



Civil Resolution Tribunal

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File: ST-2018-003694

Type: Strata

Civil Resolution Tribunal

Indexed as: *Kuzminski v. The Owners, Strata Plan LMS 2055*, 2019 BCCRT 618

B E T W E E N :

Leanne Kuzminski

APPLICANT

A N D :

The Owners, Strata Plan LMS 2055

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Sarah Orr

INTRODUCTION

1. The applicant, Leanne Kuzminski (owner), owns strata lot 8 (unit 204) in the respondent strata corporation, The Owners, Strata Plan LMS 2055 (strata).
2. The owner says the strata's contractor damaged her bathroom which required her to replace her bathtub, repair her bathroom, and upgrade pipes which are common

property. She wants the strata to pay her \$2,864.10 for the cost of replacing her bathtub and repairing her bathroom, and \$417.90 for the cost of upgrading common property pipes.

3. The strata says the owner's claims are out of time, and that she has failed to prove that its contractor caused any damage or that the strata was negligent in hiring the contractor. It also says the pipes replaced were not common property, and therefore the strata is not responsible for the replacement cost.
4. The owner is self-represented and the strata is represented by Justin McGregor, its legal representative.

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. 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.

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. The applicable tribunal rules are those that were in place at the time this dispute was commenced.
9. 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

10. The issues in this dispute are:
 - a. Are the owner's claims out of time?
 - b. If not, is the strata required to reimburse the owner \$2,864.10 for the cost of replacing her bathtub and repairing her bathroom?
 - c. Is the strata required to reimburse the owner \$417.90 for the cost of replacing her bathtub drainage pipe?

BACKGROUND AND EVIDENCE

11. The strata is a multi-building apartment complex in Vancouver established in 1995.
12. On March 11, 2016 the strata filed new bylaws with the Land Title Office repealing all previous bylaws. In 2018 the strata filed an amendment to its bylaws which is not relevant to this dispute.

13. In 2013 a water leak occurred in the unit above the owner's strata lot (first leak). The strata hired Phoenix Restorations (Phoenix) to complete emergency restoration and repair work to the affected strata lots, including the owner's strata lot, unit 204.
14. On November 14, 2013, the owner of unit 304, N.B., expressed to the strata her concerns about Phoenix and asked the strata to use a different contractor, which they declined to do. The owner submitted evidence that Phoenix mistakenly replaced the bathtub drain in unit 304 outside of its scope of work and damaged the bathtub in unit 304 in the process, which required the owner of that unit to have her bathtub replaced.
15. The owner says Phoenix conducted work on her bathtub in unit 204 as part of its restoration and repair work. She says that during this work Phoenix damaged her bathtub drain and covered up the damage with silicone, which she says falls below plumbing standards.
16. The strata says Phoenix did not do any work on the owner's bathtub. It submitted Phoenix's November 14, 2013 scope of work for its restoration and repairs after the first leak. Its scope of work for the owner's strata lot does not include work on her bathtub. The strata also submitted a list of the supplies Phoenix used for its restoration and repair work, and it does not include a bathtub drain.
17. On March 17, 2014, N.B. sent the strata an email detailing her concerns about Phoenix's work in unit 304. The minutes from the strata's March 17, 2014 council meeting show the strata council discussed concerns about Phoenix's response and action taken when conducting in-suite repairs after the first leak, and the council decided that because of these concerns it would use a different contractor for any future emergency restoration repairs. The minutes do not specify the nature of the council's concerns.
18. On April 30, 2016 the owner's bathtub leaked and caused water damage to her strata lot and the strata lot below (second leak). The owner says her bathtub had been compromised by Phoenix's substandard work after the first leak and eventually the silicone cracked and caused the second leak.

19. After the second leak the owner decided to hire a professional home inspector to assess the damage to the bathtub drain. On May 9, 2016, the owner received an inspection report from Fairbairn Inspection Services (Fairbairn report), which determined that an unidentified tradesperson used a tool improperly when removing the old bathtub drain assembly. It also determined that the old bathtub drain assembly was improperly installed using a silicone sealant instead of plumber's putty, which fell below professional plumbing standards.
20. The owner submitted photographs of her old bathtub drain which show some cracks around the edge of the drain. The owner says these photographs show that the tub was damaged a long time before the second leak, however I find I cannot determine the timing of the damage from the photographs alone. The owner also submitted photographs of the underside of her old bathtub which show evidence of water damage along the fiberglass bottom. She says this was caused by water seeping through the cracks in the silicone into the base of the tub. However, I cannot determine the cause of the water damage based only on these photographs.
21. On May 11, 2016, the strata sent the owner a letter stating that the total amount of damage to her strata lot from the second leak was below its insurance deductible, and therefore it would not be involved with any repairs to her strata lot.
22. On May 31, 2016, the owner's husband asked the strata's property manager if the bathtub drain pipes between their strata lot's floor and the ceiling of the unit below were considered common property, as a plumber (Artisan) had recommended replacing them. The strata property manager responded that she would need to see Artisan's scope of work to determine why they recommended changes to the existing pipe. She also said, "it is a common practice and a good idea to replace old pipes while you have access to an area." The owner says she took this as authorization from the strata for her to replace the pipes.
23. On June 1, 2016, Artisan sent the parties its scope of work which states, "we will connect new drainage to the tub in 204 from the ceiling of 104."

24. On June 3, 2016 Artisan repaired some of the damage to the owner's strata lot. Artisan's report indicates that it disassembled the bathtub drain, removed the bathtub, and installed a new bathtub. It also says they "connected new brass drainage from the ceiling of 104."
25. The owner says her husband was present for the entirety of Artisan's work on June 3, 2016, and that he told her Artisan did not use a screwdriver or any other tool to pry out the old bathtub drain, rather they used a tool specifically designed for removing the metal drain. She says Artisan told her husband that the leak was caused by chips and scratches on the base of the bathtub shell in the drain area, and that it looked like someone had previously used a chisel-like tool to pry out the metal drain piece. The owner did not submit a statement from her husband, so all of this evidence is double hearsay. While the tribunal may accept hearsay evidence, in the circumstances I place little weight on it as the owner has not explained why she could not obtain a written statement from her husband, or a statement from Artisan
26. The owner submitted Artisan's invoice dated June 7, 2016 for \$2,409.75. The owner also submitted 2 invoices from Benmark Contracting Ltd. (Benmark) dated June 9, 2016. One is for \$1,800.75 which was a 35% deposit on a quote Benmark provided for bathroom repair work. The other is for \$674.87 for completion of the bathroom renovation. The owner submitted a statement from her insurer which appears to indicate they paid her \$4,932.89 towards the cost of renovating her bathroom.
27. On June 14, 2016, the owner's husband asked the strata to reimburse them \$417.90 for the cost of replacing the bathtub drainage pipe. On July 22, 2016, the strata property manager told the owner that the bathtub drain pipe that serves her unit was part of her strata lot, and not common property. On July 26, 2016, Artisan told the strata's property manager that they did not work on any common pipes while replacing the owner's bathtub. The following day the property manager confirmed to the owner that the drain below her tub is part of her strata lot and for the exclusive use of her tub, and therefore not a common property pipe.

28. On May 9, 2018 the owner had a hearing before the strata council with respect to her bathtub replacement and bathroom renovations, including the upgraded pipe.
29. On May 15, 2018 the strata sent the owner a letter informing her that its original decision would stand, and the strata would not reimburse the owner any amount.

ANALYSIS

30. In a civil claim like this one the owner must prove her claims on a balance of probabilities. This means I must find it is more likely than not that the owner's version of events is correct.
31. I have reviewed all of the parties' submissions and evidence but refer only to that which is relevant to my decision.

Are the owner's claims out of time?

32. The strata says the owner's claims are out of time. It says the owner received a copy of the Fairbairn report on May 9, 2016, and that is the date she learned of the damage to her bathtub drain. The strata says that under the *Limitation Act* the limitation period is 2 years, therefore the limitation period expired on May 9, 2018. The owner did not file the Dispute Notice until May 25, 2018, and it was not issued until May 29, 2018, which is when the limitation period stopped running under section 14 (1) of the version of the Act that was in force at that time.
33. The owner says she did not discover her claim on May 9, 2016 when she received the Fairbairn report, because that report does not name Phoenix, and she says at that time she did not know which tradesperson had caused the damage to her bathtub. She says she did not learn about N.B.'s experience with Phoenix damaging the bathtub drain in unit 304 until the last week of May or early June 2016, which is when she realized Phoenix caused the damage to her own strata lot. The owner says she did not learn that the strata would not reimburse her for the cost of upgrading the bathtub pipes until June or July 2016.

34. For the following reasons, I find the owner's claims are not out of time. The May 9, 2016 Fairbairn report does not name Phoenix as the tradesperson who caused damage to the owner's bathtub. The documentary evidence does not clearly establish a date the owner learned of her claim against the strata, for the actions of its contractor, Phoenix. It is certainly plausible that the owner did not realize it was Phoenix who had allegedly caused the damage until late May or early June 2016 as she claims. Therefore, I find this claim is not out of time.
35. With respect to the owner's claim for the pipe upgrade, the correspondence in evidence indicates that the strata did not notify the owner that she was responsible for replacing the pipe until July 22, 2016. Therefore, I find the owner brought this dispute within 2 years of learning of this claim.
36. I find the owner's claims are not out of time, and therefore I must decide each claim on its merits.

Is the strata required to reimburse the owner \$2,864.10 for the cost of replacing her bathtub and repairing her bathroom?

37. The owner did not submit any direct evidence establishing that Phoenix worked on her bathtub at any time. She relies on the evidence about N.B.'s experience with Phoenix damaging their bathtub in unit 304, however this does not establish that Phoenix worked on the owner's bathtub. The owner also relies on the Fairbairn report, however that report does not name the tradesperson who caused the damage. The owner says Phoenix was the only contractor to perform work in her strata lot since she moved in in 2009, and that she could find no evidence of any contractors working on the strata lot before she owned it. However, the strata was created in 1995. The fact that the owner could not find evidence of a contractor performing work in the strata lot between 1995 and 2009 does not mean it did not happen. It is also possible, as the strata suggests, that the defect in the bathtub drain was caused by the initial construction.

38. The strata denies that Phoenix conducted restoration or repair work on the owner's bathtub after the first leak, and this is supported by Phoenix's scope of work and its list of materials.
39. On balance, I find the owner has not established that Phoenix worked on her bathtub or replaced the bathtub drain.
40. It is undisputed that Phoenix conducted repairs on the rest of the owner's bathroom, however I find there is no evidence to indicate that its work was negligent or fell below professional standards.
41. The strata says that even if Phoenix's repair work did cause or contribute to the damage to the owner's bathtub or bathroom, the strata exercised reasonable care in selecting and supervising Phoenix, who was an independent contractor, and the strata says it is not vicariously liable for Phoenix's negligence. While there is evidence that the owner of unit 304 raised concerns about Phoenix before the strata hired them, I find that evidence is insufficient to establish that the strata's decision to hire Phoenix was unreasonable or negligent. For these reasons, I dismiss this claim.

Is the strata required to reimburse the owner \$417.90 for the cost of upgrading common property pipes?

42. Section 72 of the *Strata Property Act* (SPA) and bylaw 11.1 requires the strata to repair and maintain common property that has not been designated as limited common property.
43. The definition of common property in the SPA includes pipes for the passage or provision of water, drainage, or other similar services, if they are located within a floor, wall, or ceiling that forms a boundary between a strata lot and another strata lot, or if they are located wholly or partially within a strata lot and they are capable of being and intended to be used in connection with enjoyment of another strata lot or the common property.

44. Artisan told the property manager that it did not replace common pipes, however its invoice clearly states that they “connected new brass drainage from the ceiling of 104.” The strata submitted a diagram of the bathtub plumbing in strata lots, however I find this diagram is unhelpful in determining precisely which pipe Artisan replaced. In the absence of any other evidence of the precise location of the pipe Artisan replaced, I find Artisan’s invoice is the best indication of the work it performed. Since the pipe Artisan replaced connected to the ceiling of the strata lot below the owner’s I find the pipe falls squarely within the definition of common property in the SPA.
45. The strata does not say that the replacement of the pipe was unnecessary, and I find it was reasonable for the owner to rely on the strata property manager’s May 31, 2016 email as authorization from the strata to replace the pipe.
46. Therefore, under section 72 of the SPA and bylaw 11.1, I find the strata is required to pay for the cost of replacing the pipe. Artisan’s invoice indicates that the cost of installing the tub drainage was \$417.90. I find the strata must reimburse the owner \$417.90.

TRIBUNAL FEES, EXPENSES AND INTEREST

47. Under section 49 of the Act, and the tribunal rules, since the owner was only partially successful, I find the strata must reimburse her \$112.50 in tribunal fees. The owner has not claimed any dispute-related expenses.
48. The owner is entitled to pre-judgment interest under the *Court Order Interest Act*, R.S.B.C. 1996, c. 79, (COIA) on the \$417.90 owing, calculated from June 7, 2016, which is the date of the Artisan invoice.
49. 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 ORDERS

50. I order that within 14 days of the date of this decision the strata must reimburse the owner a total of \$543.72 broken down as follows:

- a. \$417.90 for reimbursement of the cost of replacing the common property pipe,
- b. \$13.32 in pre-judgment interest under the COIA, and
- c. \$112.50 in tribunal fees.

51. The owner is also entitled to post judgement interest under the COIA, as applicable.

52. 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 123.1 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.

53. 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 123.1 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.

