



Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan K 407 v. Kelly*, 2019 BCCRT 789

B E T W E E N :

The Owners, Strata Plan K 407

APPLICANT

A N D :

Fran Kelly

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

J. Garth Cambrey, Vice Chair

INTRODUCTION

1. The applicant, The Owners, Strata Plan K 407 (strata), is a strata corporation existing under the *Strata Property Act* (SPA). The respondent, Fran Kelly (owner), owns strata lot 27 (309) in the strata.

2. The strata alleges that a leak from the owner's bathtub in 309 caused damage to the ceiling of the strata lot immediately below (209). The strata seeks recovery of \$2,520.00 for the cost to repair the owner's bathtub and damage sustained to 209, plus \$1,000.00 in estimated legal costs to place and remove a lien against the owner's strata lot.
3. The strata is represented by a member of its strata council. The owner is self-represented.
4. For the reasons that follow, I order the owner to pay the strata \$131.25 for the cost of the owner's bathtub repair, plus interest.

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 61 of the Act, the tribunal may make any order or give any direction in relation to a tribunal proceeding it thinks necessary to achieve the objects of the

tribunal in accordance with its mandate. In particular, the tribunal may make such an order on its own initiative, on request by a party, or on recommendation by a case manager.

9. Tribunal documents incorrectly show the name of the applicant as The Owners, Strata Plan, KAS 407, whereas, based on section 2 of the SPA, the correct legal name of the strata is The Owners, Strata Plan K 407. 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.
10. 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, pay money or make an order that includes any terms or conditions the tribunal considers appropriate.

ISSUES

11. The issues in this dispute are:
 - a. Is the strata entitled to payment of \$2,520.00 for the cost of repairing 309 and 209?
 - b. Is the strata entitled to payment of \$1,000 for legal fees to place and remove a lien against the owner's strata lot?

BACKGROUND, EVIDENCE AND ANALYSIS

12. I have read all the submissions and evidence provided but refer only to information I find relevant to provide context for my decision.
13. In a civil proceeding such as this, the applicant strata must prove its claims on a balance of probabilities.

14. The strata was created in October 1981. It is a self-managed strata corporation located in Kelowna, B.C. consisting of 27 residential strata lots in a single building.
15. On April 12, 2011, the strata filed a complete new set of bylaws at the Land Title Office (LTO). Two subsequent bylaw amendments were filed at the LTO, but those amendments are not relevant to this dispute. The bylaws relevant to this dispute are summarized as follows:
 - a. Bylaw 2(1): An owner is responsible for repair and maintenance of their strata lot, except for repair and maintenance that is the responsibility of the strata. (Under bylaw 10(d), the strata's duty to repair a strata lot is restricted to the structure of the building, the exterior of the building, certain things attached to the exterior of the building, and structures that enclose patios, balconies and yards, none of which apply here)
 - b. Bylaw 3(13): An owner shall indemnify and save harmless the strata from the expense of any maintenance, repair or replacement necessary to the CP, limited common property, common assets, or to any strata lot by the owner's act, omission, negligence or carelessness. Such indemnity is restricted to expenses not reimbursed from the proceeds received by the operation of any insurance policy.
16. On December 4, 2016, the owner was contacted by her neighbour in 209 below, about a water leak into 209. The owner contacted a strata council member who attended 209 with the owner and the owner of 209 and confirmed the leak. The parties agree that the owner was leaving town the next morning.
17. On the same evening, the council member arranged for KID Contracting (KID) to immediately investigate the leak into 209. KID cut open the bathroom ceiling in 209 and determined the water was coming from bathtub in 309 but that a plumber would be required to determine a more specific cause of the leak.

18. On December 5, 2016, a plumbing contractor (Rite Tech) recommend by KID, determined the bathtub component that connects the bathtub to the drain line (strainer) was defective and the source of the leak.
19. On December 6, 2016, Rite Tech returned to replace the defective strainer in the 309 bathtub. Testing confirmed the bathtub was no longer leaking after the new strainer was installed. The owner does not dispute the failed strainer caused the leak into 209.
20. Subsequently, the strata arranged for the drywall ceiling in 209 to be replaced and for some carpets to be cleaned.
21. By December 16, 2016, the owner had returned to 309 and had spoken with her insurance broker as to whether her insurance would cover the damage. An email exchange between the owner and the strata council member ensued. The owner requested a letter from the strata's insurer and was advised the estimated cost of the repairs was below the strata's \$5,000 water deductible and that a claim against the strata's insurance policy would not be made. The owner insisted on a letter from the strata's insurer so that she could provide it to her insurer to determine if she was responsible for the damage.
22. By January 17, 2017, the strata had received invoice #6 from KID for repairs to the owner's bathtub and to 209 in the amount of \$2,362.50, which the strata requested the owner to pay.
23. Between January and April 2017, the owner requested further details on repairs, including details and a breakdown of the work included in the KID invoice, which were provided by the strata. On April 8, 2017, the strata wrote to the owner requesting payment of the invoice.
24. On December 21, 2017, the strata's lawyer wrote to the owner demanding payment of the KID invoice amount and advising the strata would file a lien against the owner's strata lot if payment was not received in 2 weeks.
25. A lien was filed against 309 on February 8, 2018.

26. The Dispute Notice was issued May 3, 2018.

POSITIONS OF THE PARTIES

27. The strata relies on its bylaw 3(13) which it says obligates the owner to indemnify the strata for the cost of repairs due to her omission to repair her bathtub drain. It says the owner's omission can be accidental and does not require carelessness or negligence. The strata says the space between 209 and 309 is common property, which obligated the strata to complete the repairs. Finally, the strata says the owner (along with the owner of 209) asked the strata to complete the repairs and whether the owner's insurer covers the cost of the damage is between the owner and her insurer and does not involve the strata.

28. The strata seeks recovery of \$3,520 broken down as follows:

- a. \$2,362.50 for the cost to repair the damage sustained to the bathroom ceiling of 209,
- b. \$157.50 for cleaning the carpet in 209, and
- c. \$1,000.00 in estimated legal costs to place and remove a lien against the owner's strata lot.

29. The owner does not dispute the leak occurred nor that damage was sustained to 209 as a result of the defective strainer in her bathtub. She says the day the leak was discovered, the strata council member who investigated it agreed to keep her informed about the insurance coverage. The owner says she was surprised to receive a request to pay for the damages and, failing coverage under the strata's policy, she believes the responsibility for the repair of damage to 209 is that of the 209 owner. She also questions the cost of the repairs and suggests work other than repairs to 209 is included in the invoices.

Is the strata entitled to payment of \$2,520.00 for the cost of repairing 209?

30. In order for me to find the owner responsible for the cost of repairs she must:

- a. Have agreed to pay them,
- b. Be responsible under the SPA or bylaws to pay them, or
- c. Acted negligently.

31. As described below, I find the owner is not responsible for the majority of the expenses.

Did the owner agree to the strata completing the repairs?

32. I will first address the matter of the owner's alleged request for the strata to complete the repairs. The owner does not deny or agree with the strata's submission but rather states the council member who attended the leak agreed to keep her advised of the progress of the insurance claim.

33. In addition to the strata's submission, the only other indication the owner requested the repairs be completed was contained in the strata's lawyer's demand for payment in December 2017. Other emails in evidence show the council member chose to act quickly to prevent further damage. These include the December 6, 2016 email from the council member to what I infer are the other council members at the time and the April 8, 2017 letter from the same council member demanding the owner pay the KID invoice. The December 6, 2016 email also stated the council member acted on his own and committed the strata to spend money.

34. Based on the overall evidence I cannot agree the owner requested the strata complete the repairs or otherwise agree to pay the cost of the damage. If she had done so, I would have found her to be responsible for the cost of the repairs.

Is the owner responsible under the SPA or bylaws to pay the cost of repairs to 209?

35. There is no specific section of the SPA that addresses an owner's responsibility for repair and maintenance of a strata lot.

36. Section 72 of the SPA (and bylaw 10(a)) requires the strata to repair and maintain common property.
37. I disagree with the strata that the space between between 209 and 309 is common property and required the strata to complete the repairs. Under section 68 of the SPA, the boundary between 309 and 209 is the mid-point between the ceiling of 209 and the floor of 309. The “space” between the 2 strata lots is therefore not common property. While pipes, wires, and ducts that exist in the space are defined as common property, there were no repairs required to those things. Given that there were no common property repairs, I find the strata was not responsible for the repairs to 209 or to the bathtub in 309.
38. I turn now to the strata bylaws.
39. While the strata has the ability, by bylaw under section 72(3) of the SPA, to take responsibility for repair and maintenance of portions of a strata lot it has not done so.
40. The strata relies on its bylaw 3(13) which, as I have indicated, states the owner must indemnify and save harmless the strata from the expense of any maintenance, repair or replacement necessary to the CP, limited common property, common assets, or to any strata lot by the owner’s act, omission, negligence or carelessness.
41. A similarly worded bylaw was considered by the BC Provincial Court in *Strata Plan LMS 2446 v. Morrison*, 2011 BCPC 519, in which the court held that an owner was not responsible for expenses flowing from a water leak from a toilet in his strata lot as there was no negligence involved. The trial judge determined that the strata’s bylaw, which required a strata lot owner to indemnify the strata for expense, maintenance, repair or replacement rendered necessary “by the owner’s act, omission, negligence or carelessness” should be “read collectively and import a standard of negligence” (see paragraph 11).

42. The court's decision in *Morrison* is binding on me. Even though that decision was about collection of an insurance deductible, I find the bylaw interpretation applies equally to the cost of repairs that fall below the level of the strata's deductible.
43. I do not agree with the strata's argument that the use of the word "omission" in the bylaw is reason to find the owner responsible for the cost of repairs for 2 reasons. First, the word omission was used in the bylaw before the court in *Morrison* and court found the phrase "by the owner's act, omission, negligence or carelessness" must be read collectively. Second, "omission" is defined in Black's Law Dictionary, free on-line legal dictionary 2nd edition, as "failure to complete a task, usually as a result of apathy, complacency or neglect" which does not include "accidental" as the strata submits. This is something the court in *Morrison* appears to have considered.

Is the owner negligent?

44. The strata did not argue the owner was negligent. However, to prove negligence the strata must show that the owner owed it a duty of care, the respondent breached the standard of care, the strata sustained damage, and the damage was caused by the owner's breach (See *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, at paragraph 33).
45. Given there was no common property involved, while the owner may have owed the strata a duty of care, there is no evidence the owner acted unreasonably, and the strata did not sustain damage. Therefore, even if negligence was claimed, I find the owner is not liable for negligence.
46. Further, the strata must also prove the damage was foreseeable, which I find it was not.
47. For all of these reasons, I find the owner is not responsible to pay the cost of the repairs to 209, which includes the charges of KID that relate to the ceiling removal and repair in 209, and the carpet cleaning invoice. I dismiss the part of the strata's claim.

48. As noted, bylaw 2(1) requires an owner to be responsible for repair and maintenance of their strata lot. I find this applies to the owner with respect to the strata's repair of the bathtub in 309. Part of the KID invoice included an invoice from Rite Tech Plumbing in the amount of \$131.25 for the cost of replacing the 309 bathtub strainer. A copy of the Rite Tech invoice was provided in evidence that confirms this amount.
49. Based on bylaw 2(1), I find the strata is entitled to reimbursement of \$131.25 for the cost of the bathtub strainer in 309, and I so order.
50. Nothing in this decision restricts the strata from starting a claim against the owner of 209 to recover its cost to repair that strata lot.

Is the strata entitled to payment of \$1,000 for legal fees to place and remove a lien against the owner's strata lot?

51. The strata is entitled to register a Form G – Certificate of Lien (Form G) against the owner's strata lot for certain charges set out under section 116 of the SPA. Although a copy of the Form G and related correspondence is not before me I infer the Form G was filed with respect to the cost of repairs claimed by the strata. I find the strata's lawyer's December 21, 2017 letter supports this conclusion.
52. Section 116 of the SPA clearly states a Form G can only be registered against an owner's strata lot for outstanding strata fees or special levies, reimbursement of the cost of work under section 85 of the SPA, and a strata lot's share of a judgement against the strata. The cost of repairing strata lots does not fall into any of the permitted categories that would allow the strata to register a lien in the circumstances of this dispute. As such, I find the strata registered its Form G against the owner's strata lot contrary to the SPA.
53. Section 118 of the SPA allows a strata corporation to add reasonable legal fees to the amount owing to it under a Form G.
54. The strata says it was charged \$500.00 to register the Form G and will be charged an equal amount to discharge the lien. Thus, its claim is for \$1,000.00.

55. However, given my finding that the strata was not entitled to register the Form G, it follows that it is not entitled to recover its legal costs for doing so. Accordingly, I dismiss the strata's claim in this regard.

56. The strata should remove the lien registered against the owner's strata lot.

TRIBUNAL FEES, EXPENSES AND INTEREST

57. 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. I find the owner was the most successful party but did not pay tribunal fees or claim dispute related expenses. I therefore decline to order reimbursement of strata's tribunal fees. The strata did not claim dispute-related expenses.

58. The *Court Order Interest Act* (COIA) applies to the tribunal. The strata is entitled to pre-judgement interest on \$131.25, the cost of the bathtub strainer for 309, from January 10, 2017, the date of the KID invoice that included the strainer charge, to the date of this decision. I calculate the pre-judgement interest to be \$4.81.

59. The strata 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

60. I order that the owner, within 30 days of the date of this decision, pay the strata \$136.06, broken down as follows:

- a. \$131.25 for the cost of the bathtub strainer in 309, and
- b. \$4.81 in pre-judgement interest.

61. The strata is entitled to post-judgement interest under the COIA, as applicable.

62. The strata's remaining claims are dismissed.

63. 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.
64. 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.

J. Garth Cambrey, Vice Chair