Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Lozjanin v. The Owners, Strata Plan BCS 3577,* 2019 BCCRT 481

B E T W E E N :

Gordana Lozjanin

APPLICANT

A N D :

The Owners, Strata Plan BCS 3577

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Kate Campbell

INTRODUCTION

1. The applicant, Gordana Lozjanin (owner), owns a strata lot in the respondent strata corporation, The Owners, Strata Plan BCS 3577 (strata).

2. The owner says the strata used the limited common property (LCP) patio adjacent to her strata lot as a staging area for repairs to balconies on strata lots above her strata lot. She says was unable to use her patio for almost a year, the strata refused to provide any information or timeline for the repairs, and the strata refused her request for a hearing. The owner says this use of her patio constituted a prolonged interference with her use and enjoyment of her strata lot, and damaged her health. The owner seeks an order that the strata disclose to all owners the nature of the upstairs balcony damage and repairs. She also seeks $5,000 in damages.

3. The strata says the upstairs balcony repairs were warranty work performed by Travelers Canada Insurance (Travelers), and it did not control the work or the timeline.

4. The owner is self-represented. The strata is represented by a strata council member.

JURISDICTION AND PROCEDURE

5. 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.

6. 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.

7. 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.

8. 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.

ISSUES

9. The issues in this dispute are:

    a. Should I order the strata to disclose to all owners the nature of the upstairs balcony damage and repairs?

    b. Is the owner entitled to $5,000 in damages?

BACKGROUND FACTS

10. I have read all of the evidence provided but refer only to evidence I find relevant to provide context for my decision. In a civil proceeding such as this, the applicant owner must prove their claims on a balance of probabilities.

11. The strata was created in 2009. It consists of 87 strata lots. The owner's strata lot has a large LCP patio on its front side, designated to the exclusive use of her strata lot. Some other strata lots above the owner's have balconies, which overhang the owner's patio.

12. At some point, a warranty claim was filed regarding damage to these upstairs balconies. There are no specific details about that warranty claim in evidence.

13. In an October 5, 2017 email, FG, a representative of Travelers, wrote that there had been a site visit that day, which revealed that the extent of the damage would require a much more complex scope of repairs than expected. FG said Travelers would notify when further access was required by the owner developer. FG also said that the owner should remove any personal belongings off her patio as a

scaffolding would likely be set up on the patio, and that the owner and the owners of the damaged balconies would have no access to their patios/balconies until the repairs were complete for safety reasons.

14. On February 16, 2018, the owner's husband, ZL, emailed the strata property manager requesting an update on the status of the upstairs balcony work. ZL said he hoped that the work could be done before the summer so his family could enjoy the patio.

15. After a few exchanges, the property manager replied on March 14, 2018 that Travelers would be repairing doing the work, which was scheduled for April 2018. The property manager said Traveler's would provide work dates shortly.

16. The evidence indicates that contractors installed scaffolding on the owner's patio in April 2018. Photos provided by the owner show that this scaffolding was very large, covering much of the patio, and extending up the side of the building to the upstairs balconies. The photos show that the entire scaffolding structure was covered in a green fabric-like mesh material, presumably to contain construction debris. The photos show that the scaffolding and mesh blocked the owner's ground-floor windows on that side of her strata lot.

17. On May 14, 2018, the owner wrote to the property manager and said the work was still not done. She asked for an update, and said she could not use her patio and was "living in the dark" due to the scaffolding. Later on the same day, the property manager forwarded the owner a copy of an email from Travelers. It said the estimated time for completion of the work was 4 to 6 months. The email said the repairs could not be hastened, as once the brick was removed the previous week it became clear there was substantial enough damage to warrant involving a structural engineer.

18. The owner replied to the property manager, stating that Travelers' email was not sufficient for the owners to understand why they had to live with the inconvenience for 4 to 6 months, even though they were paying their regular strata fees. She said 4 to 6 months was too long. The owner asked whether the engineer's team was

already involved, and she asked how hazardous the damage was to the 3 involved strata lots. The owner said the strata should provide further information and an explanation.

19. In a subsequent email, the owner said she expected the strata to take an active role in pressuring Travelers to provide detailed information about the extent of the damage and a plan for resolving it.

20. The owner requested another update from the property manager on May 28, 2018. She said she was living in the dark, and not able to use her huge balcony that was the main reason she bought her strata lot. She said she wanted to know what the property management firm and the strata would do to speed up the process and protect the owners' interests. The property manager replied that she would follow up with Travelers and get back to the owner, but it was really out of her hands because it was warranty work and Travelers were the ones looking after hiring the appropriate professionals.

21. The property manager contacted Travelers, who replied on May 28, 2018 that a structural engineer had reviewed the balcony 2 weeks earlier, and was working with building envelope consultants on a design to ensure the issue did not recur. Travelers said this would take time, as the final design then had to be reviewed by Travelers management. Travelers wrote that this was all the currently available information, and that repairs would not likely be completed until August to October 2018. The email said the repairs could not be hastened because it was a very delicate matter requiring careful thought and consideration from all involved parties.

22. The owner submits that the balcony repairs and scaffolding removal was not completed until around October 10, 2018.

DECISION AND ANALYSIS

23. The owner submits that these repairs took far too long, and severely interfered with her use and enjoyment of her strata lot. She also submits that the strata failed to

communicate with owners about the nature and timeline of the repairs, despite her repeated requests.

Disclosure of Balcony Damage and Repairs

24. The owner submits that I should order the strata to disclose to all owners the nature of the upstairs balcony damage and repairs. I decline to issue that order.

25. Having reviewed the correspondence in evidence, I accept that the owner and her husband were extremely frustrated with the severe disruption they experienced due to the repairs, and in particular due to the length of time the scaffolding and mesh blocked their patio and windows. It is clear from the owner's emails that she was unsatisfied with the level of communication from the strata and from Travelers.

26. However, I note that Travelers is not a party to this dispute. Thus, I cannot make any order against that firm. At several points in their communications with the owner, the strata said it was not in charge of the repairs, and that it did not have the ability to force Travelers to work more quickly or communicate more information. For example, in her May 28, 2018 email, the property manager wrote that while she was trying to get more information from Travelers for the owner, it was really out of her hands because it was warranty work and Travelers were the ones looking after hiring the appropriate professionals.

27. Similarly, in an August 2, 2018 email to the owner, the strata council president ED wrote that the warranty provider (Travelers) and the contractor were not obligated to provide detailed reports of the balcony damage, their findings, and how and when they would carry out the work as they did not work for the strata. ED wrote that the information already provided to the owner was the only information Travelers was willing to provide. This statement is confirmed by GF, another member of the strata council, who wrote that the strata council had unsuccessfully asked for specific information from Travelers about the type of damage, the extent of the damage, and the reason for the lengthy repairs. GF said the strata was unsuccessful in its attempts to get this information. GF said that since it was an insurance claim, the contractors' only legal duty to report their work schedule or tasks was to Travelers,

not to the strata or to individual strata lot owners. GF said the strata was frustrated in dealing with Travelers, and had tried repeatedly to work with the third-party building warranty provider to get action. GF said the strata was unsatisfied with Travelers' approach to the work, and found it "appalling", but in order to avoid costly legal bills the strata took a conciliatory approach to ensure the work got done.

28. These statements from ED and GF are confirmed by a July 19, 2018 email from Travelers' representative FG. FG said that while the owner had requested a copy of the engineering report, he could not provide it due to copyright and intellectual privacy concerns. FG said the project was on schedule to complete in 4 to 6 months, as anticipated in April 2018 when the scaffolding was erected, and that Travelers would continue to act until the project completed, at which time he would send a memorandum to notify the strata.

29. I find that this email from GF is entirely consistent with the strata's submission that Travelers managed the project itself, and was not open to significant input from or reporting to the strata. Based on that, I accept that the strata does not have further information about the balcony damage or repairs that it has not yet provided to owners. I find there is no reason to order the strata to seek further information from Travelers at this point, as the repairs are complete. I note that the owner does not submit that the repairs were faulty, only that they were too long and disruptive.

30. For these reasons, I decline to order the strata to disclose information to the owners about the balcony damage or repairs.

Is the owner entitled to $5,000 in damages?

31. The owner submits she is entitled to $5,000 in damages for loss of use and enjoyment of her strata lot, and for personal injury arising from the repair process.

Personal Injury

32. The owner says the extended disruption of the repairs and the blocked windows in her strata lot caused symptoms of claustrophobia, for which she was forced to take

medication and leave her home during the day. She says that eventually her health deteriorated to the point where she was forced to stay with her mother in Europe from August 19 to October 1, 2018.

33. Based on the photos provided in evidence and the owner's emails from the time of the repairs, I accept that the process, disruption, and blocked windows were extremely distressing for the owner. However, I find she has not proved her claim for personal injury. While she provided a copy of a prescription for tranquilizing medication, there is no medical report, chart note, or other evidence before me from a health care provider explaining why the medication was prescribed, confirming the owner's claimed symptoms, and indicating a causal connection between her health status and the balcony repairs. In the absence of any such evidence, I find the owner has not met the burden of proving her personal injury claim and I dismiss it.

Interference with Use and Enjoyment

34. Based on the evidence before me, I accept that the owner and her husband experienced a significant interference with the use and enjoyment of their strata lot due to the balcony repairs. Specifically, the owner was unable to use her large patio for many months, including over the summer of 2018. Also, as noted previously, the scaffolding and mesh significantly interfered with the light and view from their strata lot, and was extremely unattractive to look at over the months of the repairs. The photos also show that at least one point during the repairs, the contractors left significant construction debris on the LCP patio.

35. I accept that this situation constituted a significant interference with the owner's ability to use and enjoy her strata lot. However, I find the owner is not entitled to damages for this interference.

36. The owner's claim against the strata is a nuisance claim. The tort of nuisance in a strata setting is an unreasonable continuing or repeated interference with a person's enjoyment and use of their strata lot, and a remedy should be made without undue delay once the respondent is aware of the nuisance (see *The Owners, Strata Plan LMS 3539 v. Ng*, 2016 BCSC 2462). In *Ng*, the court found that the owner brought

to the strata's attention facts about a water leak that required investigation, and failure to conduct that investigation amounted to an omission to use reasonable care to discover the facts. As another example, in *Chen v. The Owners, Strata Plan NW 2265*, 2017 BCCRT 113, a tribunal vice chair found a strata liable in nuisance for failing to repair a hot tub pump, as the loud noise disturbed an owner inside her strata lot.

37. I find the facts before me are not the same as those in *Ng* or *Chen.* In those cases, the strata corporations failed to take necessary actions, such as investigating a leak or repairing a noisy hot tub pump. I find that in this dispute, the strata did take steps to try to obtain information from Travelers about the scope and timeline for the balcony repairs. This is not a case where the strata simply failed to act.

38. Also, and more importantly, I find the strata did not cause the nuisance in question. In *Ng,* the court summarized the law of nuisance, quoting as follows from paragraph 40 of the Ontario Superior Court decision *Durling v. Sunrise Propane Energy Group Inc*., 2013 ONSC 583:

> Nuisance, as it applies to this case, is the tort of private nuisance. This is an interference with a person's enjoyment and use of his land:
>
> A person, then, may be said to have committed the tort of private nuisance when he is held to be responsible for an act indirectly causing physical injury to land or substantially interfering with the use or enjoyment of land or an interest in land, where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable.

39. Following on this reasoning from *Ng* and *Durling*, I find the strata was not responsible for substantially interfering with the use or enjoyment of the owner's strata lot. The evidence shows that Travelers placed the scaffolding on the patio, and Travelers controlled the repair schedule. The strata did not control these actions, and although the owner says the strata should have done more to hold Travelers accountable, the evidence before me (including the statements from ED and GF, and the emails from the property manager) indicate that the strata took the

steps available to it. It is unclear what further action the strata could have taken in the circumstances.

40. I also note that while the owner says the repairs should not have taken until October 2018 to complete, she has provided no evidence, such as a report from a contractor or engineer, to support that assertion. The emails from Travelers establish that the balcony repairs were extensive and required input from a structural engineer and a multi-party redesign plan. While it is possible that this work could have been completed more quickly, that assertion is not proven by the provided evidence. Also, as previously stated, the delay was not due to the actions or inactions of the strata.

41. For these reasons, I find the strata is not liable for nuisance experience by the owner.

42. The owner also says the re-sale value of her strata lot was reduced during the lengthy repair period. While I accept that assertion, I find that no damages are appropriate because there is no evidence confirming the amount of the reduction, and more importantly, no evidence that the owner tried to sell her strata lot during this period. Since there was no realized loss, and also because the delays were not the strata's fault, I do not order damages for loss of value.

Strata Council Hearing

43. The owner says the strata refused to grant her a hearing before the strata council to discuss the balcony repair delays, contrary to section 34.1 of the *Strata Property Act* (SPA).

44. On July 16, 2018, the owner sent an email requesting a strata council hearing. She cited section 34.1 of the SPA, which says that if an owner or tenant requests a hearing, the council must hold the hearing within 4 weeks of the request.

45. The strata initially denied the hearing request. The property manager sent some information about the repairs, and said the hearing was not necessary. Later, she

said there was no point in holding a hearing as the strata had no further information to convey. The property manager made the owner provide further reasons for her request, which I note is not required under the SPA. The owner repeated her requests for a hearing, and finally on August 3, 2018 the property manager sent a letter saying the owner could attend the regular strata council meeting on August 8, 2018.

46. Normally, I would find that letter constituted a sufficient offer of a hearing before strata council. However, I find the evidence before me does not indicate that there was any strata council meeting on August 8, 2018. Rather, all of the correspondence before me, including an August 3, 2018 email from strata council president ED attached to the property manager's August 3, 2018 letter, says the regular strata council meeting was on August 28. ED's letter specifically said the strata council could not hold any hearing for the owner before August 28.

47. As the strata's evidence on this point is contradictory, and they have not provided any explanation for that contradiction (or confirmation of an August 8, 2018 strata council meeting), I accept the owner's evidence that she was denied a hearing, contrary to section 34.1 of the SPA.

48. The SPA does not set out a specific remedy for a breach of section 34.1. I am empowered under section 123(2) of the Act to make orders related to findings of significant unfairness. As discussed further below, I find the strata's denial of a hearing was significantly unfair to the owner.

49. In *The* Owners*, Strata Plan BCS 1721 v. Watson*, 2017 BCSC 763 (CanLII), the court restated the test for determining significant unfairness as set out in *Dollan v. Strata Plan BCS 1589*, 2012 BCCA 44 (CanLII). While that test was considered under section 164 of the SPA, I find it would equally apply to an analysis under section 123(2) of the Act. In particular, in *Watson* the court stated:

> The test under s. 164 of the [SPA] also involves objective assessment. [The *Dollan* decision] requires several questions to be answered in that regard:

a. What is or was the expectation of the affected owner or tenant?

b. Was that expectation on the part of the owner or tenant objectively reasonable?

c. If so, was that expectation violated by an action that was significantly unfair?

50. In *Dollan*, the court further stated as follows:

> There is no doubt that in making a decision the Strata Corporation must give consideration of the consequences of that decision. However, in my view, if the decision is made in good faith and on reasonable grounds, there is little room for a finding of significant unfairness merely because the decision adversely affects some owners to the benefit of others. ...

51. The right to a hearing within 4 weeks of a written request is mandatory, and not optional on the part of the strata. Based on the mandatory wording of section 34.1, I find the owner had a reasonable expectation that the strata would grant her a hearing before August 16.

52. I find the strata did not meet that expectation, and acted in a manner that was significantly unfair to the owner. In addition to its failure to provide a hearing, the strata indicated that the owner must provide reasons for the hearing, which is contrary to the SPA.

53. It is unclear that having a strata council hearing would have changed the timeline or outcome of the balcony repairs. However, given that the owner and her husband had repeatedly raised concerns about the lack of communication about the repairs, and given the large and visible scaffolding and mesh blocking the owner's windows, I find the strata's denial of a hearing was unreasonable, as well as a clear violation of section 34.1. Thus, I conclude the strata acted in a manner that was significantly unfair to the owner.

54. I therefore find the owner is entitled to a remedy for significant unfairness by the strata, pursuant to section 123(2) of the Act. The owner's correspondence that one of the reasons she wanted a hearing was to request a rebate on her strata fees due to the loss of use and enjoyment of her strata lot. The strata could not have granted that remedy, nor can I, as the payment of strata fees is mandatory under section 99 of the SPA and the strata's bylaws. Strata fees cannot be waived. However, on a judgment basis, I find it is reasonable for the owner to be compensated and I order the strata to pay the owner $1,000 as compensation for its significant unfairness.

55. The owner is also entitled to prejudgment interest on the $1,000, under the *Court Order Interest Act* (COIA), from August 16, 2018.

Fees and Expenses

56. 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 dispute-related expenses. As the owner was partially successful in this dispute, I order the strata to reimburse one-half of her tribunal fees, which equals $112.50. Neither party claimed reimbursement for dispute-related expenses.

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

DECISION AND ORDERS

58. I order that within 30 days of this decision, the strata pay the owner a total of $1,123.66, broken down as follows:

    a. $1,000 as compensation for significant unfairness,

    b. $11.16 as prejudgment interest under the COIA, and

    c. $112.50 for tribunal fees.

59. The owner is also entitled to post-judgment interest under the COIA.

60. Under section 57 of the Act, a party can enforce this final tribunal decision by filing, in the Supreme Court of British Columbia, a validated copy of the order which is attached to this decision. The order can only be filed if, among other things, the time for an appeal under section 56.5(3) of the Act has expired and leave to appeal has not been sought or consented to. Once filed, a tribunal order has the same force and effect as an order of the Supreme Court of British Columbia.

61. Orders for financial compensation or the return of personal property can also be enforced through the Provincial Court of British Columbia. However, the principal amount or the value of the personal property must be within the Provincial Court of British Columbia's monetary limit for claims under the *Small Claims Act* (currently $35,000). Under section 58 of the Act, the Applicant can enforce this final decision by filing in the Provincial Court of British Columbia a validated copy of the order which is attached to this decision. The order can only be filed if, among other things, the time for an appeal under section 56.5(3) of the Act has expired and leave to appeal has not been sought or consented to. Once filed, a tribunal order has the same force and effect as an order of the Provincial Court of British Columbia.

Kate Campbell, Tribunal Member