Civil Resolution Tribunal

Date Issued: June 21, 2019

File: ST-2018-008411

Type: Strata

Civil Resolution Tribunal

Indexed as: *Larmer v. The Owners, Strata Plan NW 2969*, 2019 BCCRT 758

B E T W E E N :

Gertrude M. Larmer

APPLICANT

A N D :

The Owners, Strata Plan NW 2969

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Eric Regehr

INTRODUCTION

1. The applicant, Gertrude M. Larmer, is the owner of a strata lot in the respondent strata corporation, The Owners, Strata Plan NW 2969 (strata). The applicant claims that the strata has failed to address an ant infestation in her strata lot and failed to repair water damage, contrary to its obligation to repair and maintain common property.

2. The applicant claims $16,300 for expenses she incurred dealing with the ant infestation and $2,000 for expenses she incurred to repair the water damage.

3. The applicant is represented by a lawyer, Aman Oberoi. The strata is represented by a strata council member.

JURISDICTION AND PROCEDURE

4. 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.

5. 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.

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 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

8. The issues in this dispute are:

    a. Did the applicant bring this claim too late?

b. Did the strata breach its repair and maintenance obligation with respect to the water damage or ant infestation?

c. If so, how much, if anything, must the strata reimburse the applicant?

BACKGROUND AND EVIDENCE

9. In a civil claim such as this, the applicant must prove her 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.

10. The strata is a phased strata plan consisting of 60 strata lots in 8 buildings. Each building has 2 stories, with strata lots on the ground floor and the second floor. The applicant's strata lot is on the ground floor. The strata lots each have in-floor heating. The applicant purchased her strata lot on December 17, 2014.

11. The strata filed a complete set of bylaws on December 11, 2001. Under the bylaws, which unfortunately are not numbered, the strata must repair and maintain common property that has not been designated as limited common property. This bylaw reflects section 72 of the *Strata Property Act* (SPA), which says that a strata corporation must repair and maintain common property except as set out in its bylaws.

12. The bylaws also say that the owner must repair and maintain their strata lot except for repair and maintenance that is the strata's responsibility under the bylaws.

13. The applicant says that she noticed an ant infestation almost immediately after she moved in. She says that, at first, thousands of ants entered her strata lot every day through various entry points.

14. The applicant was not the first owner to experience an ant problem. In 2014, the strata responded to an issue with ants in common property. The strata says that it contacted a pest control company that advised that exterior spraying would not be effective. The strata says that the pest control company recommended that owners use interior products on an as-needed basis. There is no evidence from this pest

control contractor. Since then, the strata has consistently told owners, including the applicant, that pest control problems within a strata lot are their problem.

15. The applicant says that in June 2015, there was damage in her strata lot when water leaked through a door. She claims $2,000 for this damage, although she provided evidence of expenses totaling only $1,717.01.

16. At its December 17, 2015 meeting, the strata council discussed a legal opinion that in-floor heating is common property that the strata must repair and maintain. The strata council enacted a rule that the strata must repair and maintain in-floor heating unless there has been negligence on the part of the resident.

17. On January 8, 2016, the property manager wrote to the applicant to advise that the strata's pest control contractor said that the ants were under the foundation but were entering through voids within the applicant's strata lot. The property manager said that spraying outside would be useless. The property manager said that if there were cracks in the interior the applicant needed to caulk or seal them herself. Again, there is no evidence from this pest control contractor.

18. In 2017, the applicant raised an issue with the strata about water accumulating under the foundation of her strata lot. It is not clear from the evidence when the applicant first raised this issue because not all of her letters to the strata are dated. However, for the reasons set out below, I find that it makes no difference to the outcome of this dispute when she first wrote to the strata about water accumulating under the foundation.

19. On May 2, 2017, the property manager wrote to the applicant to tell her that her front drain issues had been placed on the maintenance list for repair. The applicant was unhappy that the issue was simply placed on a list, so she arranged for her own plumber to attend. On May 29, 2017, the plumber discovered that the perimeter drain was backed up because the sump was full of sand. The plumber cleared the blockage. Eventually, the strata reimbursed the applicant for the cost of the plumber.

20. On June 2, 2017, the applicant's plumber attended to look at the applicant's in-floor heating. The plumber determined that the boiler's wiring was "completely incorrect" and rewired it. The plumber charged the applicant $317.63.

21. On November 20, 2017, the applicant wrote the property manager and strata that her in-floor heat was not working properly. On December 4, 2017, the applicant had her plumber attend to fix the problem with the in-floor heating. It does not appear from his invoice that he was able to determine whether there was anything wrong with the in-floor heating. He recommended further diagnostic work. The plumber charged the applicant $223.13.

22. On June 11, 2018, the property manager asked the applicant to allow the strata's contractor to attend her strata lot to give an opinion about the applicant's various concerns. The applicant wrote to the strata refusing to allow access because she did not think that the strata selected good contractors.

23. While the precise dates are not in evidence, it appears that around that time, the applicant had her flooring completely replaced at a cost of $9,442.35. According to the applicant, she had to replace her flooring due to the combined effects of the ant infestation and the drainage issues.

24. In general, the applicant says that she has tried to deal with the ants in her strata lot, including by using ant poison and sealing her front door. The problem has persisted although it improved somewhat over time. The evidence shows that the applicant has told the strata many times since 2014 that the ants "originate" in common property by coming through cracks in the foundation and chimney, although she has presented no objective evidence to support her assertion. She therefore believed that the strata should be taking steps to investigate and remedy the problem.

25. The applicant provided invoices totaling $16,622.20 for expenses that she says that she incurred because of the ant infestation.

ANALYSIS

Did the applicant bring this claim too late?

26. The *Limitation Act* applies to tribunal claims, as stated in section 13 of the Act. Under section 6 of the *Limitation Act*, the basic limitation period is 2 years, which means that a person generally cannot bring a claim that is older than 2 years at the time the tribunal issued the Dispute Notice. The tribunal issued the Dispute Notice on November 13, 2018. I note that in the current version of the Act, which came into force on January 1, 2019, the relevant date is the date that the applicant requests resolution, not the date the tribunal issues a Dispute Notice.

27. The applicant incurred many of the claimed expenses before November 13, 2016. The strata argues that the applicant brought these claims too late.

28. The applicant says that the date that the limitation period should start to run for all of her claims is July 19, 2018, which was the date that the strata confirmed that it would not reimburse the applicant for any of the claimed expenses. The applicant says that her claims did not "actualize" until the strata denied them.

29. A limitation period begins to run on the day that a person discovers the claim. Section 8 of the *Limitation Act* says that a claim is discovered when the person knew or reasonably ought to have known:

    a. That a loss has occurred,

    b. That another person caused the loss,

    c. The identity of the person who caused the loss, and

    d. That a court (or tribunal) proceeding would be an appropriate means to remedy the loss.

30. In *Arbutus Environmental Services Ltd. v. South Island Aggregates Ltd.*, 2017 BCSC 1, the Court considered whether the fact that the parties were engaged in negotiations meant that the limitation period did not begin to run. The Court found that just because negotiations may lead to a resolution does not mean that the

person does not have a right to seek other legal remedies. The Court said that legal proceedings only need to be one of the appropriate means to remedy the loss, not the only appropriate means to remedy the loss.

31. I find that the situation in *Arbutus Environmental Services* is analogous to the situation in this dispute. The applicant's correspondence with the strata makes it clear that she has always believed that the strata was responsible for the claimed expenses. As early as February 2016, the applicant's then lawyer (not the applicant's lawyer in this dispute) was threatening the strata with a court action. Therefore, the applicant knew, or reasonably ought to have known, that bringing a tribunal or court proceeding against the strata was one of the appropriate means to seek compensation for both the ant infestation and the water damage. As in *Arbutus Environmental Services*, just because the applicant hoped to convince the strata to pay for the expenses without legal proceedings does not delay the running of the limitation period. In other words, there is no requirement in section 8 of the *Limitation Act* that the person who caused a loss must deny liability before the limitation period begins to run.

32. For these reasons, I find that the expenses that the applicant incurred before November 13, 2016, are barred by the expiration of the limitation period. I dismiss those claims.

Did the strata breach its repair and maintenance obligations with respect to the water damage or ant infestation?

33. Because of my findings about the limitation period, I only need to address 2 of the applicant's monetary claims: the in-floor heating and the new floor. I will also address whether the strata has breached its obligation to repair and maintain common property with respect to the alleged ongoing ant infestation.

In-Floor Heating

34. The applicant claims $540.76 for the 2 plumber invoices from 2017. The applicant relies on the rule that the strata is responsible to repair and maintain the in-floor heating.

35. Section 125(1) of the SPA says that the strata may make rules governing the use, safety and condition of common property. Section 72 of the SPA says that the strata may make bylaws about the strata's and the owners' respective repair and maintenance obligations. I find that the SPA does not allow the strata to make a rule about repair and maintenance obligations, so the rule is invalid.

36. That said, based on the strata council minutes when the rule was adopted, I find that the rule was likely meant to clarify that certain parts of the in-floor heating are common property that the strata must repair and maintain, rather than place additional obligations on the strata.

37. Section 1 of the SPA says that common property includes pipes and wires if they are located within a floor or wall that forms the boundary between a strata lot and common property or another strata lot. Therefore, the strata acknowledges that it must repair and maintain the pipes of the in-floor heating but denies responsibility for the work that the plumber did because it did not involve common property.

38. The strata says that the plumber's invoices do not indicate that there was any repair or maintenance done on common property. I agree. The plumber rewired the boiler, which I assume was in the applicant's strata lot, but there is no indication that any of these wires were within a wall or floor. There is no indication that the plumber performed work on the pipes within the floor. The second invoice only describes diagnostic work.

39. There is no evidence from the plumber other than the invoices. There is also no evidence from the floor installer, who attended in 2018, about whether there was anything wrong with the in-floor heating.

40. It is the applicant's burden to prove that the strata failed to repair and maintain common property. I find that she has not provided any objective evidence to meet this burden.

41. In addition, I am not satisfied that the applicant gave the strata a reasonable opportunity to inspect and assess the in-floor heating. In some circumstances, it may be necessary for an owner to conduct repairs that are the strata corporation's responsibility and seek reimbursement, such as in an emergency. However, in general, if an owner unilaterally decides to repair common property, they usurp the strata corporation's ability to prioritize repair and maintenance for the benefit of all of the owners and within a budget.

42. For these reasons, I dismiss the applicant's claim for reimbursement of expenses associated with the in-floor heating.

New Floor

43. The applicant claims that a combination of the strata's failure to deal with the drainage issues outside of her strata lot and the ongoing ant infestation forced her to replace her flooring in 2018, even though she had just replaced it in 2015.

44. The fact that the strata reimbursed the applicant for the cost of fixing the drainage problem is some evidence that it acknowledged a failure in its repair and maintenance obligations. According to the plumber's invoice, there was a significant blockage that the strata failed to remedy.

45. However, there is no evidence, other than the applicant's repeated assertions, that any failure of the strata caused damage to her flooring that required it to be replaced.

46. In particular, the flooring company's invoices do not say anything about the condition of the floor that was removed. The applicant also did not provide a statement from the flooring company or any other expert to prove that the drainage problems caused so much damage that the floors needed to be replaced.

47. Furthermore, the applicant refused to let the strata's contractor attend before the flooring was replaced. I find that the applicant's refusal was unreasonable.

48. In the absence of any objective evidence to support her claims and keeping in mind her unreasonable refusal to allow the strata access to her strata lot, I find that the applicant has not proven that the strata's failure to repair and maintain common property caused damage to her flooring. I dismiss her claim for reimbursement of the cost of reflooring her strata lot.

Ant Infestation

49. The applicant also asked for an order that the strata comply with the SPA and the bylaws in handling her claims for the ant infestation and water damage repair. I interpret this order as being about the applicant's allegation that the ant infestation continues and that the strata still refuses to investigate it or fix it. Because the strata's obligation to repair and maintain common property is ongoing, I find that this claim is not out of time under the *Limitation Act*.

50. The applicant says that the strata's belief that the ant infestation is caused by conditions within her strata lot is speculative. The strata says the same thing about the applicant's belief that the ant infestation is caused by conditions on common property. The parties each believe that the other party should have to pay to investigate the issue.

51. A strata's obligation to repair and maintain common property is to act reasonably. In general, when an owner raises an issue with the state of common property, it will be reasonable for a strata corporation to investigate the issue, bearing in mind that the strata must prioritize between competing pressures on its resources and work within a budget.

52. In 2014 and 2016, the strata says that it asked its pest control contractor about the ants and that the pest control contractor recommended against spraying on common property. While there are unfortunately no written records from the pest control contractor, the strata council minutes regularly refer to the strata's pest

control contractor performing work on-site. In addition, the strata hired a contractor to assess the applicant's belief that there were "cracks" in the chimney, who found none.

53. With that, it cannot be said that the strata has done nothing to address the applicant's concerns, as the applicant suggests. Rather, the applicant disagrees with the advice that the strata has received. As I interpret her evidence, she either believes that the strata's pest control contractor was wrong or that it failed to consider the state of the strata's common property. When a strata corporation retains a professional to perform its repair and maintain obligations and reasonably follows that professional's advice, the strata corporation has fulfilled its statutory duty, even if that professional was wrong. See *Leclerc v. The Owners, Strata Plan LMS 614*, 2012 BCSC 74 and *Joshi v. The Owners, Strata Plan NW 1833*, 2019 BCCRT 39. Absent any evidence of negligence in the selection of the pest control contractor, which I find there is none, the strata was entitled to rely on its professional advice.

54. The applicant has not provided any expert evidence or professional opinion to support her assertion that the strata could reasonably abate the ant problem by performing work on common property. As mentioned above, the applicant bears the burden to prove her case. I find that she has not proven that the strata failed to act reasonably in dealing with her complaints about ants. For these reasons, I dismiss the applicant's claim that the strata has failed to fulfill its obligations under the bylaws and the SPA.

55. That said, nothing in this decision prevents the applicant from retaining her own pest control contractor to provide an opinion about the cause and potential solutions for the ant infestation. If her contractor determines that there is work that the strata could perform on common property to abate the alleged ant infestation, she can provide a written report to the strata for its consideration. My decision in this dispute is restricted to the strata's past actions in response to the applicant's complaints about the ant infestation. Nothing in this decision restricts the applicant's ability to

bring a future dispute about how the strata addresses any complaints from this time forward.

TRIBUNAL 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 reasonable dispute-related expenses. The applicant has been unsuccessful in this dispute. I dismiss her claims for tribunal fees and dispute-related expenses.

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

DECISION AND ORDER

58. I dismiss the applicant's claims, and this dispute.

Eric Regehr, Tribunal Member