 26, 2017. Starting on June 9, 2017, the strata began imposing a weekly $200 fine for breaching the pet bylaw.

19. On June 5, 2018, the strata's property manager sent a demand letter under section 112(2) of the SPA. The property manager demanded payment of $14,821.39 by June 19, 2018. The property manager said that if Mr. Gibson did not pay, the strata would start a tribunal claim. In fact, as discussed in more detail below, Mr. Hamilton had already commenced this dispute.

20. Mr. Gibson provided an invoice dated June 11, 2018 for replacing the patio door and 2 bedroom windows in his strata lot for a total of $3,921.75.

21. Mr. Gibson provided a brief letter from a doctor stating that he needed a service dog for his health and activity. Mr. Gibson also provided a copy of what he says is certification for his dogs under the *Americans with Disabilities Act*. There is no evidence that Mr. Gibson has taken any steps to have his dogs certified as service dogs under British Columbia's *Guide Dogs and Service Dogs Act* (GDSDA).

ANALYSIS

Did the strata comply with section 135 of the SPA in imposing fines for breaching the pet bylaw?

22. Section 135 of the SPA sets out the procedural requirements for a strata to impose a fine against an owner. The strata must:

    a. Receive a complaint.

    b. Write to the owner to tell them the particulars of the complaint.

    c. Give the owner a reasonable opportunity to respond to the complaint, including having a hearing if requested.

    d. Give the owner written notice of its decision to impose a fine as soon as feasible.

23. Section 135(3) of the SPA says that if the strata complies with the proper procedures when it imposes a fine and the contravention continues, the strata may impose continuing fines without going through the procedure again.

24. Mr. Gibson submits that the strata failed to prove that it received a complaint and failed to give him written notice of the complaint. Mr. Gibson says that he was not given a reasonable opportunity to respond to the complaint.

25. In its reply submissions, the strata says nothing about Mr. Gibson's arguments about section 135 of the SPA other than to say that "fines are owed".

26. The only evidence the strata provided about providing written notice of the bylaw infractions is a photograph of the outside of an unopened envelope addressed to Mr. Gibson. The envelope was postmarked February 1, 2017. The strata says that the letter inside was about the pet bylaw infractions. The letter itself is not in evidence.

27. Therefore, I find that the strata has failed to provide any evidence about what, if any, written notice the strata gave to Mr. Gibson about imposing fines for breaching the pet bylaw.

28. It is the strata's obligation to prove that it met the obligations set out in section 135 of the SPA. The strata has failed to provide any evidence to show that it did so. I find that the strata did not comply with section 135 of the SPA before imposing any fines for breaching the pet bylaw.

29. Therefore, all of the fines that the strata has imposed against Mr. Gibson's strata lot for breaching the pet bylaw must be cancelled. I order that the strata do so immediately.

30. The parties each made submissions about Mr. Gibson's position that his 2 dogs are service animals. In the interests of assisting the parties moving forward, I will briefly comment on the law regarding strata corporations and service dogs.

31. Section 123(1.01) of the SPA says that a bylaw that restricts pets in a strata lot or common property does not apply to a service dog, as defined by the GDSDA. Only service dogs that have been certified under the GDSDA are entitled to an automatic exemption from a pet bylaw. The GDSDA sets out a specific process that a person and dog must go through to be certified. The certification that Mr. Gibson presented

does not satisfy the requirements of the GDSDA. There is no evidence before me that Mr. Gibson's dogs are certified under the GDSDA or that he has started the process to have them certified under the GDSDA.

32. As set out in *N.K. v. The Owners, Strata Plan LMS YYYY*, 2018 BCCRT 108, a lack of certification under the GDSDA does not necessarily end the matter. According to the *Human Rights Code* (Code), a strata corporation must not, without a "bona fide and reasonable justification", discriminate against a person requiring accommodation due to a disability. In some circumstances, it may be reasonable for a strata corporation to allow a person with a disability to keep a service dog that is not certified under the GDSDA as a reasonable accommodation of that person's disability. There is not sufficient evidence before me to assess whether the Code would operate to permit Mr. Gibson to keep his 2 dogs, and I make no comment on the strength of his arguments on that issue. I note that under section 114 of the Act, the tribunal has jurisdiction to apply the Code to tribunal disputes. However, under section 11(a)(d) of the Act, the tribunal may refuse to resolve a dispute that involves the application of the Code.

Did the strata commence this dispute without providing proper notice under section 122(1) of the SPA?

33. Before I address section 112(1) of the SPA, I will address the issue of who filed the Dispute Notice. Mr. Hamilton submitted an application for dispute resolution on May 31, 2018 and the tribunal issued the Dispute Notice on June 1, 2018. As stated above, Mr. Hamilton commenced the dispute in his own name and later amended the Dispute Notice to make the strata the applicant. Mr. Gibson submits that Mr. Hamilton commenced the dispute in his own name because he knew that the strata had not provided written notice under section 112(1) of the SPA, but also knew that the limitation period was close to expiring.

34. Section 112(1) of the SPA says that before a strata can initiate a dispute with the tribunal to collect money that the owner owes the strata, the strata must give at least 2 weeks' written notice demanding payment. Mr. Gibson submits that the

strata did not give proper notice under section 112(1) of the SPA because Mr. Hamilton commenced this dispute before the strata sent the June 5, 2018 demand letter.

35. The strata did not reply to any of Mr. Gibson's arguments about section 112(1) of the SPA or the *Limitation Act*, despite having the opportunity to do so. Mr. Hamilton did not explain why he initially filed the Dispute Notice in his own name.

36. The strata provided an unsigned letter from the strata's property manager to Mr. Gibson dated December 8, 2016. The letter demanded payment of $3,753.63 for clean up costs by December 30, 2016. The letter threatened collection procedures if Mr. Gibson did not pay.

37. There is no evidence of whether or how the strata delivered the letter to Mr. Gibson. Section 61 of the SPA sets out how the strata must give notice to an owner. If the strata fails to give notice in a method set out in section 61 of the SPA, the strata has not given proper notice. See *The Owners, Strata Plan BCS 3372 v. Manji*, 2015 BCSC 2503.

38. I find that it is the strata's burden to prove that it gave proper notice as required by section 112(1). Because the strata failed to provide evidence of whether or how it delivered the December 8, 2016 letter, I find that the strata did not deliver it in accordance with section 61 of the SPA.

39. Mr. Gibson admits to receiving the June 5, 2018 demand letter. I find that when Mr. Hamilton initiated this dispute, he did so on behalf of the strata. Whether he did so inadvertently or cynically does not matter, because either way the strata initiated this dispute without giving Mr. Gibson proper notice under section 112(1) of the SPA.

40. The remaining question is the remedy. In *Manji*, the Court commented on section 112(2) of the SPA, which is the same as section 112(2) of the SPA except that it applies to filing a lien against a strata lot. The Court decided the case on the basis that sending notice via registered mail was not proper notice under section 61 of the

SPA. The Court also commented on the owners' argument that they had not received proper written notice under section 112(2) of the SPA.

41. The written notice that the strata corporation provided in *Manji* stated that the owner had 14 days from the date of the demand letter to pay the outstanding strata fees. Because section 61 of the SPA says that notice sent by ordinary mail is deemed to be received by the owner 4 days after it is mailed, the Court determined that if the strata had sent the notice by ordinary mail as it was supposed to, it would only have given 10 days notice. Therefore, the Court said that the written notice was deficient.

42. The Court's comments about section 112(2) of the SPA were *obiter dicta*, which means that they were not the basis for its decision and do not bind this tribunal. However, I interpret the Court's statements as saying that a strata corporation must strictly comply with section 112 of the SPA before bringing a claim or filing a lien. This conclusion is consistent with previous tribunal decisions: see *Leidl v. The Owners, Strata Plan LMS 1755*, 2018 BCCRT 371 and *Wadler v. The Owners, Strata Plan VR 495*, 2018 BCCRT 567.

43. I also rely on the mandatory language of section 112 of the SPA. There is no provision in the SPA that gives a strata corporation discretion to shorten the time period for giving written notice.

44. I find that by failing to give proper notice, the strata breached section 112(1) of the SPA and improperly brought this dispute. For this reason, I dismiss the strata's claims for reimbursement of the expenses it incurred cleaning up the applicant's strata lot. I order the strata to immediately remove all charges against Mr. Gibson's strata lot for these expenses.

45. Because of my finding, I do not need to address Mr. Gibson's arguments about the expiration of the limitation period.

Did the strata damage or destroy Mr. Gibson's personal property? If so, what remedy is appropriate?

46. Mr. Gibson claims that the strata's contractors destroyed a stereo worth $1,500, a recorder worth $1,500 and a love seat worth $1,800. Mr. Gibson says that he had arranged for his own junk removal contractor when the strata hired its own.

47. The strata provided many photographs of the state of the strata lot when its junk removal contractor attended. The photographs show the love seat, which is in extremely poor shape. I find that it is inaccurate for Mr. Gibson to assert that this love seat has any market value, let along the $1,800 value that Mr. Gibson provides. I find that this submission undermines Mr. Gibson's credibility about the strata damaging or destroying valuable property when its contractor cleaned up the strata lot. The photographs show that Mr. Gibson's tenant caused considerable damage to everything that was in Mr. Gibson's strata lot and left it in a shockingly dirty and damaged state. I am unable to determine from the photographs whether there was a stereo or recorder in the strata lot when the junk removal contractor attended. However, based on my assessment of Mr. Gibson's credibility on this issue and of the general state of the items left in the strata lot that are shown in the photographs, I find that there was nothing of market value in the strata lot.

48. Because Mr. Gibson's claim rests on the fact that the items in his strata lot had market value, which I reject, I find that it does not matter whether Mr. Gibson had arranged for his own junk removal contractor.

49. I dismiss Mr. Gibson's claim for compensation for destruction or damage to his property.

Did the strata fail in its obligation to repair and maintain Mr. Gibson's windows and patio doors?

50. The strata is responsible for repairing and maintaining common property under section 72 of the SPA.

51. Mr. Gibson says that he first brought the issue of his patio door and windows requiring replacement in 2012. He provided an estimate dated October 1, 2012, for the installations of windows and a patio door to support this submission. Mr. Gibson says that the windows and patio doors were inefficient. He had observed condensation.

52. He says that a member of strata council told him that the strata would replace windows and patio doors on an as-needed basis. According to Mr. Gibson, to date the strata has only replaced 1 of the 66 strata lots' windows and patio door.

53. Mr. Gibson says that his tenant broke into his unit multiple times. In response, Mr. Gibson says that the strata hired a contractor to secure the unit, which the contractor did by putting plywood over the patio door and windows and securing the plywood to the frames of the windows. Mr. Gibson says that this damaged the patio door and windows.

54. Mr. Gibson argues that the strata failed in its obligation to repair and maintain common property. He says that he decided to arrange for the replacement at a cost of $3,921.75.

55. The strata argues that Mr. Gibson had to replace the patio door and windows because his tenant damaged them. The strata says that because Mr. Gibson's tenant caused the damage, it was Mr. Gibson's responsibility to repair. The strata's submissions reflect bylaw 4.4, noted above.

56. There is no objective evidence before me about the strata's plan to repair or replace the patio doors and windows. For example, neither party provided minutes of any annual general meetings, special general meetings, or strata council meetings that might shed light on the strata's plan to replace the windows and patio doors.

57. The strata's obligation in carrying out its duty to repair and maintain common property is to be reasonable. Mr. Gibson bears the burden of establishing that the strata failed to act reasonably when it chose not to replace Mr. Gibson's windows and patio door. When deciding how to repair and maintain common property, there

are often several reasonable options available to a strata corporation. The strata must balance competing needs and priorities. The strata must also operate within a budget that the owners can afford. See *Weir v. The Owners, Strata Plan NW 17*, 2010 BCSC 784.

58. Mr. Gibson says that the windows and patio doors were drafty but he does not provide any objective evidence that they were in such poor shape that they required immediate replacement. In the absence of that evidence, I find that Mr. Gibson failed to prove that the strata acted unreasonably.

59. As for Mr. Gibson's argument that the strata's contractor contributed to the need to replace the windows and patio doors by attaching plywood to the windows and patio door, I find that this was a reasonable course of action in the circumstances.

60. Section 133 of the SPA allows the strata to carry out work in a strata lot or common property to remedy a breach of a bylaw. The state of the strata lot when the tenant left was a clear breach of bylaw 4.1, which prohibits causing a nuisance or hazard to another person. I find that the strata was entitled to have the contractor board up the windows and patio doors under section 133 of the SPA.

61. Therefore, if the strata's contractor caused damage to the windows and patio doors that required them to be replaced, then bylaws 4.2 and 4.4 apply. The tenant caused the damage and Mr. Gibson is responsible for the cost of repairing the damage.

62. For these reasons, I dismiss Mr. Gibson's claims about the patio door and windows.

TRIBUNAL FEES AND EXPENSES

63. Under section 49 of the Act, and the tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. Neither party has been successful in their claims. I dismiss both parties' claims for reimbursement of tribunal fees and dispute-related expenses.

64. The strata corporation must comply with the provisions in section 189.4 of the SPA, such as not charging dispute-related expenses against the owner.

DECISION AND ORDER

65. I order the strata to immediately reverse all fines imposed against Mr. Gibson's strata lot for breaching the pet bylaw.

66. I order the strata to immediately remove all charges against Mr. Gibson's strata lot for expenses associated with cleaning and securing Mr. Gibson's strata lot.

67. I dismiss the strata's claims and Mr. Gibson's counterclaims.

Eric Regehr, Tribunal Member