Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan LMS 4512 v. Baxter*, 2020 BCCRT 548

B E T W E E N :

The Owners, Strata Plan LMS 4512

APPLICANT

A N D :

JESS BAXTER

RESPONDENT

REASONS FOR DECISION

Tribunal Member: J. Garth Cambrey, Vice Chair

INTRODUCTION

1. The applicant, The Owners, Strata Plan LMS 4512 (strata), is a strata corporation existing under the *Strata Property Act* (SPA). The strata is represented by a strata council member.

2. The respondent Jess Baxter (owner), co-owns a strata lot (SL123) in the strata and is self-represented. He was also a strata council member during the times relevant to this dispute.

3. The strata seeks to recover $9,675.92 in engineering and legal fees it charged to the owner that it alleges relate to the owner's alterations completed to SL123. The strata also claims $225.00 for tribunal fees and $1,310.80 for legal fees related to this dispute.

4. The owner denies the strata's claim that he must pay the engineering and legal fees. He says he was not provided with appropriate particulars about why the strata charged him these expenses and that he was denied the opportunity to be heard by the strata council, contrary to section 135 of the SPA. He also says he is not required to pay the claimed fees under an Assumption of Lability Agreement for Modifications to Strata Lots and Common Property (liability agreement) he signed when he applied for permission to complete the SL123 alterations. The owner asks that the strata's claims be dismissed.

5. For the reasons that follow, I find in favour of the owner and dismiss this dispute.

JURISDICTION AND PROCEDURE

6. 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.

7. The tribunal has discretion to decide the format of the hearing, including in writing, by telephone, videoconferencing, email, 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.

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 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 order any other terms or conditions the tribunal considers appropriate.

ISSUES

10. The issues in this dispute are:

    a. Is the strata entitled to reimbursement of engineering and legal fees it paid to investigate the alterations made to SL123?

    b. If so, what amount, if any, is appropriate?

BACKGROUND, EVIDENCE AND ANALYSIS

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

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

13. The strata was created in October 2001 under the SPA provisions. It consists of 152 strata lots in a building located in Richmond B.C.

14. On April 22, 2004, the strata repealed all of its bylaws that were filed at the Land Title Office (LTO) and replaced them with an entirely new set of bylaws. Other bylaw amendments have been filed at the LTO that do not apply except for a bylaw amendment about access to a strata lot filed on May 17, 2010 and a bylaw about the strata commencing a tribunal claim filed on December 17, 2018. I discuss the bylaws relevant to this dispute below as necessary.

15. In February 2018, prior to purchasing SL123, the owner requested permission to complete alterations to SL123 by completing the liability agreement requested by the strata and submitting it to the strata. Clause 4 of the agreement states "I/we request that the Strata Council approve the following alteration(s) to be made:" and leaves a blank lined space for a description of the requested alterations. The owner inserted the phrase "Please see Schedule A" in the space and appended a description of his requested alterations. The requested alterations included removing a portion of the existing wall between the kitchen and dining area, changing the floor coverings, and changing fixtures and finishing in 2 bathrooms and the kitchen, among other things. I note the requested alterations included the installation of a gas line for a natural gas kitchen range, but that work was not completed. I also note the agreement before me was not signed by the strata.

16. LTO documents show the owner purchased SL123 on March 3, 2018. The evidence shows the owner started the renovations in March 2018. There is some evidence that suggests the strata manager, on March 13, 2018, advised the owner that "only approved exploratory work for the wall you are looking to alter" had been approved by the strata. This evidence is not disputed by the strata and is supported by a March 15, 2018 email from the strata council president to the owner which stated, in part, that the renovations were not approved and that the strata had "given permission for exploratory removal of the wall in the kitchen for inspection".

17. In the same March 15, 2018 email, the strata council president requested the owner stop all work and provide the strata access to SL123 to investigate the status of the alterations, which the owner did. The evidence shows the strata contacted a consultant, Pro Construction Ltd. (PCL) to investigate. A meeting was arranged in SL123 on March 16, 2019 with PCL, the owner (and possibly the owner's contractor) to view the alterations.

18. PCL's role is unclear but I find I do need to determine its role to resolve this dispute. PCL completed a second inspection on March 26, 2019 and a "final" inspection on April 2018. I infer from the overall evidence and submissions that the SL123 alterations were complete in May 2018.

19. Based on a July 23, 2018 letter to the strata from the lawyer acting for the owners of SL141, I accept that, on June 5, the strata received an email from an owner of strata lot 141 (SL141), located above SL123. The email apparently expressed concern over structural issues in SL141 as a result of the SL123 alterations, but is not before me.

20. On June 12, 2018, the strata requested access to SL123 "to inspect the renovation work recently completed inside [SL123]".

21. The June 27, 2018 strata council meeting minutes confirm a complaint letter had been received about the SL123 alterations. The minutes state the strata council had "reviewed the concerns and agreed that no further action is required at this time".

22. On July 23, 2018, the strata council received a letter from the lawyer acting for the owners of SL141. The letter refers to the earlier June 5, 2018 email from an SL141 owner to the strata and the June 27, 2018 strata council meeting minutes.

23. The SL141 lawyer's letter also expresses concern over "a noticeable depression" in the dining area floor that the SL141 owners' attribute to the SL123 alterations. The SL141 owners' stated concerns are that the SL123 alterations caused structural damage in SL141, including the floor depression. Further reference to correspondence and telephone discussions between the SL141 lawyer and the strata's lawyer are shown in the strata's lawyer's invoices, but no further evidence about the concerns of SL141 was provided.

24. The strata retained Sense Engineering Ltd. (Sense) to investigate the neighbours' concerns. Sense provided an opinion letter dated October 24, 2018 (first Sense report) following its investigation of both SL123 and SL141 concluding that some signs of building movement reported by the upstairs owners was consistent with the SL123 alterations, but that further exploratory investigation was needed in SL123. Sense expressed specific concern that the owner removed a short support wall that was not identified in the alteration request or by the owner's engineer who approved the structural alterations. The first Sense report was provided to the owner.

25. In an October 31, 2018 letter to the owner, the strata requested access to SL123 to allow Sense to conduct its further investigation. The strata advised the cost of Sense and a contractor of its choosing to open up and repair drywall would be charged to the owner's account but did not explain why. This was the first mention of the strata charging the owner with any investigative expenses.

26. The owner initially refused the strata's access to SL123 for Sense to conduct its further investigation because he felt he was not responsible for the cost of the inspection. In email exchanged between the strata's lawyer and owner's lawyer on November 20 and 21, 2018, the owner agreed to provide access based on "the [strata] agreeing to restore [SL123] to the condition it was in prior to the inspection". I find the owner did not expressly agree to pay for the exploratory work based on their lawyer's statement that "my clients are not prepared to indemnify the [strata] to repair work that was approved by the authorized representative of the [strata]". I conclude from the evidence that it is more likely than not that the strata agreed to complete the investigative work at its expense.

27. This email exchange contained the first reference to the liability agreement. It was raised by the strata's lawyer although the context is not clear. The response from the owner's lawyer was that the owner never received a signed copy of the agreement from the strata.

28. On February 25, 2019 Sense provided a second letter following its further investigation of SL123 (second Sense report). The report concluded the completed alterations posed no structural concerns. The report also reiterated that it was possible that some of the upstairs floor movement "could have occurred" during the alterations. In addition, the report also identified a floor "depression" in SL123 similar to one reported in SL141. Sense concluded that the depression in both strata lots could have existed before the alterations were undertaken.

29. On April 26, 2019, the strata wrote to the owner requesting payment of $6,351.76 that had been charged to the owner's account. The charges listed 2 invoices from Sense (for the 2 reports) totalling $3,597.37, and 6 invoices from the strata's lawyer

totalling $2,754.39. Copies of the invoices were attached to the letter. The letter stated the charge back of the invoices was "due to structural concerns from renovations made at [SL123]" and asked the owner to provide a response with 14 days citing section 135 of the SPA. The letter also stated that if the owner failed to respond the amount would be charged to his strata lot account.

30. On April 29, 2019, the owner, through his lawyer, requested the strata provide the written particulars of the complaint in compliance with section 135 of the SPA (for a section 133 demand for reasonable costs that was not identified in the April 26, 2019 letter). The lawyer's response also requested a hearing with the owner and strata council to discuss the charges. An email from the property manager to the owner's lawyer around May 13, 2018 confirms the hearing request was denied.

31. At the July 10, 2019 strata council meeting, the council voted to refer the matter to the tribunal for resolution.

32. Accounts receivable records of the strata show the owner's account was charged $6,351.76 in September 2019.

33. The Dispute Notice was issued on November 8, 2019.

Is the strata entitled to reimbursement of engineering and legal fees it paid to investigate the alterations made to SL123? If so, what reimbursement amount is appropriate?

34. Based on my review of the strata's bylaws, the strata does not have a bylaw that allows it to charge the owner with expenses that fall outside section 116 of the SPA (non-lienable expenses), such as the engineering and legal fees. In order to collect a non-lienable expense, 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 at paragraphs 40 and 41.

35. In order to be successful in this dispute, the strata must prove:

    a. the owner breached a bylaw and that, as a result the bylaw breach, the strata was entitled to charge the claimed fees to the owner, and did so under section 135 of the SPA or,

    b. the owner had a contractual obligation under the liability agreement to reimburse the strata for the claimed fees.

The Bylaw Breach

36. The strata submits that the owner did not receive its written permission to alter the owner's strata lot as required under its bylaws. The strata also says that PCL was only retained to check the initial status of the renovation and report back to the strata.

37. The owner says the alterations were completed as approved by the strata through its representative PCL. However, whether PCL endorsed the owner's alterations does not mean they were approved by the strata.

38. For the reasons that follow, I agree with the strata.

Did the owner breach the bylaws?

39. Bylaw 7.1 states, in part:

> An owner must obtain the written approval of the strata corporation before making or authorizing an alteration to a strata lot that involves any of the following:
>
> (a) The structure of a building,
>
> ….
>
> (g) those parts of the strata lot which the strata corporation must insure under section 149 of the [SPA], and

(h) wiring, plumbing, piping, heating, air conditioning and other services. (Emphasis in original)

40. There is no question the owner's requested alterations included things set out in bylaw 7.1, such as the structure of the building (kitchen wall removal), parts of the strata lot which the strata must insure (flooring coverings, if they were original), and wiring and plumbing services. Therefore, I find the owner was required to obtain the written approval of the strata before the alteration work began. The evidence is clear that this did not occur. There is no evidence that either the strata, or PCL as its representative, ever provided written approval of the alterations. The evidence is that PCL largely oversaw the alterations but there is no evidence before me of any written approval.

41. Accordingly, I find the owner contravened bylaw 7.1 when he completed the alterations without the written approval of the strata.

42. I note that bylaw 7.2 says the strata must not unreasonably with hold its approval under bylaw 7.1 and ***may*** require the owner to take responsibility for, and to indemnify the strata for any future costs or expenses relating to, the alteration. The requirement for a liability agreement is at the discretion of the strata. As I have earlier noted, the owner signed a liability agreement with his requested alterations appended. The strata did not sign that agreement. Other than the original signed liability agreement provided by the owner, there is no evidence before me that the strata required an amended liability agreement to be signed.

43. Finally, I note bylaw 7.3 requires an owner intending to apply for permission to alter a strata lot to submit a written description and detailed plans, which the owner did.

44. For completeness, I do not find the owner contravened bylaws 7.2 or 7.3.

Is the strata entitled to reimbursement as a result of the bylaw breach?

45. The applicable enforcement options available to the strata as a result of the bylaw breach are set out in section 129 of the SPA and include imposing a fine and remedying the contravention under section under section 133. Section 133 says the

strata can remedy a bylaw contravention by doing what is “reasonably necessary”, including doing work to a strata lot.

46. At no time did the strata attempt to impose fines.

47. For the reasons that follow, I find the strata is not entitled to reimbursement of its claimed fees as a result of the owner’s contravention of bylaw 7.1.

48. The evidence shows the SL123 alterations were complete in May 2018. It was not until July 2018, when the strata received the neighbours’ lawyer’s letter, that the strata decided to investigate the alterations by retaining Sense.

49. I do not find the investigation of SL123 by Sense was about the owner’s bylaw breach. I agree with the owner that the Sense investigation would likely not have occurred if the upstairs owner did not complain about the flooring in SL141. In other words, I do not agree that the engineering and legal costs incurred by the strata fall within the meaning of reasonable expenses under section 133 of the SPA. I find the strata is not entitled to reimbursement of the claimed fees as a result of bylaw breach for the reasons that follow.

50. First, the strata completed the first Sense report without asking the owner to pay for it.

51. Second, I have already found the strata proceeded with the second Sense report at its own expense.

52. Third, the April 26, 2019 letter from the strata requesting payment of the claimed fees was made about 1 year after the SL123 alterations were completed. If the strata wanted to remedy a bylaw breach, one would expect the strata to pursue such a claim shortly after the alleged breach occurred. I find it was unreasonable for the strata to wait 1 year before beginning enforcement of a bylaw breach.

53. Fourth, the strata did not state in its April 26, 2019 letter that the charge back amount was related to a bylaw breach, although this was a reasonable assumption by the owner’s lawyer given the strata’s reference to section 135. When asked for

the particulars of the complaint relating to an alleged bylaw breach, the strata did not provide a response. Nor did the strata provide the owner an opportunity to be heard before charging the owner the $6,351.76 for the claimed fees. The strata's requirements to provide the owner with the particulars of the complaint and an opportunity to be heard are strictly required as determined by the courts. See *Terry v. The Owners, Strata Plan NW 309*, 2016 BCCA 449 and *The Owners, Strata Plan NW 3075 v. Stevens*, 2018 BCPC 2.

54. For these reasons, I find the strata's claim for reimbursement of engineering and legal fees for a bylaw breach cannot succeed. I dismiss this aspect of the strata's claim.

The Liability Agreement

55. The strata relies on the liability agreement signed by the owner, but did not sign it. It says the agreement was not signed because it was incomplete.

56. According to the owner's interpretation, the claimed fees are not captured by the liability agreement.

57. I find the real issue here is whether the parties reached agreement on the terms of the liability agreement such that the agreement is enforceable. This means the general principles of contract law apply to this claim.

Did the parties have an agreement?

58. For the reasons that follow, I conclude that no agreement was reached between the strata and the owner for the SL123 alterations and, specifically, there was no agreement that the owner would assume liability for the SL123 alterations. As such I find the liability agreement is not enforceable.

59. To have an enforceable contract, there must be a 'meeting of the minds' about the contract's subject matter. A party's subjective intention is not enough. I find that the parties did not agree to the essential elements of the liability agreement such as offer, acceptance, intention to be bound, and certainty. While the owner provided a

signed liability agreement as part of his alteration request, it was never signed by the strata, so it was never accepted by the strata. Also, the agreement does not accurately reflect the work done as it includes the installation of a gas line for a natural gas kitchen range, which was not completed, and does not include the removal of the small kitchen wall identified by Sense.

60. While it may be true the parties intended to agree to the liability agreement, an agreement to agree is not a contract. As the court noted in *Middleton Estate v. Howard*, 2012 BCSC 1089 at paragraph 13, all essential elements of a contract must have been decided before any agreement can be established. And at paragraph 10, citing *Bawitko Investments Ltd. v. Kernels Popcorn Ltd*. (1991), 79 D.L.R. (4th) 97 (Ont. C.A.) at paragraph 105:

> ... If no agreement in respect to essential terms has been reached or the terms have not been agreed to with reasonable certainty, it can only be concluded that such terms were to be agreed upon at a later date and until that time there would be no completed agreement.

61. For these reasons, I find the liability agreement relied on by the strata is not enforceable. I dismiss the strata's claim for reimbursement of expenses under the liability agreement.

62. In summary, I dismiss the strata's claims and therefore this dispute.

TRIBUNAL FEES AND EXPENSES

63. 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. Given the strata was not the successful party, I do not order reimbursement of tribunal fees. The owner did not pay tribunal fees.

64. As earlier noted, the strata claimed $1,310.80 in dispute-related expenses entirely made up of legal fees. The tribunal's rules state that the tribunal will not order one party to reimburse another party's legal fees in strata property disputes, except

in extraordinary circumstances. I do not agree that the circumstances in this dispute rise to the level of extraordinary. Accordingly, I dismiss the strata's claim for dispute-related expenses.

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

ORDER

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

J. Garth Cambrey, Vice Chair