



Civil Resolution Tribunal

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Type: Strata

Civil Resolution Tribunal

Indexed as: *Berg v. The Owners, Strata Plan NW 53*, 2019 BCCRT 1263

B E T W E E N :

LEIF DANIEL ELDRED BERG

APPLICANT

A N D :

The Owners, Strata Plan NW 53

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Kathleen Mell

INTRODUCTION

1. The applicant, Leif Daniel Eldred Berg (owner), owns a strata lot in the respondent strata corporation, The Owners, Strata Plan NW 53 (strata).
2. This dispute is about repairs to the owner's roof, deck and deck door. The strata hired companies to carry out these repairs and the owner says that he was inconvenienced by the roof repair for five to six weeks and four to five months for the deck and door replacement. The owner says that the strata was negligent because the companies it hired to carry out the repairs were incompetent and this created a nuisance. The owner also says that the deck is still defective.
3. The owner requests \$10,000.00 as damages for the inconvenience associated with the deck repair and another \$10,000.00 for the inconvenience surrounding the roof repair. The owner is self-represented.
4. The strata submits that it properly hired other companies to perform the repairs. It says it is not responsible for the delay or inconvenience the owner experienced in the completion of the roof or deck and door repairs. The strata also submits that any damages or claims involving the roof should be made against the roofing company. The strata is represented by JS, who I infer is a strata council member.

JURISDICTION AND PROCEDURE

5. 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.
6. 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 “he said, it 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.

7. 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.
8. 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

9. The issue in this dispute is whether the strata was negligent or committed the tort of nuisance in hiring the companies to perform the repairs and, if so, what is the appropriate remedy.

EVIDENCE, FINDINGS AND ANALYSIS

10. In a civil dispute such as this, the applicant must prove his claim. He bears the burden of proof on a balance of probabilities.
11. While I have reviewed all of the material provided, I have only commented below on the evidence and submissions necessary for this decision.
12. The owner has made allegations of bullying and says the strata ordered repairs that were not warranted so it could provide money to its associates. The owner has

provided no evidence to support these allegations so I will not address them in this decision.

The Roof Repair--Negligence

13. The strata says that it discovered a leak and hired a roofing company after a proper bidding process. It is undisputed that the roofing company did not seal the roof properly which allowed water to leak into four strata lots, including the owner's strata lot. The strata says that it took steps to repair and mitigate the damage immediately and agrees that it took the contractor multiple visits to do so. The strata admits that there were delays and inconvenience but it denies it was negligent.
14. The strata registered bylaws with the Land Title Office on June 7, 2016. These bylaws and section 72 of the *Strata Property Act* (SPA) indicate that the strata is responsible for repairing and maintaining common property, which includes the building's roof. Also, the case law establishes that in its duty to repair under section 72 (1) of the SPA, the strata must act reasonably in fulfilling its obligation.
15. In order to be successful in an action for negligence, the owner must demonstrate that the strata owed him a duty of care. Here the duty of care is statutory one imposed by section 72 of the SPA. The owner must also prove that the strata's behaviour breached that standard of care, that the owner sustained reasonably foreseeable damage, and that the damage was caused by the strata's breach of the standard of care.
16. However, the strata is not an insurer. The courts have held that a strata corporation is not held to a standard of perfection. Rather, it is required to act reasonably in its maintenance and repair obligations. If the strata's contractors fail to carry out work effectively, the strata should not be found negligent if the strata acted reasonably in the circumstances. The strata has no liability to reimburse an owner for expenses an owner incurs, unless the strata has been negligent in repairing and maintaining common property. (see *Leclerc v. Strata Plan LMS 614*, 2012 BCSC 74, *Kayne v. LMS 2374*, 2013 BCSC 51, *John Campbell Law Corp. v. Strata Plan 1350*, 2001

BCSC 1342, and *Wright v. Strata Plan No. 205*, 1996 CanLII 2460 (BCSC), affirmed 1998 CanLII 5823 (BCCA))

17. Turning to the facts at issue in this dispute, the strata has provided estimates from different companies supporting their position that they properly sought out a competent company to perform the repairs. They ultimately hired a company to perform roof repairs in late October 2017.
18. When the roofing company made the error allowing water to leak into the four units, the strata says that repair and mitigation began immediately but that it did take a while to fix and it required multiple visits. The strata says that it notified the owners to contact their insurance companies to make claims for any damages caused to their strata lots by the roofing company.
19. The owner says that the strata was negligent in deciding to perform the roof repairs in the fall months when there was excessive rainfall. He says that he was inconvenienced because of the amount of rainfall and snow. He notes that there were de-humidifiers and air blowers going on for weeks. He also submits that tenting was necessary because it was discovered that the old insulation had asbestos.
20. In *Hirji v. The Owners Strata Corporation Plan VR 44*, 2015 BCSC 2043, the Court said that the overarching test in deciding if the strata was negligent is reasonableness. The Court indicated that strata corporations are entitled to rely on advice from their professionals. The Court went on to say that there is no requirement that repairs be performed immediately or perfectly. Most relevant to the issues in this dispute, the Court found that a strata cannot be held responsible for the failed work of others so long as it acted reasonably.
21. Further, in a dispute before this tribunal, *Rawle v. The Owners, Strata Plan NWS 3423*, 2017 BCCRT 15, the vice chair found that if the strata's contractors fail to carry out work effectively, the strata should not be found negligent if it acted reasonably in the circumstances.

22. I find that the owner has not proved that the strata was negligent because the evidence shows that the strata acted reasonably. It hired a company to perform roofing repairs after diligently investigating the work to be done and obtaining quotes. The strata could not have reasonably foreseen that the contractor would cause a leak.
23. The professional independent company the strata hired then made an error and did not properly seal the roof. Just as in *Hirji*, here there is no reliable or credible evidence that the strata was irresponsible, careless, or unreasonable in its choice of professionals. I find that the strata was reasonable in choosing to hire the roofing company and was reasonable in how they then dealt with the error that resulted in water getting into the owner's strata lot. Therefore, the strata was not negligent and is not responsible for the owner's stated damages.
24. I note that the strata submits that the owner can still seek a remedy against the roofing company. However, there are issues around privity of contract and therefore this is not necessarily so. Ultimately, I need not make a finding on this issue since the roofing company is not a party in this strata property dispute.

The Roof Repair -- Nuisance

25. The tort of nuisance in a strata setting is an unreasonable continuing or repeated interference with a person's enjoyment and use of their strata lot, and a remedy should be made without undue delay once the respondent is aware of the nuisance (see *The Owners, Strata Plan LMS 3539 v. Ng*, 2016 BCSC 2462). In *Ng*, the court found that the owner brought to the strata's attention facts about a water leak that required investigation, and failure to conduct that investigation amounted to an omission to use reasonable care to discover the facts. As another example, in *Chen v. The Owners, Strata Plan NW 2265*, 2017 BCCRT 113, a tribunal vice chair found a strata liable in nuisance for failing to repair a hot tub pump, as the loud noise disturbed an owner inside her strata lot.
26. I find the facts before me are not the same as those in *Ng* or *Chen*. In those cases, the strata corporations failed to take necessary actions, such as investigating a leak

or repairing a noisy hot tub pump. Here the strata investigated the leak and took immediate steps to mitigate the damage.

27. Also, and more importantly, I find the strata did not cause the nuisance in question. In *Ng*, the court summarized the law of nuisance, quoting from the Ontario Superior Court decision *Durling v. Sunrise Propane Energy Group Inc.*, 2013 ONSC 583. The Court noted that a person may be said to have committed the tort of private nuisance when he is held responsible for an act indirectly causing physical injury to land or substantially interfering with the use or enjoyment of land or an interest in land, where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable. Also, in *Kayne*, the Court decided that if the strata had knowledge of the nuisance, the question is whether the strata took reasonable steps to abate the nuisance.
28. Here, the owner submits that the carpets were ripped up for five weeks until the strata lot was completely dry. He says that there was so much moisture in the ceiling and walls that the renovators came by 10 or 11 times to check on the walls and roof so they could do the repair work. He says the repairs took place over 6 to 7 weeks.
29. The owner also states that the renovators were so concerned about mold that they painted his strata lot's living room ceiling with a sealant to keep spores out. He submits that he had to meet with drywallers and painters and the stress of accommodating the workers affected his relationship with his wife.
30. The owner's submissions allege that nuisance was caused by the actions taken to mitigate the damage caused by the error. Some of the owner's complaints are related to the amount of rain and snowfall. This is beyond the strata's control. The owner suggests that the original leak that started the investigation into the state of the roof was minor. He also says that the repair could have waited until there was better weather. He has provided no evidence to support this submission.
31. Further, the owner seems to argue that the problem was that the company dealing with the leak into his strata lot were too competent and constantly carrying out its

work and checking its effectiveness. I accept that the owner was affected for several weeks while his strata lot was dried out, drywall was replaced, and sealant was applied. However, the owner has not provided any evidence that this was an excessive time to complete the job or that any of these steps were unnecessary. Also, as previously stated, the need to perform this work was due to an error made by the roofing company and not the strata. For these reasons, I find that the strata is not liable for nuisance experienced by the owner as it did not cause an unreasonable interference with the owner's use and enjoyment of his strata lot.

32. Therefore, I find the strata was not responsible for creating a nuisance impacting the owner.

The Deck and Deck Door Repair--Negligence

33. The strata says that it hired a company to perform a simple deck railing repair but the strata lot below the owner's was experiencing a water leak which continued after the railing fix. The strata investigated and discovered that there was wood rot under the owner's deck door that needed repair. The strata took steps to replace the door and acknowledges that there were delays due to weather and that the repair company originally installed the wrong sized door.
34. Bylaw 8 says that the strata is responsible for repairing and maintaining limited common property which includes balconies as well as doors leading to the exterior of the building. Although the door in question here led to the deck, I find that the deck is on the exterior of the building and therefore the door leading to the deck is limited common property that the strata must repair and maintain. I note also that the problem was not with the door itself but a leak under the door and therefore technically on the deck. Further, the strata does not dispute that it is responsible for the repair and maintenance of both the deck and door.
35. Again, in maintaining and repairing the deck and door the strata is not held to a standard of perfection and the test is one of reasonableness (see *Atkins et al. v. The Owners, Strata Plan LMS 3297*, 2019 BCCRT 376, which discussed the

standard regarding the strata's obligation to repair and maintain limited common property).

36. An August 16, 2017 email from the owner to the strata's property manager indicates that the owner's deck door needed to be replaced and suggests there should be an investigation into the state of the deck.
37. There is an absence of evidence indicating what then occurred. The owner provided no evidence and the strata very little. The owner says that the strata hired incompetent people and that the workers did not measure the width of the wall where the new deck door was to be installed. He says that they bought the wrong sized door and, although it was the wrong size, they put it in anyway.
38. The owner says that he brought a strata council member to his strata lot to see the door. The owner says that after this the strata did intervene and hired somebody else who did install a deck door that fit properly. The strata admits that there was an error initially with the size of the door.
39. During this time work was also being done on the owner's deck to stop the leak. The strata says that the contractor attempted to repair this but was delayed by the weather and scheduling difficulties. The strata says that some of these delays were because the owner did not show up for appointments and that he ordered the contractor to leave and not return. The strata did not provide evidence to support this statement.
40. The owner again says that the strata hired an incompetent contractor which prolonged the repairs for months. He alleges that the contractor hired sub-contractors who were under the influence of drugs so they were unable to do the job properly. The owner also says that the workers did not show up when they were supposed to and that he complained to the strata multiple times about this. The owner did not provide any evidence in support of these submissions.
41. The owner further states that after ripping up the deck the workers had to apply a sealer but this could only be done if the temperature was 4 to 5 degrees. However,

the weather was not cooperating so the strata agreed to put a tent over the deck to heat it to the proper temperature. This is supported by a January 2018 email exchange where the strata agreed that they should tarp off the owner's deck and use torches to dry it off completely so they could seal the deck and not delay by waiting for warm weather.

42. The owner says that even though the strata agreed to this a month went by and nothing was done. The owner also says that his deck is still defective because it has a dip in the middle which collects water.
43. The strata says that it did not breach its duty of care to the owner and therefore was not negligent. It says that it hired this specific company to repair the deck and to replace the door because it had used the company before with satisfactory results. The strata says it had no reason to suspect that the company would not carry out the desired repairs professionally and competently. Also, the owner's submissions state that when the strata became aware that the hired company's subcontractors did not carry out their assigned duties professionally that it intervened and they were dismissed. The strata again does not deny that there were delays and inconvenience.
44. On the evidence before me, I find that the strata investigated and repaired the source of the leak that was affecting both the owner's strata lot and the strata lot below him. They were reasonable in choosing which company should perform the repairs. It had previous dealings with this company and was satisfied with the company's work. It was not unreasonable to expect that the standard of work would be similar.
45. The strata also replaced the owner's deck and had a properly sized door installed. Although there were some delays in the work's completion, the owner has not established that this was due to the strata's negligence. As noted above, the strata is required to act reasonably in its maintenance and repair obligation but if the strata's contractors fail to carry out work effectively, the strata should not be found negligent if the strata acted reasonably in the circumstances. The evidence shows

that the strata was diligent in following how the repairs were proceeding and hands-on in approving the tenting and having a sub-contractor fired who was not properly performing his job.

46. Therefore, I find that the owner has not established that the strata was negligent in its investigation and repair of the deck and deck door.

The Deck and Door Repair--Nuisance

47. The owner's claim against the strata is again also a nuisance claim. Specifically, the owner says he was not able to use his deck for several months and that he was negatively affected by the ongoing work being performed. Based on the evidence before me, I accept that the owner experienced a significant interference with the use and enjoyment of his strata lot due to the deck repairs. However, I find that the owner is not entitled to damages for this interference.
48. I find that the strata did take steps to try to obtain information from the contractors about the scope and timeline for the deck repairs. Just as with the roof repairs, this again is not a case where the strata simply failed to act. As outlined in *Kayne*, once the strata had knowledge of the nuisance it took reasonable steps to abate the nuisance.
49. I also note that the owner here says that the repairs should not have taken months to complete, but he has provided no evidence, such as a report from a contractor or engineer, to support that assertion. While it is possible that this work could have been completed more quickly, that assertion is not proven by the provided evidence. Also, as previously stated, the delay was not due to the actions or inactions of the strata. For these reasons, I find that the owner has not proved that the strata should be held liable for nuisance.
50. I note that the owner says that the deck is still defective. Nothing in this decision prevents the owner from requesting that the strata repair the deck if it is in need of repair.

TRIBUNAL FEES

51. 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. The owner was unsuccessful in his claims and therefore he is not entitled to have his tribunal fees reimbursed.

ORDER

52. I dismiss the owner's claims and this dispute.

Kathleen Mell, Tribunal Member