Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Zanon v. The Owners, Strata Plan VIS1968*, 2020 BCCRT 1074

B E T W E E N :

ROBERT ZANON and DEBRA MURPHY

APPLICANTS

A N D :

The Owners, Strata Plan VIS1968

RESPONDENT

A N D :

ROBERT ZANON and DEBRA MURPHY

RESPONDENTS BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member: Sherelle Goodwin

INTRODUCTION

1. The applicants and respondents by counterclaim, Robert Zanon and Debra Murphy (owners), own strata lot 3 (SL 3) in the respondent residential strata corporation, The Owners, Strata Plan VIS1968 (strata).

2. The owners say their patio screen door is broken, the patio glass door collects condensation, the frame is moldy and the door sill is rotten. The owners say the strata has refused to replace the patio door unit even though it is the strata's responsibility. The owners claim $1,483.53 to replace the patio door.

3. The strata denies the owners' door sill is rotten or that the patio door needs to be replaced. The strata says the mold and the screen door are the owners' responsibility. The strata asks that the owners' claim be dismissed.

4. In its counterclaim the strata says the owners' have used strata resources at the expense of other owners. It counterclaims $4,486.13 for legal fees spent on an unrelated disagreement with the owners in 2015 and $454.90 for mediation costs in this dispute. The strata also asks the CRT to order the owners to cease making claims against the strata.

5. The owners say the strata's counterclaim for legal fees is out of time under the *Limitation Act* (LA) and that the strata cannot recover mediation costs from the owners under the *Strata Property Act* (SPA). The owners ask that the strata's counterclaim be dismissed.

6. The owners are each self-represented. The strata is represented by a strata council member.

JURISDICTION AND PROCEDURE

7. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over strata property claims under section 121 of the *Civil Resolution Tribunal Act* (CRTA). The CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. The CRT must

act fairly and follow the law. It must also recognize any relationships between dispute parties that will likely continue after the CRT's process has ended.

8. The CRT 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 CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court. The CRT may also ask the parties and witnesses questions and inform itself in any way it considers appropriate.

10. Under section 123 of the CRTA and the CRT rules, in resolving this dispute the CRT may order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the CRT considers appropriate.

11. As a preliminary matter, I decline to order the owners to cease making claims against the strata I find such an order is not necessary to resolve this particular dispute and so the injunctive relief does not fall undersection 123 of the CRTA. Further, the CRT generally does not make prospective orders, or orders about things that are in the future and have not happened (see *Yas v. Pope*, 2019 BCCRT 1349).

ISSUES

12. The remaining issues in this dispute are:

    a. Must the strata pay the cost of replacing or repairing the owners' patio door unit and, if so, how much?

    b. Is the strata's counterclaim for legal fees out of time under the LA and, if not, must the owners pay the strata's 2015 legal fees?

    c. Must the owners pay mediation costs in this dispute and, if so, how much?

EVIDENCE AND ANALYSIS

13. In a civil case such as this one the applicant owners must prove their claim on a balance of probabilities. To succeed in its counterclaim, the strata must prove its claims to the same standard. I have reviewed all submissions and evidence provided, but I will only refer to that which explains, and gives context to, my decision.

14. The strata was created in 1990. The owners' building is part of Phase 1, which was completed in approximately 1992. The strata consists of 32 residential strata lots.

15. The strata plan shows that SL 3 has a front and back patio areas that are designated as limited common property (LCP) for the exclusive use of SL 3.

16. The strata filed a set of amended bylaws in the Land Title Office on March 22, 2017. I find the following bylaws apply to this dispute:

- Bylaw 4(2) says that an owner who has the use of LCP must repair and maintain that LCP, except for repair and maintenance that the strata is responsible for.

- Bylaw 6(1) says an owner must obtain written strata approval before altering common property, common assets, or doors, windows or skylights on the exterior of a building, or that front on the common property, among other things.

- Bylaw 8(1)(c)(ii) says the strata must maintain and repair the following parts of LCP: the structure and exterior of the building, patios attached to the exterior of the building, and doors, windows and skylights on the exterior of a building or that front on the common property.

- Bylaw 39 authorizes the strata to commence a CRT proceeding against an owner without requiring a percentage vote of owners, under section 171 of the SPA.

The Owners' Claim - Patio Door Replacement

17. The owners' patio door unit includes a sliding glass door and sliding screen door, in an aluminum frame. The screen door is on the inside of the glass door. The patio door unit is the original unit from 1992. The owners' strata lot is 1 of 21 strata lots with the original aluminum frame patio door units. The owners replaced their patio door unit on December 2, 2019. None of this is disputed.

18. The owners say they have been asking the strata to replace their patio door since June 2015. The owners did not provide any evidence supporting their June 2015 request and the strata says it is unable to find any such request. In any event, I find the strata repaired the glass patio door rollers and lock in 2017, based on an August 29, 2017 work order to the glass contractor. At that time the strata instructed the glass contractor that the screen door was the owner's responsibility.

19. In a July 18, 2019 email the owners asked the strata to replace the patio door and screen. The owners wrote that the screen was torn and the screen door handle had broken off and could not be replaced. The owners wrote that the patio door rollers had previously been replaced, that the doors' useful life was 15 to 20 years and that the door unit needed to be replaced.

20. At the next strata council meeting on August 30, 2019, the strata decided that the patio screen door was the owners' responsibility. The owners wrote the strata and advised the screen door, as part of the patio door unit, was the strata's responsibility.

21. In October 2019 the owners requested, and received, strata approval to replace their patio door unit as an alteration to common property. After receiving the strata's approval the owners asked for a hearing to ask the strata to pay for the patio door unit replacement. After the November 28, 2019 hearing the strata concluded that the screen doors were the owners' responsibility and repairing the glass patio door was the strata's responsibility. The strata pointed out that the owners had not asked for glass patio door repairs and so there was no action for the strata to take. The

strata told the owners that replacement of the 21 older patio door units was not in the strata's budget for that year.

22. The owners served the strata with a notice to arbitrate under SPA section 179, which resulted in a mediation on January 9, 2020. The parties agree that, after the mediation, the owners agreed not to pursue arbitration any further and the strata agreed to ask all owners to vote on a patio door replacement resolution at the upcoming annual general meeting (AGM). The owners voted against the resolution for the 21 older patio door units to be replaced, at the expense of those 21 strata lot owners. None of this is disputed.

23. The strata says this dispute was resolved at the meditation on January 9, 2020 when the owners agreed not to pursue arbitration. I disagree.

24. Section 187 of the SPA says that a decision of an arbitrator is final and binding on the parties. I find this section inapplicable to this dispute as there was no final decision of an arbitrator. Although the owners agreed not to pursue binding arbitration, they did not agree not to pursue recovery of the patio door replacement cost through the CRT. There is no suggestion that the parties signed a settlement agreement and the strata's mediation minutes specifically state that the owners agreed not to pursue further arbitration.

25. Under section 11(1)(a)(ii) of the CRTA, the CRT may refuse to resolve a claim if the matter has been resolved through a legally binding process, or other dispute resolution. I do not find the January 9, 2020 mediation resolved the owners' patio door dispute, even though it effectively ended the arbitration process. I find the owners' claim is for the strata to pay for the patio door replacement, under its obligation to repair and maintain common property. Whether the strata is, or is not, responsible for the patio doors was not resolved at the January 9, 2020 mediation. So, I find the owners' claim was not resolved at the mediation and I find it is in the best interests of the parties for the CRT to resolve the claim and provide finality to the parties.

26. The owners say the strata is responsible for repair and maintenance of the whole patio door unit, including the screen door, the glass door and the frame that encloses the doors. For the following reasons, I agree.

27. Section 72 of the SPA requires the strata to repair and maintain common property and common assets, apart from any LCP repair and maintenance obligations of owners set out in the strata's bylaws. Bylaw 8 requires the strata to maintain and repair exterior doors within LCP.

28. I infer the strata to argue that the screen doors are not exterior doors because they are on the inside of the glass patio doors. I disagree. Based on photos provided by the owners, and the parties' submissions, I find the patio door units are an entire unit, with the glass door and screen door both enclosed in one aluminum frame. Further, I find both the screen and glass door are exterior doors as they both allow for entry to and exit from to the building. I find the patio door units are exterior doors and, under bylaw 8, the strata is responsible for repairing and maintaining the whole patio door unit, including glass doors, screen doors, and aluminum frame.

29. The strata says its duty to repair and maintain common property, such as the glass doors, does not necessarily extend to replacement. It points out that the owners did not ask for any repairs to their patio door unit and did not say their glass door was broken. The strata's obligation to repair and maintain is measured by the test of what is reasonable in all circumstances and can include replacement when necessary (see *The Owners of Strata Plan NWS 254 v. Hall,* 2016 BCSC 2363). The standard is not one of perfection. When deciding whether to fix or replace common property, the strata has discretion to approve "good, better or best" solutions to any given problem. The court will not interfere with a strata's decision to choose a "good," less expensive, and less permanent solution, although "better" and "best" solutions may have been available. (*Weir v. Owners, Strata Plan NW 17,* 2010 BCSC 784 at paragraphs 28 and 29). In other words, the strata is not required to replace the owners' patio door unit if there are other reasonable repair options open to it.

30. The owners say the patio door unit was old and well past its life expectancy. They say the strata's most recent depreciation report says the original patio door units needed replacing. Neither party provided a copy of the depreciation report to support why the patio door units require replacement or when. So, I find the depreciation report does not assist me in resolving this dispute.

31. The owners say the screen door handle was broken and could not be repaired, the screen was torn, and that the glass door was difficult to open and close, that the sliders were pitted and the door sagged into the sliders. Photos provided by the owners show condensation between the glass doors and black mould on the wooden door frame and door sill, and over the caulking around the aluminum frame. The wooden door sill appears swollen, although there is no visible rot. Although there are no photos, I accept the owners' statement that the screen door was damaged as the strata does not dispute it.

32. The strata disputes that the glass door needed repair or maintenance. There is no evidence, such as a video, that shows the difficulty with opening and closing the glass door, and the owners did not describe this difficulty when they asked the strata to replace the doors in June 2019. There is also no evidence from the glass contractor who replaced the patio door unit about problems with the glass door function. Without that evidence, I cannot determine what was, or was not, wrong with the patio door unit. There is no evidence that the black mould or condensation is due to the failure of the patio door unit. Further, without an opinion from a patio door expert, the owners have failed to prove that replacing the patio door unit was the only reasonable solution to their patio door problems.

33. Based on emails from the owners to the glass contractor, I find the owners attempted to obtain the glass contractor's opinion on the state of the patio door unit. Based on emails between the strata council members, I find the glass contractor was unwilling to provide an opinion to the owners. In these circumstances, I do not draw an adverse inference in the absence of the glass contractor's opinion. In other words, I do not find the glass contractor's opinion would hurt the owners' case. However, there is no opinion evidence which supports the owners' case either.

34. On balance, I find the strata was not required to replace the owners' patio door unit, including the screen door, glass door, and door frame. Although the strata is required to repair and maintain the patio door unit, including the screen door, there is no evidence before me establishing what repairs were required.

35. In proceeding with the replacement of their patio door unit I find the owners unilaterally imposed the "best" solution to the problem. In doing so, they prevented the strata from exploring "good" or "better" solutions. It may be that replacement of the patio door unit was the only reasonable solution. However, given that the owners chose to proceed as they did, I find they must bear the cost for doing so. I find the owners are not entitled to reimbursement of the patio door unit replacement cost. I dismiss their claim for $1,483.53.

Counterclaim – 2015 Legal fees

36. The strata says the owners were responsible for "costly litigation" against the strata in 2015. According to the strata's October 2015 general ledger the strata spent $4,486.13 in legal fees that month. Although the ledger does not associate those legal fees to any particular issue, both parties agree that the strata retained legal counsel around that time in relation to the owners' concerns with a pet fence blocking access to common property.

37. The owners say the strata's claim for recovery of the 2015 legal fees is out of time. The strata did not provide submissions on the limitation period, despite that the owners raised it in their Dispute Responses to the counterclaim.

38. Section 13 of the CRTA confirms that the LA applies to CRT claims. Section 6 of the LA sets out a basic limitation period of 2 years, after the claim is "discovered". Section 8 of the LA explains that a claim is discovered on the first day the person knew, or reasonably ought to know, that the loss occurred, that it was caused or contributed to by an act or omission of the person against whom the claim may be made, and that a court or tribunal proceeding would be an appropriate means to remedy the loss.

39. As the strata spent the money on legal fees in October 2015, and as the parties agree the legal fees were spent in regard to the owners' claim against the strata about a pet fence, I find the claim was discoverable at that time. Specifically, I find the strata knew of the legal expenses and knew that the owners caused or contributed to the need for the expense. Given bylaw 39, which authorizes the strata to file a CRT claim against an owner, I also find the strata knew that the CRT was a reasonable means to seek recovery of the expenses. On balance, I find the claim was discoverable in October 2015 and so the strata should have filed its claim by October 2017.

40. Although the 2-year limitation period can be extended in certain circumstances, such as written acknowledgment of the claim, or partial payment of a liquidated sum, there is no suggestion that such circumstances exist in this dispute. So, I find the 2-year basic limitation period has not been extended.

41. As the strata did not file its claim for legal fees by October 2017, I find the claim is out of time. I dismiss the strata's $4,486.13 counterclaim for legal fees.

Counterclaim – Mediation fees

42. The strata claims $390 in strata management company fees for "extra meeting time and mediation". The owners say the mediation fees are expenses for defending a legal claim against the strata and thus the owners are not required to contribute to that expense, under the SPA.

43. Section 167(2) of the SPA says an owner who sues a strata corporation is not required to contribute to the expense of defending the suit. Section 176(b) says that section 167(2) applies to an arbitration which includes the strata. In other words, a strata cannot require an owner to contribute to the expenses of defending an arbitration initiated by that owner. I find the strata's counterclaim for $390 for mediation and meeting fees are an expense of defending the arbitration initiated against the strata by the owners. So, I find the strata cannot recover those expenses from the owners under sections 167(2) and 176(b) of the SPA. I dismiss the strata's $390 counterclaim.

44. I further find the strata's $64.90 counterclaim for USB sticks to record the January 9, 2020 mediation is also an expense of defending the owners' arbitration notice. As such, I find the strata cannot recover that expense from the owners under sections 167(2) and 176(b) of the SPA. I dismiss the strata's $64.90 counterclaim.

CRT FEES and EXPENSES

45. Under section 49 of the CRTA, and the CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. I see no reason in this case not to follow that general rule. As the owners were unsuccessful in their claim, I find they are not entitled to reimbursement of their CRT fees. As the strata was unsuccessful in its counterclaim, I find it is also not entitled to reimbursement of its CRT fees. Neither party asked for reimbursement of dispute-related expenses.

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

ORDER

47. I dismiss the owners' claims, the strata's counterclaims, and this dispute.

Sherelle Goodwin, Tribunal Member