Civil Resolution Tribunal

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File: ST-2019-004037

Type: Strata

Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan BCS 2103 v. Zeng,* 2019 BCCRT 1236

B E T W E E N :

The Owners, Strata Plan BCS 2103

APPLICANT

A N D :

FANHAN ZENG

RESPONDENT

AMENDED REASONS FOR DECISION

Tribunal Member: J. Garth Cambrey, Vice Chair

INTRODUCTION

1. The applicant, The Owners, Strata Plan BCS 2103 (strata), is an airspace parcel strata corporation existing under the *Strata Property Act* (SPA). The respondent, Fanhan Zeng (owner), owns a strata lot (SL445) in the strata.

2. The strata says the owner or their tenant breached its short-term rental and short-term accommodation bylaws on 23 occasions in 2018 and 2019. The strata seeks an order that the owner pay it $200 for each bylaw infraction for a total of $4,600.

3. The owner says neither they nor their tenant breached the strata's bylaws and asks the tribunal to dismiss the strata's claims.

4. The strata is represented by a member of its strata council. The owner is represented by their daughter, Stephanie Zeng.

5. For the reasons that follow, I find the owner's tenant breached the strata's short-term accommodation bylaw on 17 occasions and that the owner must pay the strata $3,400 for their tenant's bylaw fines.

JURISDICTION AND PROCEDURE

6. 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* (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 parties to a dispute that will likely continue after the dispute resolution process has ended.

7. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Some of the evidence in this dispute amounts to a "they said, he said" scenario. Credibility of interested witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal

proceeding appears to be the most truthful. The assessment of what is the most likely account depends on its harmony with the rest of the evidence. In the circumstances here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the tribunal's mandate that includes proportionality, I find that an oral hearing is not necessary. I also note that in *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, the BC Supreme Court recognized the tribunal's process and found that oral hearings are not necessarily required where credibility is in issue.

8. 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 other way it considers appropriate.

9. 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 make an order that includes any terms or conditions the tribunal considers appropriate.

PRELIMINARY ISSUE

Evidence

10. In their response argument, the owner says the strata relies on new evidence it submitted with its initial argument after the deadline for submitting evidence had passed. The owner says the strata's new evidence provided links to certain web-sites and should not be accepted. Alternatively, the owner says they should be able to provide additional evidence in their response arguments and did, in fact, provide additional website links in their response.

11. In its final reply, the strata submits its initial arguments were only "made against [the owner's] evidence" and should be allowed together with the strata's reply arguments that also contained website links.

12. I obtained email communications from the case manager between the parties and case manager with respect to evidence and confirm the parties were advised not to provide additional evidence past August 20, 2019 without the approval of the case manager. The case manager has also advised me that no party requested to provide additional evidence after that date.

13. It may be that the strata did not understand that when it provided website links in its initial argument, those website links are indeed evidence. To permit the links provided by the strata in its final reply without the owner having an opportunity to respond would ordinarily be contrary to the rules of procedural fairness. In any event, I did not request further submissions from the owner because the website links provided by both parties relate almost entirely to AirBnb listings, and copies of text and email exchanges with past guests of AirBnb suites. Some photographs were also provided by the strata that it alleges were of SL445 or its balcony. I place no weight on the late evidence because I find the links unreliable, given they did not always direct me to an active website, they may have changed since they were first posted, and there is no proof the listings were for SL445. There is also no supporting evidence, such as witness statements, for the strata's allegation that the photographs provided relate to SL445.

ISSUES

14. The issues in this dispute are:

    a. Did the owner or tenant breach the strata's short-term rental bylaw?

    b. Did the owner or tenant breach the strata's short-accommodation bylaw?

    c. What amount of bylaw fines, if any, must the owner pay to the strata?

BACKGROUND, EVIDENCE AND ANALYSIS

15. I have read all the submissions and evidence provided but refer only to information I find relevant to provide context for my decision.

16. In a civil proceeding such as this, the applicant strata must prove its claims on a balance of probabilities.

17. The strata was created in 2006 and is located in downtown Vancouver. It consists of 608 strata lots in 2 high-rise towers.

18. The owner purchased SL445 on March 29, 2013 as shown on Land Title Office (LTO) documents. In affidavit evidence, the owner submits they purchased SL445 with the intention of leasing it as they do not live in Vancouver full time. It is unclear if the owner has another Vancouver residence, but based on my conclusions below that SL445 is has been rented since at least October 1, 2016, I find they do not reside in SL445.

19. The owner says that beginning October 1, 2016, SL445 was rented to Simon Choy (tenant). The tenant also provided affidavit evidence stating he has "leased [SL445] from [the owner] since October 1, 2016". Copies of rental agreements provided by the tenant show Mr. Choy leased SL445 from the owner from October 1, 2016 for a 1-year term, from October 1, 2017 for a further 1-year term, and from October 1, 2018 on a month to month basis. From this evidence, I conclude the tenant alleges he has rented SL445 from October 1, 2016 and continues to be the tenant in SL445.

20. I do not agree with the strata's arguments to the contrary. First, the strata asserts that the rental agreements provided by the tenant are "not genuine" because they do not include contact information for the tenant. The strata suggests that it "would not expect a vague, incomplete agreement for a tenancy, especially after the difficult eviction of a prior tenant…" I do not agree that a prior tenant's alleged eviction from SL445 would have any bearing on whether the owner would include contact information on a rental agreement with a new tenant.

21. Second, the tenant provided copies of a cell phone bill, internet service bill, hydro bill, credit card bill, and insurance statement that show the name of the tenant and their address as that of SL445. The strata says this evidence does not prove the tenant resides in SL445. While I agree the bills are not proof of residency, as I

discuss further below, I find they support the owner's argument that SL445 was rented to the tenant.

22. Finally, the strata argues that the owner did not provide a Form K for the tenant. The owner says they provided a Form K to the strata's building concierge and that it must have been misplaced. It was open to the strata under its bylaws and the SPA to require the owner to provide a current Form K form to establish the owner's tenant, if any. The fact the strata discovered at a later date it did not have a current Form K does not mean SL445 was not rented out. Additionally, all of the correspondence issued by the strata relating to bylaw fines was sent to both the owner and the "current resident" which supports the owner's position that SL445 was not occupied by the owner.

23. Based on the evidence described above, I find it is more likely than not that the tenant has been and continues to be the owner's tenant in SL445 since at least October 1, 2016.

24. In June 2010, the strata filed a full replacement set of bylaws at the Land Title Office (LTO). The June 2010 bylaws included rental restriction bylaw 43.1 prohibiting an owner from renting their strata lot for periods of less than 3 months. Rental of strata lots was, and is not otherwise restricted. The strata has filed several bylaw amendments since that time that have not disturbed bylaw 43.1 although the bylaw was renumbered to bylaw 35(1) on May 9, 2018.

25. Bylaws 35(2) and 35(3) restate the landlord's (owner's) obligations under section 146 of the SPA to provide their prospective tenants with a copy of the strata's current bylaws, rules, and a Form K – Notice of Tenant's Responsibilities (Form K), and to provide a signed copy of the Form K to the strata within 2 weeks of renting their strata lot.

26. Bylaw 36A, a bylaw restricting short-term accommodations, was also filed at the LTO on May 9, 2018. I find that bylaws 43.1 and 36A are relevant to this dispute.

27. I note the strata has adopted bylaws 47 and 48 that specifically address security measures and the use and collection of personal information. These bylaws were part of the amendments registered on May 9, 2018. Bylaw 47(3)(c) permits the strata to use closed circuit television and video camera (CCTV) surveillance and security FOB use records to enforce the strata's bylaws. The Office of the Information and Privacy Commissioner for British Columbia (OIPC) found the use of video surveillance by a strata corporation was not permitted for bylaw enforcement. See Order P09-02, [2009] B.C.I.P.C.D.no. 34 (*Shoal Point*).)

28. I find that the decision of the OIPC in *Shoal Point* is not binding on the tribunal. Further, *Shoal Point* is based on unique set of facts particular to that case that include, in part, whether the strata corporation had given proper notice of its intended use of the video footage. The strata may wish to seek clarification from the OIPC on the wording of its bylaws 47 and 48.

29. Neither party argued bylaw 47(3)(c) was unenforceable, and any decision involving personal use of the strata's video surveillance or FOB records falls under PIPA, which is outside the tribunal's jurisdiction. Absent a finding by the OIPC that bylaw 47(3)(c) is contrary to PIPA, I find the strata's video and FOB evidence is admissible.

Did the owner or tenant breach the strata's short-term rental bylaw?

30. I have already determined that SL445 was tenanted continuously from October 1, 2016, which would not offend bylaw 43.1 (or renumbered bylaw 35) about short-term rentals by the owner. However, there still remains a question of whether the tenant was involved in short-term rentals involving a sub-tenant in 2018.

31. On February 9, 2018, prior to the adoption of the strata's short-term accommodation bylaw, the strata wrote separate but identical letters to the owner and "current resident" at the SL445 address. The letters advised that the strata had received a complaint of short-term rentals in SL445 contrary to bylaw 43 and requested a response with 14 days or a fine could be imposed. I note the correct bylaw number was 43.1 but nothing turns on this error.

32. On March 5, 2018, the owner advised the strata's property manager that they had spoken to their tenant who had advised the owner that they "do not do any short-term rental". The property manager replied on March 5, 2018 stating the matter would be reviewed by the strata council at its next meeting on March 20, 2018. I find the property manager's March 5, 2018 email extended the 14-day period for the owner's response.

33. On March 7, 2018, the strata wrote to the owner and "current resident" stating that it had not received a response to its February 9, 2018 letter and that a $200 fine had been placed against the account. The statement of account shows a $200 fine was registered on the SL445 account on March 8, 2018. Given the email exchange between the owner and property manager, I find this bylaw fine to be invalid as the owner clearly responded to the allegation that SL445 was being used as a short-term rental within the requested timeframe and was advised the matter would be addressed by the council on March 20, 2018. The imposition of a fine before the strata had considered the email exchange offends the procedural requirements of section 135 of the SPA. As the owner notes, the reversal of the fine is supported by the strata council meeting minutes of March 21, 2018 that state correspondence was received from "SL445 in regards (sic) to a bylaw infraction for rental. Council requests the [property manager] to send a letter… that the infraction has been resolved."

34. The strata made no other allegations against the owner or tenant about breaching the strata's rental bylaws.

35. Given the strata advised the owner that the alleged rental bylaw infraction has been "resolved", I find the owner and tenant did not breach the strata's rental bylaw 43.1 or subsequent renumbered bylaw 35(1).

Did the owner or tenant breach the strata's short-accommodation bylaw?

36. Between May 2018 and May 2019, the strata alleges the owner or tenant breached the newly adopted short-term accommodation bylaw 20 times as evidenced by the correspondence issued over this period.

37. The strata relies on closed circuit television camera (CCTV) photos taken at the main entrance to the building and in the elevator and corresponding FOB information about building and elevator access. Some photographs were of people with luggage that the strata claims were short-term guests to SL445. This evidence was provided by the strata's concierge and resulted in complaint letters being issued for each alleged infraction. The owner did not respond to the strata's correspondence within the timeframe requested. Consequently, the strata wrote to the owner advising bylaw fines had been levied "against your account".

38. In its affidavit evidence, the owner specifically acknowledges receipt of correspondence dated May 14, June 15, and Sept 13, 2018 alleging SL445 was being used for an AirBnb contrary to bylaw 36A. Given this acknowledgement, and that all other correspondence was sent to the same address, I find it is more likely than not that the owner received the strata's correspondence and failed to respond. The owner does not explain why they did not respond to the correspondence. The owner also does not dispute that, other than their March 2018 email exchange with the strata, they did not communicate with the strata until after this dispute was filed.

39. Based on the evidence, I find the owner did not contravene bylaw 36A. However, as explained below, the same cannot be said about the tenant.

40. It was not until after the owner received the Dispute Notice that they contacted their tenant and investigated the possibility of SL445 being listed for short-term accommodations on AirBnB, VRBO and Kijjiji. That their tenant denied offering SL445 as short-term accommodation and that the owner could not locate it advertised online, does not mean the tenant was not contravening bylaw 36A.

41. The tenant also did not respond to the strata's correspondence at the times it was issued. If the tenant was residing in SL445 as they claim in their affidavit, I find they would have received the strata's correspondence offering them the opportunity to respond to the bylaw allegations. Instead, the tenant waited until the Dispute Notice was provided to them by the owner before responding to the strata's allegations.

42. The tenant asserts they allowed their family and friends to use "the key fob for [SL445]" and that the individuals identified in the roughly 20 CCTC camera photographs were either family or friends. In total, the tenant identifies 2 family members and 12 friends as being shown in the photographs over the 7 months from June 2018 to January 2019. However, there were no statements from these people attesting to visiting SL445 or using the tenant's FOB at the alleged times.

43. Further, it is difficult to identify people in some of the photographs because their faces are not directed to the camera or are otherwise obscured. In other photographs there is more than one person and the tenant does not say which person is their friend or family member.

44. More persuasive to me is the FOB evidence provided for each alleged entry to the building or elevator. The evidence shows only 2 Fobs were used to gain access. Except for 3 occasions between September 11 and October 2, 2018, the same FOB was used as identified on the security screen shots provided by the strata. I find it unlikely that the same FOB was used by 11 of the tenant's friends and family over the 7-month period. I also find it unlikely that the building's enter phone (buzzer) system was not working for this entire period as suggested by the tenant. I agree with the strata that the $35,000 expenditure approved at the annual general meeting (AGM) held April 30, 2019 to "update" the enter phone system was not passed because the system was not working. I say this because there was no evidence contained in either the April 24, 2018 AGM or April 30, 2019 AGM minutes to reflect the system was in a state of disrepair.

45. Overall, I prefer the strata's submissions over the tenant's submissions and find the tenant contravened the strata's bylaw 36A about short-term accommodations.

46. Regardless, the proper time for the owner or tenant to have raised their defences was immediately after the strata notified them about the alleged bylaw infractions (See *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc*., 2016 BCSC 32 at paragraph 208).

47. Based on *Sze Hang*, the owner and tenant had an obligation under the SPA to rectify the contravention or challenge the bylaw infraction notice. If the owner or tenant did not agree that the fines were properly imposed, the proper course of action was for them to request a hearing with the strata, which they did not do.

What amount of bylaw fines, if any, must the owner pay to the strata?

48. I will first address some procedural matters.

49. As I have noted, all relevant strata correspondence about bylaw infractions and fines was addressed by separate letter to both the owner and the "current resident". All letters were sent to the civic address of SL445.

50. Section 61(1) of the SPA sets out how notice ***must*** be provided to a person under the SPA and strata bylaws. This includes notice of bylaw infractions and fines, and includes mailing it to the person at the address of the strata lot. From the evidence, the owner did not provide a mailing address outside the strata, so I find the strata properly mailed its correspondence to the owner to SL445.

51. Although it was not argued by the parties, I point out that when providing a notice, record or other document under the SPA, bylaw or rules, section 61(2) states that the strata ***may*** address it to "the person by name, or to the person as owner or tenant." [My emphasis]

52. I find by addressing correspondence relating to bylaw infractions to the "current resident" rather than "tenant" or Mr. Choy by name, the strata has not offended section 61(2) of the SPA. I say this because a tenant is a current resident and, as explained below, the strata did not initially know if SL445 was tenanted.

53. It is important to note that section 61(3) states notice is "conclusively deemed" to have been given after 4 days after it is delivered under section 61(1). This includes mailing. (See *The Owners, Strata Plan BCS 3372 v. Manji*, 2015 BCSC 2503 at paragraph 56.) Based on *Manji*, the 14-day response period then becomes 18 days. Under section 25(4) of the *Interpretation Act* then in force, the first and last days are

excluded in the calculation of time and so the period then becomes 20 days. As described below, some of the strata's correspondence does not meet this requirement and, in those cases, I have found the fines to be invalid.

54. The strata has commenced this dispute only against the owner even though the thrust of the strata's arguments are against the tenant. Even though section 130 of the SPA essentially restricts the strata to fine the owner for bylaw infractions committed by the owner, and a tenant for bylaw infractions committed by the tenant, section 131 of the SPA permits the strata to recover fines it imposes against a tenant from the owner.

55. As is evident from the strata's submissions, it received complaints from either its concierge or a strata council member that bylaw breaches were occurring on a regular basis and it rightly decided that it must enforce the bylaws. I find the strata was initially uncertain if SL445 was rented out, and if so, to whom, so it directed all bylaw infraction letters to the owner and "current resident" at the address of SL445. By about March 2018 that the strata knew or ought to have known SL445 was rented out when the owner emailed the property manager denying SL445 was used for short-term rentals. Even then, the name of the tenant was not known because the strata could not locate or did not receive a Form K for the tenant.

56. Strata bylaw 27(1)(a) permits maximum fines of $200 for each contravention of a bylaw. Strata bylaw 28 permits the strata to impose fines every 7 days "if an activity or lack of activity that constitutes a contravention of a bylaw…continues, without interruption, for longer than 7 days.

57. The owner says some of the fines were imposed at a frequency of less that 7 days and says this is contrary to bylaw 28. I disagree. Rather, I find the strata wrote to each of the owner and the tenant about every alleged bylaw infraction. The correspondence did not identify bylaw 28 nor did the strata rely on a continuing bylaw infraction when it imposed fines.

58. I find the strata did not contravene bylaw 28 about fining for continuing contraventions of strata bylaw 36A.

59. I turn now to the individual bylaw fines imposed by the strata between March 2018 and May 2019 totaling $4,600.

60. Even though the strata found there was no rental bylaw infraction in March 2018 as I discussed earlier, it did not remove the March 8, 2018 fine from the SL445 account. I find the $200 fine for breach of bylaw 43.1 dated March 8, 2018 on the statement of account to be invalid and order the strata to remove it.

61. Except as noted below, I find the strata issued correspondence in compliance with section 135 of the SPA. That is, the strata had received a complaint (from the concierge or a strata council member), given the owner and tenant written particulars of the complaint, including a reasonable opportunity to respond to the complaint or request a hearing, and given written notice to the owner and tenant of the strata's decision to impose a fine.

62. On May 14, 2018, the strata wrote to the owner and tenant about an alleged infraction of bylaw 36A. On June 14, 2018, the strata advised that the strata had decided not to take further action "as a result of your response". Despite the strata's argument that the June 14, 2018 letter was written in error, I find the statement of account does not show a fine was charged in this instance. Therefore, I find there is no adjustment to the total fines required on the statement of account.

63. On July 13, 2018, the strata advised the owner and tenant of a complaint that "someone associated with [SL445] granted entry to individuals suspected of AirBnb". The letter advised that bylaw 11(1) about security being breached. Bylaw 11(1) states a resident must not permit anyone to enter the buildings unless that person is known to them. I cannot determine from the evidence before me any link between the short-term accommodation complaint and bylaw violation. In particular, the strata did not prove the people in the photograph being let into the building, were let into the building by a resident of SL445 or that the resident was an AirBnb guest of SL445. I therefore find this $200 fine is invalid and order the strata to reverse it.

64. Similarly, on September 13, 2018, the strata advised the owner and tenant of a complaint about a "new AirBnb guest" being in SL445 on September 7, 2018 contrary to bylaw 36. Bylaw 36 relates to the maximum number of persons permitted to reside in a strata lot. The strata did not establish any link between the complaint of an AirBnb rental with the number of residents in SL445. The allegation that a new guest, in the singular, implies only one person occupied SL445 which, on it face, would not offend bylaw 36. I therefore find this $200 fine is invalid and o[1]rder the strata to reverse it.

65. As discussed earlier, based on section 61(3) of the SPA and the *Interpretation Act*, the 14-day response period equates to 20 days, which I find is reasonable. However, the strata wrote to the owner and tenant on July 26, 2018 to inform them of an alleged bylaw 36A contravention of July 19, 2018, giving them 14 days to respond. The strata advised the owner and tenant that a fine had been imposed on August 14, 2018. I find the strata did not allow the proper response time to expire before imposing the fine. I calculate only 18 clear days between the date the owner and tenant were given notice of the bylaw infraction and the date the fine was imposed rather than the required 20 clear days. As a result, I find the $200 fine for this bylaw infraction to be invalid and order the strata to remove it from the statement of account.

66. The strata also wrote to the owner and tenant on July 30, 2018 to inform them of an alleged bylaw 36A contravention of July 23, 2018, giving them 14 days to respond. The strata advised the owner and tenant that a fine had been imposed on August 14, 2018. For the same reason, I find strata did not allow the proper response time to expire before imposing the fine allowing only 13 clear days to elapse. As a result, I find the $200 fine for this infraction to be invalid and order the strata to remove it from the statement of account.

67. The strata also wrote to the owner and tenant on January 2, 2019 to inform them of an alleged bylaw 36A contravention of December 14, 2018, giving them 14 days to respond. The strata advised the owner and tenant that a fine had been imposed on January 1, 2019. For the same reason, I find strata did not allow the proper

response time to expire before imposing the fine allowing only 7 clear days to elapse. As a result, I find the $200 fine for this infraction to be invalid and order the strata to remove it from the statement of account.

68. In summary, I find that $1,200 of the $4,600 that the strata charged the owner for short-term rental or short-term accommodation bylaw infractions are invalid and must be removed from the statement of account. For the reasons stated above, I order the owner to pay the strata $3,400 in bylaw fines.

TRIBUNAL FEES, EXPENSES AND INTEREST

69. 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 strata is the successful party and is entitled to reimbursement of $225.00 for tribunal fees. No party claimed dispute-related expenses, so I make no such order.

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

71. Even though the SPA does not allow the strata to charge interest on fines, that is not the case under the *Court Order Interest Act* (COIA). I find the owner owes the strata pre-judgement interest on the fines imposed from the date the fine was imposed to the date of this decision. I calculate pre-judgement interest to be $60.95.

DECISION AND ORDER

72. Within 30 days of this decision, I order the owner to pay the strata a total of $3,685.95 broken down as follows:

    a. $3,400.00 for bylaw fines,

    b. $225.00 for tribunal fees, and

    c. $60.95 for pre-judgement interest under the COIA.

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

74. The strata's remaining claims are dismissed.

75. Under section 57 of the CRTA, a party can enforce this final tribunal decision by filing a validated copy of the attached order in the Supreme Court of British Columbia (BCSC). Once filed, a tribunal order has the same force and effect as a BCSC order.

76. Orders for financial compensation or the return of personal property can also be enforced through the Provincial Court of British Columbia (BCPC). However, the principal amount or the value of the personal property must be within the BCPC's monetary limit for claims under the *Small Claims Act* (currently $35,000). Under section 58 of the CRTA, a party can enforce this final decision by filing a validated copy of the attached order in the BCPC. Once filed, a tribunal order has the same force and effect as a BCPC order.

J. Garth Cambrey, Vice Chair

[1] Amendment notes
Reference to the owner's strata lot as SL455 was changed to SL445 throughout to correct a typographical error