



Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan NW 1961 v. Yan Yi Sun*, 2019 BCCRT 1120

B E T W E E N :

The Owners, Strata Plan NW 1961

APPLICANT

A N D :

YAN YI SUN

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Kathleen Mell

INTRODUCTION

1. The respondent, Yan Yi Sun (owner), owns a strata lot in the applicant strata corporation, The Owners, Strata Plan NW 1961 (strata). The strata says that, due to the owner's negligence, water penetrated into the ceiling of the strata lot below his.

The strata requests reimbursement of the \$1,063.13 cost of the investigation report into the incident. The strata is represented by DT, a strata council member.

2. The owner says he was not negligent and did not cause the leak. He also says that he did not authorize the inspection and that the investigation report showed that there were common property defects beyond his strata lot. He says that he should not have to pay for the inspection report. The owner is self-represented.

JURISDICTION AND PROCEDURE

3. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over strata property claims under section 121 of the *Civil Resolution Tribunal Act* (CRTA). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. The tribunal must act fairly and follow the law. It must also recognize any relationships between dispute parties that will likely continue after the tribunal's process has ended.
4. The tribunal has discretion to decide the format of the hearing, including in writing, by telephone, videoconferencing, or a combination of these. In some respects, this dispute amounts to a "it said, he said" scenario with both sides calling into question the credibility of the other. In the circumstances of this dispute, I find that I am properly able to assess and weigh the evidence and submissions before me. Further, 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 decision *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, in which the court recognized that oral hearings are not necessarily required where credibility is in issue. I therefore decided to hear this dispute through written submissions.
5. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court. The tribunal may also ask the parties and witnesses questions and inform itself in any way it considers appropriate.

6. Under section 123 of the CRTA 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, or order any other terms or conditions the tribunal considers appropriate.

ISSUE

7. The issue in this dispute is whether the owner should reimburse the strata the cost of the investigation report.

EVIDENCE, FINDINGS AND ANALYSIS

8. In a civil dispute such as this, the applicant must prove its claim. It bears the burden of proof on a balance of probabilities.
9. While I have reviewed all of the material provided, I have only commented below on the evidence and submissions necessary for this decision.

The Incident

10. It is undisputed that the owner has tile on the balcony that the previous owner installed. The owner also inserted the metal from coat hangers into the drains. He says that this helps keep the drains free of debris and that they are helpful in cleaning the drains when necessary. In October 2016, water leaked through the ceiling of the unit, 1602, beneath the owner's strata lot
11. The owner of unit 1602 confirmed that there were 4 other leakages in October 2012, March 2015, August 2016, and February 2017.
12. The strata hired RDH Building Science Inc. (RDH) to investigate the cause of the leak. The strata claims that the owner accepted that he would pay for the investigation report if RDH decided he was responsible for the leak.

Did the Owner Say He Would Pay for the Investigation Report if He was Responsible for the Leak?

13. In an October 21, 2016 text, the strata asked the owner to authorize the building manager to enter his strata lot, which was rented to tenants, with an RDH engineer to “check things out” early the next week. There is no suggestion that the strata said that depending on the results of the investigation the owner might be liable for the cost.
14. The strata provided an October 21, 2016 email exchange between H, who I infer is a strata council member, and the property management company which states that the property management company should send the owner notification that if RDH finds that the leak was a result of his negligence then the invoice would be charged back to him. H stated that the council discussed this the previous night and agreed that the notification should come from the property manager’s office.
15. The property manager wrote back and advised the strata that the word negligence should not be used as then they would have to prove it.
16. On October 25, 2016, the strata wrote to the owner and said that if RDH determined that the water damage occurred because of the balcony tile, or because of debris accumulation due to the wire in the drain, that the cost of the report “may be” charged back to the owner. The wording is equivocal and there is no clear indication that payment would be demanded. I also note that the email came after the owner gave permission on October 23, 2016 for RDH to enter the suite. There is no reply showing the owner agreed to pay for the cost of the investigation report.
17. The owner provided H’s November 16, 2016 email which stated that at the time of the flood the owner said that he would pay for the damage to the suite below. There is no suggestion he said he would pay for the investigation report or that it was even mentioned.
18. The strata provided a series of emails between the parties from between November 2016 to December 2016 in which the owner disputes that RDH said he was responsible for the leak and points to the other issues RDH discussed, which I will

address below. The owner indicated that he had done his best to keep the drains clear. In none of these emails does the owner say that he agreed to cover the cost of the investigation.

19. On February 20, 2017, the strata wrote to the owner that RDH investigated the leak and concluded that the drain opening on his balcony was restricted as a result of the tile installation and also partially restricted by debris. The strata said that as per the strata's "executive instruction" the \$1,063.13 cost of the investigation had been charged to the owner's strata lot account. A year later, on February 2, 2018, the strata again wrote to the owner and made it clear that the \$1,063.13 was a "chargeback" for "investigation" of the leak.
20. The strata submits that although the owner was careful to not specifically say that he would pay for the RDH's report, he did not say that he would not do so and he did allow access to the strata lot.
21. Based on the above, I find that the owner did not agree that he would pay for RDH's report. The strata suggests that because the owner gave permission for RDH to enter the unit that he assumed responsibility for the investigation if he was found responsible for the leak. The owner never said this, as the strata admits. Further, the owner granted permission to access the strata lot before there was any suggestion he might be responsible for the cost of the report. Therefore, his allowing access does not amount to an assumption of liability for the cost of the report. Also, as discussed below, I find that the investigation report did not definitively find that the owner was responsible for the leak.

The Investigation Report

22. The strata submits that it hired RDH to investigate the cause of the leak and to provide remedial recommendations. On November 1, 2016, RDH reported that, based on its site observations of other strata lots, it was unlikely that there was a waterproof membrane under the tiles of the owner's balcony. Therefore, when the drains became plugged the water penetrated the tiles and grout bed between the tiles and the structural slab.

23. RDH said that it was also likely that the water below the grout penetrated a crack in the structural slab and entered into the building between the owner's strata lot and unit 1602 below. RDH noted that the owner of unit 1602 said that the water leakage through the concrete slab and the staining of the ceiling was a common problem.
24. RDH did say that the drains in the owner's strata lot were partially restricted by the tile that was installed and the presence of the coat hangers in the drains increased the likelihood that the drains would become plugged.
25. However, RDH also noted that it recommended to the strata previously that repairs be made to the delaminated concrete on the balconies and the installation of a waterproof membrane on all of the balconies. RDH also said that the remedial work should include the installation of larger scupper drains. RDH stated that the delaminated concrete seen at unit 1602 reinforced the need for this course of action.
26. RDH also recommended the installation of appropriate scupper drains with troughs and downspouts on all of the balconies and said that it would significantly reduce the risk of water ingress into the suite below. RDH further indicated that there were low threshold heights at many of the sliding glass doors and that it recommended installation of new doors at the same time as the balcony membrane installation. It provided a picture showing the gap in the door of the unit 1602 below the owner's strata lot.
27. RDH said that in the "short-term" the owner should clean the existing drains regularly and not leave coat hangers in the drain when not being used for cleaning.

Did the Strata Prove that the Owner Was Negligent?

28. In order to prove the owner was negligent the strata has to prove the owner owed it a duty of care, he breached the applicable standard of care, and the breach caused the damage.
29. The strata submits that the owner assumed the liability for the tile the previous owner installed when he purchased the strata lot. I note that the balcony is not part

of the owner's strata lot and that it is limited common property. Bylaws were filed with the Land Title Office on January 18, 2002. Bylaw 2.1 B (3) (iii) indicates that the strata is responsible for repairing and maintaining limited common property including balconies. A number of amended bylaws have been submitted since 2002 but none address whether balconies are limited common property which the strata has a duty to repair and maintain.

30. The strata also provided a picture of a balcony with snow on it, but the picture is not date stamped and there is no clear indication where it was taken. The strata says the picture was taken on February 9, 2017. This is not the date of the incident or before the incident. I do not place any weight on this evidence.
31. There is no proof of the state of the drains on the day of the incident. RDH's report spoke of the "likelihood" of the metal hangers increasing the chance of the drains getting clogged but did not definitively state that this occurred. Further, even if I were to accept that the drains were clogged, the strata has not proved that this meant that the water would have entered the strata lot beneath if not for the other issues identified in RDH's report.
32. The owner says that there have been other leaks that the strata took responsibility for and would rather repair the ceiling of the unit below him than fix the building's larger structural problems. As noted, the owner of unit 1602 confirmed that there had been prior leaks.
33. The owner provided the April 8, 2018 strata meeting minutes which stated that about a year ago, so in April 2017, RDH gave the strata an estimate for, amongst other things, replacing windows, installing a water membrane, sliding doors, and balcony renewals.
34. The owner provided an April 16, 2019 letter from the strata indicating that it hired RDH and planned on installing a waterproof membrane and fixing window and door assemblies on all strata lots. The letter also stated that the strata was enlarging and replacing the drainage scuppers and installing gutters and adding drains at "select locations." I find that the fact that the strata has taken responsibility for the leaks in

the past and is currently making upgrades suggests that the strata is aware that the balcony is limited common property which it must repair and maintain.

35. I also find that the strata has not proved that the owner was negligent and responsible for the leak. RDH's report indicates that in the "short term" the owner should keep the drains clear but that there were larger problems including the size of the drains, the gaps in the doors, openings in the structural slab, and the lack of a waterproof membrane. It also notes the absence of troughs and downspouts. I accept the owner's submission that the fact that the strata has agreed to fix these issues indicates it is aware of the larger problem.
36. Based on this, I find that the strata has not proved that the owner's actions are the reason the water entered the unit below. It may have been the reason the drain overflowed but the evidence does not prove it is the reason the water found its way to unit 1602.
37. Further, even if I had decided that the owner was even partially responsible for the leak, I still would not have ordered he pay for RDH's investigation report because the strata did not have the authority to charge back the owner. The charge back of an engineering invoice is not captured by section 116 of the SPA and is commonly referred to as a non-lienable amount as it cannot be included in the amount of a Certificate of Lien filed under section 116 of SPA. In order to collect a non-lienable amount the strata must have the authority to do so under a valid and enforceable bylaw or rule that creates the debt. (see *Ward v. Strata Plan VIS #6115*, 2011 BCCA 512)
38. Arguments on the validity of the charge back of the invoice were not presented by either party. Based on my review of the bylaws, I find there is no bylaw that permits the respondent to charge the invoice back to the applicant. I also note that the strata did not suggest that it had authority under a bylaw to charge back the cost of the investigation report but said that it was authorized under an "executive instruction."
39. In summary, I find the strata decided to investigate why the water was leaking under its duty to keep the strata in a state of repair under the SPA. The strata is also

responsible for keeping the limited common property in a state of repair under the bylaws. The owner is not responsible for the cost of an investigation into how to accomplish this. The strata also did not have the authority to charge back the owner because the bylaws do not allow for this.

40. For all of these reasons, I find that the owner is not responsible for the investigative report and does not have to reimburse the strata for RDH's invoice.

TRIBUNAL FEES, EXPENSES, AND INTEREST

41. Under section 49 of the Act, and the tribunal's rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. Given my finding that the owner is not liable for RDH's invoice he does not have to reimburse the strata tribunal fees or expenses.

42. The strata corporation must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against the owner.

DECISION

43. I dismiss the strata's claims and this dispute.

Kathleen Mell, Tribunal Member