



Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Burkhardt v. Rygiel et al*, 2019 BCCRT 919

B E T W E E N :

Walter Burkhardt

APPLICANT

A N D :

Marian Rygiel and The Owners, Strata Plan NW2716

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Julie K. Gibson

INTRODUCTION

1. The applicant Walter Burkhardt says the respondent strata corporation The Owners, Strata Plan NW2716 (strata) does not enforce its bylaw restricting the types of pets that may be kept by occupants.

2. The strata is a 46-unit residential complex in Abbotsford. Mr. Burkhardt owns strata lot 33 (SL33), which is unit 33. The respondent Marian Rygiel and his spouse BR co-own strata lot 35 (SL35), which is unit 34. According to the strata plan, SL35 is located directly above SL33.
3. In June 2017, Mr. Burkhardt became aware that a cat was living in SL35.
4. The parties agree that the Bylaws restrict the pets that owners may keep fish, birds or small aquarium animals only. The Bylaws do not permit cats or dogs to reside in strata lots.
5. Mr. Burkhardt says he complained about the cat in SL35, but the strata has not removed it.
6. Mr. Burkhardt asks for an order requiring:
 - a. enforcement of the pet bylaw,
 - b. payment of \$5,360.16 for cleaning SL33, including fumigation, carpet cleaning, duct work, etc.
 - c. payment for “legal and personal” costs of \$2,058.94,
 - d. \$2,000 in compensation for “personal stress and suffering from pain”, and
 - e. Mr. Rygiel to be responsible for cleaning up SL35, at his own cost.
7. The strata says it has used its best efforts to comply with its obligations under the *Strata Property Act (SPA)* and its Bylaws.
8. Mr. Rygiel says the strata approved his family cat when he bought SL35 in 2010. When that cat, Funia, died, Mr. Rygiel and BR obtained a new cat, also named Funia (Funia 2), who now lives with them. One document referred to the new cat as Fuma, but another stated that the Rygiels chose the name Funia again because they liked it. I refer to the new cat as Funia 2, throughout.

9. Mr. Rygiel says Funia 2 is covered by the previous exemption from the pet bylaw. He also says that Funia 2 provides emotional support to BR, in a manner akin to a support animal. Mr. Rygiel asks that the dispute be dismissed.
10. Mr. Burkhardt and Mr. Rygiel are each self-represented. The strata is represented by strata council member Steven Major.

JURISDICTION AND PROCEDURE

11. 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.
12. 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.
13. 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.
14. The applicable tribunal rules are those that were in place at the time this dispute was commenced.
15. 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

16. The issues in this dispute are:
- a. Whether Mr. Rygiel has a valid exemption to the Bylaws allowing him to keep his cat, Funia 2, in SL35?
 - b. If the exemption is valid, what impact do Mr. Burkhardt's allergies have on the situation?
 - c. If the exemption is not valid, whether Funia 2 is a support animal such that I must grant an exemption for her to remain in SL35? and,
 - d. If not, what remedy is appropriate?

BACKGROUND AND EVIDENCE

17. I have reviewed all of the evidence but only refer to the evidence and submissions as I find necessary to provide context for my decision.
18. Bylaw 3(4) provides that an owner must not keep any pets on a strata lot except one or more fish or small aquarium animals and up to 2 caged birds. The parties agree that this pet bylaw has not changed since at least 2001, before the owners involved in this dispute bought their strata lots.
19. I find that the bylaw is mandatory and does not allow cats. There is no provision in the bylaw or the SPA permitting the strata to make an exception to allow a cat to be kept in a strata lot, unless there was one needed to accommodate an owner's disability.
20. In March 2008, Mr. Burkhardt took possession of SL33.
21. In 2010, when Mr. Rygiel and BR were considering purchasing SL35, they became aware that the Bylaws did not allow cats. They requested permission for their family cat, Funia, to live with them in SL35.

22. On May 28, 2010, strata council members signed a document addressed to Mr. Rygiel and BR giving permission for their then ten-year old family cat, Funia, to reside in SL35. The letter specifically says that “Funia” who is described as “...a family cat named Funia that is 10 years old”, “...is allowed to reside in the property”.
23. I find that this permission is limited to the Rygiels’ then 10 year-old family cat Funia and does not extend to other cats, even if given the same name. Put differently, although the letter does not expressly say that other cats are prohibited, I find that it only extends permission to their specific family cat at the time.
24. In June 2010, Mr. Rygiel and BR took position of SL35.
25. Mr. Rygiel and BR kept Funia in SL35 from the time they purchased the unit until Funia passed away. They then replaced Funia with another family cat, Funia 2, without asking for fresh permission for Funia 2 to reside in SL35.
26. The strata says, and I accept, that it received no complaints from Mr. Burkhardt regarding the pet bylaw or allergies from the time Funia moved into SL35, until 2017.
27. In 2017, Mr. Burkhardt complained about the cat living in SL35.
28. In July 2017, the strata council directed the property manager to send a Notice of Bylaw Complaint to Mr. Rygiel and BR about the cat.
29. On August 23, 2017, Mr. Rygiel and BR, through a helper MB, wrote to the strata responding to the Notice of Bylaw Complaint. Mr. Rygiel admitted that his cat was not the one previously approved. Mr. Rygiel said he had strata’s permission to keep Funia 2. When Funia passed away, Mr. Rygiel reasoned that he could replace her without needing new permission to keep a cat. Mr. Rygiel offered to sign a document indicating that he would not replace Funia 2.
30. On August 31, 2017, Dr. G, family physician, wrote a letter saying that BR was “stressed and anxious” about the prospect of losing Funia 2. Dr. G then wrote “She

is stating that if she will loose (sic) her cat she may have a major depression which may affect her activities of daily living.”

31. On September 7, 2017, Mr. Rygiel again wrote to the strata. He said Funia 2 was required for emotional support. Mr. Rygiel enclosed the letter from Dr. G.
32. On October 10, 2017 strata council considered Mr. Rygiel’s response to the bylaw complaint.
33. On October 19, 2017, Mr. Burkhard wrote to the strata saying that due to his “severe cat allergy”, the cat at SL35 needed to be removed without delay. Mr. Burkhard did not provide medical evidence to prove his health condition, nor evidence about how an indoor cat in SL35 could adversely impact him.
34. On February 20, 2018, Mr. Burkhardt requested a SPA section 34.1 hearing before strata council. The hearing was held on March 6, 2018.
35. On March 12, 2018, the strata wrote to Mr. Burkhardt saying it would conduct hearings with pet owners in the strata to determine the appropriate course of action.
36. On April 24, 2018, psychologist Dr. M P-H offered his opinion that removal of Funia 2 from SL35 would likely cause BR to suffer “significant emotional distress”.
37. On May 8, 2018, the strata held a hearing to consider the issue of the cat in SL35.
38. The issue of whether Funia 2 could remain in SL35 remains outstanding.

ANALYSIS

Does Mr. Rygiel has a valid exemption to the Bylaws allowing him to keep Funia 2 in SL35?

39. The Bylaws do not allow cats. I have found that strata council cannot grant an exemption to Mr. Rygiel in these circumstances.
40. I find that the previous exemption, in 2010, was invalid. In any case, it applied specifically to Funia and not to Funia 2.

41. Mr. Burkhardt filed no medical or expert evidence about whether he suffers from allergies, what causes them and what issues they cause. He relied upon his description of his allergies alone. I find it unnecessary to decide the impact of Mr. Burkhardt's allergies on the situation, because I have found that Mr. Rygiel does not have an exemption from the bylaw prohibiting cats from living in strata lots.

Is Funia 2 a support animal such that I must grant an exemption for her to remain in SL35?

42. The *Guide Dog and Service Dog Act* provides that the only pets to which a pet bylaw does not apply under the SPA are guide dogs or service dogs or dogs that are members of a retired service dog team.

43. I find that the opinions of Dr. NG and psychologist Dr. M. P-H do not prove that Funia 2 is a guide or service dog, or a member of a retired service dog team. There is no evidence to prove that Funia 2 meets this definition.

44. Under section 8 of the *Human Rights Code* says that unless there is a bona fide and reasonable justification, a person must not, because of a physical or mental disability, discriminate against another person regarding any accommodation, service, or facility customarily available to the public.

45. Neither Dr. G nor psychologist Dr. M. P-H offered a diagnosis for BR nor gave an opinion that she has a physical or mental disability that would trigger the section 8 duty to accommodate. That is, the fact that some emotional distress will likely result does not prove a disability triggering the duty to accommodate.

46. While I understand that Funia 2 provides important companionship to BR and Mr. Rygiel, I find that Funia 2 is not exempt from the pet bylaw prohibiting cats from living in strata lots.

What remedy is appropriate?

47. A final question is whether it is significantly unfair for the strata to require Mr. Rygiel and BR to comply with the bylaw prohibiting cats. Although Mr. Rygiel did not file a

counterclaim, I include this analysis for completeness, as it relates to Mr. Burkhardt's requested order for enforcement of the pet bylaw.

48. The courts and the tribunal have considered the meaning of "significantly unfair" in a number of contexts, equating it to oppressive or unfairly prejudicial conduct. In *Reid v. Strata Plan LMS 2503*, 2003 BCCA 128, the BC Court of Appeal interpreted a significantly unfair action as one that is burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith and/or unjust or inequitable.
49. The BC Court of Appeal considered the test for significant unfairness in *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44. The test established in that case was restated by the Supreme Court of BC in *The Owners, Strata Plan BCS 1721 v. Watson*, 2017 BCSC 763, in an application for leave to appeal a decision of the tribunal at paragraph 28:
 - a. What is or was the expectation of the affected owner?
 - b. Was that expectation on the part of the owner objectively reasonable?
 - c. If so, was that expectation violated by an action that was significantly unfair?
50. In *Aasland et al v. The Owners, Strata Plan VIS 3478*, 2018 BCCRT 675 the applicants had 2 cats contrary to a bylaw restricting the number of cats to 1. The applicants argued that the strata corporation's enforcement of the pet bylaw was significantly unfair because other owners had 2 pets. The tribunal rejected the argument because there was no evidence that the applicants knew that other owners had 2 pets at the time they acquired 2 cats. In other words, the tribunal found that the relevant point in time to assess whether the applicants' expectation that they would be able to keep 2 cats was objectively reasonable was at the time they acquired the cats.
51. In *Aasland*, the tribunal found that the owners' expectation of being allowed to keep 2 cats contrary to the bylaws was not objectively reasonable.

52. While other tribunal decisions are not binding on me, I agree with the reasoning in *Aasland* and find it applicable here.
53. Mr. Rygiel says he expected to be allowed to keep a replacement cat for Funia, because of the permission granted in 2010. I find that, even had that exemption been valid, it did not encompass future cats. The letter specifically referred to Mr. Rygiel and BR's then family cat.
54. I have considered that the strata granted at least one other pet exemption to another owner. However, the strata notified all owners with cats known to be living in their strata lots and is awaiting the tribunal's determination about the bylaw and exemptions. Therefore, I find that the strata has acted consistently on this issue since receiving Mr. Burkhardt's complaint. As well, Mr. Rygiel was aware that cats were not permitted under the Bylaws, from the time of buying SL35.
55. I find that it is not objectively reasonable for Mr. Rygiel to expect, based on the 2010 exemption letter, the Bylaws or the strata's actions, that Funia 2 or any other future cat would be exempted from the bylaw.
56. I order that Mr. Rygiel comply with Bylaw 3. I order that he not keep any cats in SL35.
57. I note that the strata owners could meet to consider amending the pet bylaw to allow cats currently residing in the strata to remain there, if they wish.
58. I turn to Mr. Burkhardt's damages claims.
59. Mr. Burkhardt seeks an order that the strata or Mr. Rygiel pay him \$5,360.16 for cleaning SL33, including for fumigation, carpet cleaning and duct work.
60. Mr. Burkhardt has provided quotes for cleaning and painting work, including cleaning of carpets, blinds and furniture in SL33. However, I find that Mr. Burkhardt has not proven that any of these items need cleaning or painting because an indoor cat resides in SL35. Mr. Rygiel provided photographs showing no shared venting or ducts visible. Heating in SL35 is via electric baseboards. Mr. Burkhardt did not

provide evidence such as air quality testing to show contamination with cat-related allergens and failed to prove his allergies were caused by the cat. Therefore, I dismiss Mr. Burkhardt's claim for these damages.

61. Mr. Burkhardt also claims payment of personal and legal costs totalling \$2,058.94. This includes a claim for \$1,800 of his time, valued at \$30 per hour, and \$78 for a lawyer. I dismiss these claims, based on section 20 of the Act and the tribunal's rules that legal fees are only ordered in extraordinary cases and that parties generally represent themselves. I find that this case is not extraordinary.
62. I will consider Mr. Burkhardt's claims for \$30.94 for Canada Post expenses and his tribunal fees separately below.
63. Mr. Burkhardt also claims \$2,000 in damages for "personal stress and suffering from pain". While I accept that this situation has been trying, there must be evidence of harm that was caused by the alleged actions of the respondents to recover these damages. Mr. Burkhardt provided a statement saying he had been hospitalized and told that he was in poor health. However, he did not file a statement or letter from any medical professional to prove that he has health issues caused by the cat living in SL35. I find that Mr. Burkhardt has not proven this claim and I dismiss it.
64. Mr. Burkhardt seeks an order that Mr. Rygiel be responsible for cleaning up SL35, at his own expense. The photographs Mr. Rygiel filed in evidence show SL35 to be tidy. While I understand that Mr. Burkhardt is claiming cat-detoxifying cleaning, he has not proved his claimed allergies, nor whether the cleaning quoted would assist with his allergies. I dismiss this claim.
65. In *Kuan et al v. The Owners, Strata Plan NW2603*, 2019 BCCRT 800, at paragraph 29, the tribunal held that an owner does not have standing to pursue bylaw enforcement against other owners. Although not binding upon me, I accept this analysis and apply it here. For this reason, I make my orders regarding bylaw enforcement below as between the strata and Mr. Rygiel.

TRIBUNAL FEES, EXPENSES

66. 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. Mr. Burkhardt was only partly successful here. I therefore order the strata to reimburse Mr. Burkhardt for \$125, being 50% of his tribunal fees of \$250 and 50% of his dispute-related expenses of \$30.94 for Canada Post delivery of the Dispute Notice, which I find reasonable, for a total of \$140.47
67. The strata claimed reimbursement of \$4,967.50 in legal fees and \$182.97 in disbursements. I dismiss these claims as the strata has not been successful on the bylaw enforcement aspect of this claim. As well, pursuant to section 20(1) of the Act, the general rule is that parties represent themselves.
68. I also dismiss the strata's claim for special costs, because it was not successful here. As well, there was no proven conduct that was reprehensible and deserving of reproof to the extent that special costs would have been warranted (see *Garcia v. Crestbrook Forest Industries Ltd.*, [1994] B.C.J. No. 2486 (BCCA)).
69. The strata corporation must comply with the provisions in section 189.4 of the SPA, such as not charging dispute-related expenses against Mr. Burkhardt.

DECISION AND ORDERS

70. I order that:
- a. Mr. Rygiel must, within three months of this decision, comply with Bylaw 3 and, in particular, not keep cats in SL35; and
 - b. The strata must pay Mr. Burkhardt \$140.47, in payment of 50% of his tribunal fees and expenses, within 30 days of this decision.
71. 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.

72. 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.

Julie K. Gibson, Tribunal Member