



Civil Resolution Tribunal

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Type: Strata

Civil Resolution Tribunal

Indexed as: *Lee v. Gjerek et al*, 2019 BCCRT 1150

B E T W E E N :

JINCHUNG LEE

APPLICANT

A N D :

ANTON GJEREK and The Owners, Strata Plan BCS2784

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Trisha Apland

INTRODUCTION

1. This is a dispute about water damage to a strata lot.
2. The applicant, Jinchung Lee, owns a strata lot in the respondent strata corporation, The Owners, Strata Plan BCS2784 (strata). The strata building is a 35-level high-

rise. The respondent Anton Gjerek owns the strata lot directly above the applicant's strata lot. Both strata lots are tenanted

3. Mr. Lee says water leaked from Mr. Gjerek's strata lot causing damage to his strata lot bathroom ceiling. Mr. Lee claims repair costs of \$1,890.00. He also claims \$500 for a rent reduction he gave his tenant for the leak inconvenience.
4. Mr. Gjerek denies that he or his tenants caused the water leak or that he is responsible for Mr. Lee's loss.
5. Mr. Lee and Mr. Gjerek are each self-represented.
6. The strata filed no Dispute Response and did not participate in this dispute. I find Mr. Lee properly served the Dispute Notice on a strata council member as permitted under Civil Resolution Tribunal (tribunal) rule 2.6. Despite naming the strata, Mr. Lee does not claim the strata is responsible for his loss. The substance of Mr. Lee's claim is against Mr. Gjerek. However, since the strata is a named respondent, I have considered whether it is responsible for Mr. Lee's loss. For the reasons set out below, I find that neither Mr. Gjerek, nor the strata, are responsible for Mr. Lee's loss.

JURISDICTION AND PROCEDURE

7. These are the formal written reasons of 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.
8. The tribunal has discretion to decide the format of the hearing, including in writing, by telephone, videoconferencing, or a combination of these. I am satisfied an oral hearing is not required as I can fairly decide the dispute based on the evidence and submissions provided.

9. 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. I have only addressed the evidence and arguments to the extent necessary to explain my decision.
10. 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.

ISSUES

11. The issues in this dispute are:
 - a. Is the strata responsible to reimburse Mr. Lee for his loss?
 - b. Was the water damage to Mr. Lee's strata lot caused by Mr. Gjerek's negligence?
 - c. If so, to what extent, if any, must Mr. Gjerek reimburse Mr. Lee \$1,890.00 for repairs costs and \$500 for lost rent?

EVIDENCE AND ANALYSIS

12. Mr. Lee provided a timeline of events in his Dispute Notice that I find is not entirely consistent with his submissions. It is undisputed that Mr. Lee lived out of town and learned of the leak from his tenant. Mr. Lee was not present to witness the leak or the repairs. Therefore, I infer Mr. Lee's inconsistencies are due to him learning about the events second hand. I have reviewed all the parties' submissions and evidence. However, I have only referred to that which I found necessary to establish the facts and to give context to my decision.
13. In his Dispute Notice, Mr. Lee says there were two leaks into his strata lot bathroom, one on October 16, 2018 and one on October 29, 2018. In his submissions, Mr. Lee explains that he was mistaken about the second leak. Mr. Lee

says in his submissions that there was only one leak that started on October 16, 2018 and continued until October 25, 2018. I find just one leak, that started on October 16, 2018, is consistent with the rest of the evidence.

14. The emails in evidence show that Mr. Lee notified Mr. Gjerek of the water leak and sent a picture of the ceiling damage on October 16, 2018. Mr. Lee's later emails suggest that he had some difficulty contacting the building manager about the leak. However, the emails show that Mr. Lee was able to contact the strata management company and the strata, or its insurer, hired WEBIR Automation & Control Services Ltd. (WEBIR) to investigate and repair the leak.
15. In his Dispute Notice, Mr. Lee said that WEBIR inspected both his, and Mr. Gjerek's strata lots on October 18, 2018, but could not find the leak's source. This is consistent with Mr. Gjerek's submissions. Mr. Gjerek says it took upwards of 6 weeks to ascertain the leak source. Mr. Gjerek provided a statement from his tenants, who said the plumbers had difficulty finding the leak's source and the plumbers returned to their strata lot several times, turning the water on and off to check the system. Mr. Gjerek's tenants say the repairs went on from about October 16, 2018 to December 4, 2018.
16. On October 30, 2018, WEBIR sent an email to Mr. Lee confirming that just the week before it had discovered the leak's source. The leak's source was related to a plumbing fixture in Mr. Gjerek's strata lot's "tub/shower". The WEBIR email does not provide any details of its inspection. The email explains that WEBIR removed a "fair amount of drywall" in Mr. Lee's strata lot due to water saturation and it had temporarily masked off the area until the plumbing repairs and restoration were complete. It says the owner above (Mr. Gjerek) had "now given approval to further access the plumbing in their unit for inspection and determining the scope of repairs." WEBIR said it also advised Mr. Gjerek and his tenants to stop using the "tub/shower until required plumbing repairs are completed and verified."
17. I find WEBIR's email suggests that the plumbing work was not complete by October 30, 2018. However, Mr. Lee says the leak only continued until October 25, 2018. I

find Mr. Lee was either mistaken about the timing, or WEBIR's initial work had stopped the leak on about October 25, 2018 but there was still additional work to "verify" and finalize the job.

18. On June 6, 2019, at Mr. Lee's request, WEBIR provided its opinion on the exact source of the leak. WEBIR stated that the leak was caused by "a bad seal on the shower drain/strainer hub assembly" in Mr. Gjerek's strata lot bathroom. The parties do not dispute that the leak source was the failed hub assembly seal. While the exact repair date is unclear, there is no dispute that once WEBIR repaired the fixture in Mr. Gjerek's bathroom, the leak stopped.
19. The title searches show that both parties purchased their strata lots in 2008. Mr. Gjerek says the failed plumbing fixture was original as he had not replaced it. This is consistent with WEBIR's June 6, 2019 email that says the "shower drain/strainer hub assembly appears to be from original construction." Therefore, I find the fixture was over 10 years old when its seal failed.

Is the strata responsible to reimburse Mr. Lee's for his loss?

20. It is undisputed that the strata did not repair the water damage in Mr. Lee's strata lot. The strata manager directed Mr. Lee to use his own insurance policy for his strata lot repairs. Mr. Lee's deductible was more than the cost of repairs, so he did not make a claim under his policy.
21. The SPA and the strata bylaws set out the repair and maintenance obligations of the strata and of strata lot owners. Sections 3 and 72 of the SPA require the strata to repair and maintain common property, subject to any bylaws placing the obligation on an owner. The strata had filed numerous amended bylaws, but I find they are not relevant to repair and maintenance obligations. Instead, I find the relevant strata bylaws are the Standard Bylaws of the SPA. Standard Bylaw 2 says that an owner must repair and maintain the owner's strata lot, except for repair and maintenance that is the responsibility of the strata corporation under the bylaws. Bylaw 8 sets out the strata corporation's duty to repair and maintain, which does not include an owner's strata lot, unless it is part of the structure of the building or other

unrelated parts. There is no suggestion that Mr. Lee's strata lot ceiling was structural.

22. Section 149(1)(d) of the SPA requires the strata to insure original fixtures within a strata lot. Although it has a duty to insure, I find the SPA, sections 3 and 72, place no duty on the strata to repair or maintain original fixtures, unless the strata passes a bylaw creating that duty, which is not the case here. My interpretation of the SPA is consistent with the tribunal's decision in *David v. The Owners, Strata Plan KAS 2955*, 2018 BCCRT 98. Although other tribunal decisions are not binding on me, I agree with its interpretation of the law.
23. As mentioned, the strata is in default, as defined in the CRTA. A party in default is generally presumed to be liable. However, I find in this matter, the presumption of liability is overridden by the SPA, the bylaws and the evidence before me. Accordingly, I find it would be inappropriate to presume the strata liable.
24. I find the strata had no duty under the SPA or its bylaws to maintain the shower fixture or repair Mr. Lee's strata lot. Mr. Lee has not argued that the strata should otherwise be responsible in negligence for his loss, nor is there any evidence to support such a finding. On the weight of the evidence, the SPA, and the bylaws, I find the strata is not liable for Mr. Lee's claimed losses. I dismiss Mr. Lee's claims against the strata.

Was the water damage to Mr. Lee's strata lot caused by Mr. Gjerek's negligence?

25. Mr. Lee's position is that Mr. Gjerek is responsible for his loss because Mr. Gjerek failed to do his "due diligence" to determine the cause of the leak. Mr. Lee says Mr. Gjerek did not "pay attention and as a result, the leaking continued from the first day (Oct. 16) to Oct. 25". Mr. Lee provided no statements from his tenant, but says his tenant told him the conditions worsened over time. Mr. Lee argues that Mr. Gjerek's tenants must have continued to run water after they knew about the leak and were told to stop.

26. Mr. Gjerek's position is that neither he, nor his tenants did anything wrong. Mr. Gjerek's tenants assert that they never used the shower after they learned of the leak. Instead, the tenants point out that WEBIR's plumbers came to their strata lot several times and turned the water off and on to check the system over time. I find Mr. Lee is only guessing that the tenants ran the water after the notification. The evidence shows that Mr. Lee had no first-hand knowledge of the tenants' actions or when the water was leaking into his strata lot. I accept the tenants' own evidence that they did not run the water after the notification. I find if there was any worsening it was more likely than not, caused by WEBIR running the water to check the system. This action would be consistent with WEBIR inspecting the plumbing system for the leak.
27. Mr. Gjerek says this dispute is similar to the tribunal's decision in *Zale et al v. Hodgins*, 2019 BCCRT 466. In *Zale*, the issue was nuisance and not negligence. The decision was based on the strata's nuisance bylaw. The tribunal member found the respondent not liable in nuisance when their toilet leaked and caused damage to the strata lot below. In *Zale*, the tribunal member explained that a private nuisance occurs when a person unreasonably interferes with the use or enjoyment of another person's property. However, if the person is not aware of the problem that causes the interference, and had no reason to know of the problem, they will not be liable because they did not act unreasonably. The tribunal member in *Zale* found no evidence that the respondent knew or should have known that the toilet valve would fail and cause a leak. Therefore, he found the applicants had not proven the respondent liable. Although not binding on me, I agree with the tribunal member's analysis and findings.
28. I find Standard Bylaw 3(1) applies to the case at hand. It says that an owner, tenant, occupant or visitor must not use a strata lot, the common property or common assets in a way that causes a nuisance or hazard, or unreasonably interferes with the rights of another person to use and enjoy a strata lot.
29. There is no evidence of water leakage into Mr. Gjerek's own strata lot that would have alerted him or his tenants to the leak before being notified by Mr. Lee. The

undisputed evidence is that it took the plumbers several days to find the leak's source, the failed seal. I find it more likely than not that the leak's source was a latent problem, not visible on ordinary inspection. There is no evidence to suggest that Mr. Gjerek would have known of the latent problem until he was told about it. Accordingly, I find Mr. Gjerek neither knew, nor should have known about the failed seal. As in *Zale*, I find Mr. Gjerek is not liable in nuisance.

30. As mentioned, Mr. Lee's position is that the damage was caused by Mr. Gjerek's negligence. I note that negligence was not raised in the *Zale* decision. The case law suggests that when water escapes from an owner's strata lot, the onus is on the owner to prove on a balance of probabilities that they are not responsible in negligence for the loss (see *Westsea Construction v. Billedeau*, 2010 BCPC 109 at paragraph 39, and *Fontaine v. ICBC*, [1998] 1 SCR 424). This is commonly referred to as a reverse onus because in a civil claim, the burden of proof is normally on the applicant.
31. While there is a reverse onus, the standard is not strict liability. In other words, the fact that the seal failed does not automatically mean that Mr. Gjerek was negligent. There must still be some evidence that Mr. Gjerek's actions or inaction fell below a reasonable standard of care and caused the loss. For the following reasons, I find that there is no such evidence here.
32. The plumbing fixture was over 10 years old at the time it failed. I find it more likely than not that the failed seal was caused by normal wear and tear that happens to parts over time. There is no evidence to suggest otherwise.
33. The facts in this dispute are different from my recent decision in *Minn v. Jang et al*, 2019 BCCRT 1124. In *Minn*, I found the upstairs owner liable in negligence where the upstairs tenant allowed water to overflow a plugged bathroom drain. The leak in *Minn* was not caused by a latent problem or normal wear and tear as in the case at hand. Unlike in *Minn*, I find there is no evidence here that Mr. Gjerek's tenants caused the leak or contributed to the damage. Again, I accept that his tenants did not run the water after learning about the leak.

34. Mr. Lee argues that Mr. Gjerek should have done his own due diligence after learning about the leak. I infer Mr. Lee means by inspecting the fixture himself or calling in his own plumber. However, there is no evidence that such action by Mr. Gjerek would have reduced or prevented the water damage. The evidence is that the failed seal was not discovered for several days, despite investigative efforts by WEBIR's plumbers. I find it unlikely, and speculative, that Mr. Gjerek would have discovered the failed seal earlier as Mr. Lee's argument suggests. There is no evidence that someone other than WEBIR would have found the leak's source sooner.
35. I find Mr. Gjerek acted reasonably in providing the strata's plumbers with access to his strata lot to inspect and fix the leak. There is no evidence that Mr. Gjerek delayed or obstructed their work. On a balance of probabilities, I find that Mr. Gjerek and his tenants acted reasonably regarding the leak. Therefore, I find Mr. Gjerek is not liable in negligence for Mr. Lee's claimed losses. I dismiss Mr. Lee's claims against Mr. Gjerek.
36. Under section 49 of the CRTA, 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 see no reason in this case not to follow that general rule. As the unsuccessful party, I find Mr. Lee is not entitled to reimbursement of his fees or dispute-related expenses.

ORDER

37. I order that Mr. Lee's claims and this dispute are dismissed.

Trisha Apland, Tribunal Member