Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Section 3 of The Owners, Strata Plan NW2406 v. Section 1 of The Owners, Strata Plan NW2406*, 2021 BCCRT 377

B E T W E E N :

Section 3 of The Owners, Strata Plan NW2406

APPLICANT

A N D :

Section 1 of The Owners, Strata Plan NW2406

RESPONDENT

REASONS FOR DECISION

Tribunal Member: David Jiang

INTRODUCTION

1. This dispute is about rent owing for storage lockers. The parties are separate sections of the same strata corporation, The Owners, Strata Plan NW2406 (strata). The

applicant, Section 3 of The Owners, Strata Plan NW2406 (commercial section), consists of non-residential strata lots in the strata. The respondent, Section 1 of The Owners, Strata Plan NW2406 (apartment section), consists of strata lots that provide apartment-style residential housing in the strata. The strata includes another section of residential strata lots, Section 2 of The Owners, Strata Plan NW2406 (townhouse section), which is not a party to this dispute. I will refer to the apartment and townhouse sections collectively as the residential sections.

2. The commercial section rented out a storage room to the residential sections. The residential sections in turn provided storage lockers in the storage room for rent to residential owners. The commercial section says the 2 residential sections owe $1,729 in rental arrears under 2 invoices dated March 2019. It also says the residential sections owe another $6,100 in arrears for a period of 10 months, from August 2019 to May 2020. Finally, the commercial section claims for $6,027 that was taken out of a rental bank account (rental account), of which only $4,650 was returned. This leaves $1,377 unreturned. In total, the commercial section claims for $9,206. The commercial section says both residential sections owe this amount, but only the apartment section is a respondent.

3. The apartment section disagrees. It says it is not responsible for collecting any rent owing under the rental agreement due to the decisions reached at a February 2019 strata council meeting. It also says the missing $6,027 was returned in full.

4. The commercial and apartment sections are represented by a member of each of their respective strata councils.

5. For the reasons that follow, I find the commercial section cannot legally provide the storage room for rental and dismiss its claims for rental arrears. I also find that a portion of the rental account is missing, but I do not find the apartment section liable for it. I dismiss this claim as well and this dispute.

JURISDICTION AND PROCEDURE

6. 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.

7. 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.

8. 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.

9. 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.

10. CRT documents incorrectly show the applicant's name as Strata Corporation 3 of Strata Plan NW2406 and the respondent's name as Strata Corporation 1 of Strata Plan NW2406. Based on section 2 of the *Strata Property Act* (SPA) and the strata's bylaws, the parties' correct legal names are Section 3 of The Owners, Strata Plan NW2406 and Section 1 of The Owners, Strata Plan NW2406. Given the parties operated on the basis that the correct names of the sections were used in their documents and submissions, I have exercised my discretion under section 61 of the CRTA to direct the use of the sections' correct legal names in these proceedings. Accordingly, I have amended the parties' names above.

11. This dispute concerns money owing under a breach of contract. I find this dispute is nonetheless within the CRT's jurisdiction over strata property claims because it relates to the use of limited common property under CRTA section 121(1)(b). The parties also did not dispute my jurisdiction to hear this matter, and for those reasons I find it appropriate to proceed.

12. As discussed below, I find that the issues in this dispute include the threshold issue of whether the commercial section is legally entitled to rent out the storage room and whether it has standing to make the claims that it does. I asked the parties to provide comments on these issues. The commercial section provided submissions that I have considered. The apartment section did not provide submissions.

ISSUES

13. I find the following threshold issue must be considered first:

    a. Is the commercial section legally entitled to rent out the storage room?

    b. If the commercial section is entitled to rent out the storage room and has standing to bring a claim, is the apartment section liable for the rental arrears documented in the 2 March 2019 invoices or for the months of August 2019 to May 2020, and if so, what is the appropriate remedy?

    c. Did the strata's new property manager return all the rental account funds, and if not, what is the appropriate remedy?

BACKGROUND, EVIDENCE AND ANALYSIS

14. In a civil claim like this one, the applicant commercial section must prove its claims on a balance of probabilities. I have only addressed the parties' evidence and submissions to the extent necessary to explain and give context to my decision.

15. The strata has existed since 1986. It consists of 128 strata lots in 4 different buildings.

16. As noted earlier, the strata has 3 sections. Under SPA section 191, a strata corporation may have sections for the purposes of representing the different interests of owners of residential strata lots, different types of residential strata lots, and non-residential strata lots. A section is essentially a "mini-strata corporation": see *Lim v. The Owners, Strata Plan Vr2654,* 2001 BCSC 1386 at paragraph 48. Under SPA section 196, an executive administers each section, much like a strata council administers the strata.

17. SPA section 193 says the owners in the strata may pass bylaw amendments by a 3/4 vote to create sections. The section is created once the bylaw amendments are registered in the Land Title Office.

18. In 2003 the strata repealed its existing bylaws and filed new bylaws in the Land Title Office. The strata's registered bylaws show the owners voted to form 3 sections within the strata. These are the apartment, townhouse, and commercial sections mentioned earlier. The bylaws have been amended several times, though those amendments are not relevant to this dispute.

19. The strata plan shows a storage room on floor 2 of one of the buildings. The room is designated as limited common property (LCP) for the exclusive use of strata lots 26 and 32. These are the only strata lots in the commercial section. I find this to be the storage room at issue.

20. It is undisputed that in August 2014 at a strata council meeting, the commercial section agreed to rent out the storage room to the other residential sections.

21. Under SPA section 194, a section is considered a corporation and may enter into contracts in the name of the section. SPA section 194(3) specially states that a section may not contract or sue in the name of the strata. It also says the strata has no liability for contracts made or debts incurred by the section.

22. I find the commercial section and the residential sections entered into a contract. The parties' contract was verbal and there is no reference to it in the bylaws. I asked the parties to provide submissions and evidence about its terms. Based on the

commercial section's undisputed submissions, I find the commercial section initially charged $400 as monthly rent and both residential sections agreed to pay it.

23. Based on the evidence, I also find that the residential sections relied on the strata's property manager to collect the rent from individual owners and place it into a specific numbered account operated by the strata's property manager. I have referred to this above as the rental account.

24. It is undisputed that the residential sections then rented out the 30 storage lockers in the storage room to their owners, and collectively charged these owners $600 per month. The residential sections kept the extra $200 charged per month to compensate them for collecting rent and administering this program. The commercial section did not receive any of the additional $200.

25. As documented in emails, in January 2017, the parties agreed to increase the rental fee to $620 per month. Subsequently, the parties mistakenly referred to the rent as being $610 per month and the parties retroactively agreed to use this amount out of convenience. The residential sections in turn collectively charged their owners $900 per month.

26. Over time, fewer residential owners wished to rent lockers and a shortfall began to accumulate for the residential sections. At a February 12, 2019 strata council meeting the strata council discussed the issue. The commercial section's representative was present as he was a member of strata council. The strata council voted and approved the following measures. The strata would not pay the monthly rent as it was not a strata-related expense. However, one strata council member would help coordinate the locker rentals to see if enough lockers could be rented out to sustain the program. If there were not enough interested owners, the storage lockers would no longer be made available for rent. The commercial section agreed to extend the time for residential owners to vacate the lockers to March 31, 2019, to see if there was enough interest.

Issue #1. Is the commercial section legally entitled to rent out the storage room?

27. As noted above, the storage room is designated as LCP for the exclusive use of strata lots 26 and 32. I asked the parties to comment on whether there was any change in this designation and whether this affected the enforceability of the rental agreement. Only the commercial section responded. It confirmed the storage room's designation had not changed.

28. Under SPA section 66, an owner owns the common property of the strata corporation as a tenant in common in a share equal to the unit entitlement of the owner's strata lot divided by the total unit entitlement of all strata lots. I find that the common property includes the LCP of the storage room at issue.

29. I find that one of the difficulties with the commercial section's claim is that it seeks payment for rent on property it does not own. Under SPA section 66, I find that the owners in the strata own the storage room, subject to the exclusive use of strata lots 26 and 32. Moreover, even if the owners of strata lots 26 and 32 could rent out the storage room, the commercial section cannot. The commercial section is a separate legal entity from the owners of strata lots 26 and 32. Put another way, the commercial section does not have the exclusive use of the storage room. It cannot provide the storage room to the residential sections for rental.

30. Although not necessary to my finding, above, I also find that renting the storage room to the residential sections is a significant change in the use or appearance of the strata's LCP. Under section 71 of the SPA, a strata corporation must not make a significant change in the use or appearance of common property unless the change is approved by a resolution passed by a 3/4 vote at an annual or special general meeting. There is no evidence before me that the owners have ever approved such a resolution.

31. In *Foley v. The Owners, Strata Plan VR387,* 2014 BCSC 1333, the court considered the meaning of "significant change" for the purposes of SPA section 71. It provided

the following non-exhaustive list of factors to consider at paragraph 19, which I summarize here:

a. A change would be more significant based on its visibility or non-visibility to residents and its visibility are non-visibility towards the general public;

b. Whether the change to common property affects the use or enjoyment of the unit or number of units or an existing benefit of all unit or units;

c. Is there a direct interference or disruption as a result of the change to use?

d. Does the change impact on the marketability or value of the unit?

e. The number of units in the building may be significant along with the general use, such as whether it is commercial, residential or mixed-use;

f. Consideration should be given as to how the strata corporation has governed itself in the past and what it is followed. For example, has it permitted similar changes in the past? Has it operated on a consensus basis or has it followed the rules regarding meetings, minutes and notices as provided in the SPA?

32. In *Foley* the court found that SPA section 71 also applied to changes to common property made by individual owners.

33. I find that under *Foley*, the owners of strata lots 26 and 32, along with the residential sections, have made a significant change in the use and appearance of the LCP. On the strata plan, the storage room is marked for the exclusive use of the strata lots in the commercial section. However, it is now being used as a storage room for use by the paying members of the residential sections. I find that under this arrangement, the change in use creates a direct disruption and affects a significant number of strata lots in both the commercial and residential sections. There are also individual storage lockers added to the storage room, which I find would be a significant change in both its use and appearance.

34. I acknowledge that some of the *Foley* factors suggest the change is not significant. For example, the strata plan indicates the change would not be visible to the general public. However, I find the above-noted factors to be of greater significance.

35. I also acknowledge that the parties have worked under this arrangement for some time. However, this does not change the fact that the current change in use of the storage room is not permitted under the SPA.

36. In summary, I have found that the commercial section has no ownership interest in the storage room. I have also found the commercial section does not have the exclusive use of the storage room and cannot legally provide it for rental. Though not necessary for my decision, I have also found that the use and appearance of the storage room was changed without a ¾ vote of the ownership, in contravention of SPA section 71.

37. I find that in these circumstances, the law of mistake applies. See *Ron Ghitter Property Consultants Ltd. v. Beaver Lumber Company Limited,* 2003 ABCA 221 at paragraphs 12 to 13. I find that the parties have made a common mistake, meaning that they have made the same mistake about whether the commercial section could rent out the storage room. I find that the mistake was so fundamental that it has rendered the agreement unenforceable. This is because the commercial section could not legally provide what was bargained for.

38. As noted above, the commercial section claims $1,729 in rental arrears under the 2 March 2019 invoices. It also claims $6,100 in rental arrears from August 2019 to May 2020. Given my findings, I decline to order payment of these amounts.

Issue #2. Did the new property manager return all the rental account funds, and if not, what is the appropriate remedy?

39. As noted above, the commercial section says the strata's new property manager failed to return a portion of its rental account money. I will first discuss the background below.

40. On August 1, 2019, the strata decided to change its property manager. As noted earlier, the residential sections relied on the property manager to collect the storage locker rent and deposit it in this account. An August 2019 financial statement shows that the rental account held $6,027 at the time.

41. Two issues arose after the strata changed property managers. First, the rental account disappeared from the statements for several months. Second, the new property manager did not collect rent for the months of August 2019 to May 2020. I have already dismissed the claim for the rent arrears for this time period, so I will only discuss the rental account issue below.

42. The rental account did not appear on the financial statements for September, October, or November 2019. In October 2019, the commercial section began sending letters to the new property manager asking where the money had gone. The rental account reappeared on the December 2019 financial statement showing a balance of $0.00.

43. In June 2020, a strata council member emailed the new property manager to ask where the money from the rental account went. The new property manager's accountant replied. They said the rental account money was placed in the commercial section's account on May 6, 2020.

44. The apartment section provided 2 contradictory submissions. First, it says the rental account funds did not show because the strata's fiscal year end is August, and the money would not appear in the financial statements after this. Second, and contrary to the first submission, it agrees that the new property manager initially placed the rental funds in the wrong account. The apartment section says that, based on the June 2020 emails, the issue has been corrected.

45. I find from the June 2020 emails the rental account funds were in fact misplaced. Consistent with this, the monthly statements show that the new property manager attempted to restore the rental account by depositing funds totaling $4,650 into the rental account in March, April, and May 2020. I find that there is an unexplained shortfall of $1,377.

46. While I find a portion of the rental account is still missing, I am not persuaded that the apartment section is liable for this shortfall. The rental account consisted of funds collected under an agreement I have found to be unenforceable. Further, the commercial section agreed to have its payments held in the rental account. There is no indication that the apartment section continued to be responsible for these funds after they were already paid to the commercial section. The commercial section says the residential sections had control over this account, but I do not find this proven by any evidence.

47. The commercial section also says that the strata should be responsible for these amounts. However, the strata is not a party to this dispute. It is a separate legal entity from the apartment section. I do not find this claim to be properly before me.

48. I dismiss this claim.

CRT FEES, EXPENSES AND INTEREST

49. 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.

50. The apartment section is the successful party. It did not pay any CRT fees or claim any dispute-related expenses. I therefore do not order reimbursement for any parties.

ORDER

51. I dismiss the commercial section's claims and this dispute.

David Jiang, Tribunal Member