Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Szeto v. The Owners, Strata Plan NW 246*, 2022 BCCRT 855

B E T W E E N :

KA HUNG SZETO

APPLICANT

A N D :

The Owners, Strata Plan NW 246

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Chad McCarthy

INTRODUCTION

1. This dispute is about alleged strata lot damage. The applicant, Ka Hung Szeto, owns strata lot 8 (SL8) in the respondent strata corporation, The Owners, Strata Plan NW 246 (strata). Mr. Szeto says the strata's exterior building repair work caused cracks in his bedroom wall and affected the operation of his toilet. He requests an order that the strata inspect and repair the alleged wall and toilet damage.

2. The strata says the building repair work was performed properly and did not damage Mr. Szeto's strata lot, and the strata is not responsible for the claimed repairs.

3. In this dispute, Mr. Szeto is represented by his daughter, RS. The strata is represented by a lawyer, Anil Aggarwal.

4. For the following reasons, I dismiss Mr. Szeto's claims for SL8 wall and toilet investigations and repairs.

JURISDICTION AND PROCEDURE

5. 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). CRTA section 2 says the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between the dispute's parties that will likely continue after the CRT process has ended.

6. CRTA section 39 says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice and fairness.

7. CRTA section 42 says the CRT may accept as evidence information that it considers relevant, necessary, and appropriate, even where the information would not be admissible in court. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

8. Under CRTA section 123, 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.

9. Mr. Szeto submitted photo and video evidence after the deadline had passed. I find this evidence is relevant. The strata had an opportunity to comment on the late evidence and does not object to it. So, I allow the late evidence, because I find it would not be unfair to do so.

Strata Council Hearing

10. Section 189.1 of the *Strata Property Act* (SPA) says a strata lot owner may not ask the CRT to resolve a strata dispute unless the owner requested a council hearing under SPA section 34.1, or the CRT waives the hearing requirement under section 189.1(2)(b). It is undisputed that Mr. Szeto did not request a strata council hearing under section 34.1 before applying for CRT dispute resolution on May 27, 2021. The strata says this means this CRT dispute cannot proceed.

11. However, it is also undisputed that the strata council held a hearing on the CRT claim issues on November 1, 2021. The hearing did not result in the parties agreeing to resolve those issues. Further, the strata does not say it was prejudiced by the late hearing date. In these circumstances, I find it is reasonable for me to waive the council hearing requirement under SPA section 189.1(2)(b). I find it would not be consistent with the CRT's mandate to be speedy, economical, and flexible, to require Mr. Szeto to request another hearing at this late stage of the dispute process.

New Claims

12. I find that in the Dispute Notice, Mr. Szeto requested remedies for only 2 issues, namely that the strata inspect and repair the bedroom wall cracks and the alleged toilet flushing noise and vibration. Although he mentioned construction noise in the Dispute Notice, he did not request a remedy for it.

13. Later, in his submissions, Mr. Szeto requested new remedies not raised in the Dispute Notice. These additional claims for relief are:

    a. That the strata repair a ceiling hole behind a cover plate, or that the strata pay a professional to estimate the value of that alleged damage and pay for it,

b. That the strata pay $2,500 as compensation for unreasonable noise, nuisance, loss of enjoyment of the strata lot, and interference with property, and

c. That the strata pay $100 for Mr. Szeto's Condominium Home Owners Association (CHOA) membership fee.

14. The strata says it would be procedurally unfair for the CRT to decide the new claims. The strata says it has a right to know the case it must meet, which would be denied if the late claims were decided, given that they were first requested in Mr. Szeto's submissions.

15. Under CRTA section 7(1), the CRT may resolve a claim only if the applicant serves a copy of the Dispute Notice on the respondents. In this case, I find the Dispute Notice served on the strata did not include ceiling, noise, or CHOA fee claims or requested remedies. I find that it was open to Mr. Szeto to request to amend the Dispute Notice by adding new ceiling, noise, and CHOA fee claims, but he chose not to do so. I acknowledge that the ceiling and noise claims relate to work performed by the same strata contractor that allegedly caused the bedroom wall cracks and toilet vibrations. However, I find the bedroom wall cracks and toilet vibrations are different claims than the ceiling, noise, and CHOA fee issues.

16. The strata responded to Mr. Szeto's newly-requested remedies in its submissions. However, on the evidence before me, I find that the strata did not have proper notice of those new claims. I find the strata was deprived of an adequate opportunity to know the case against it with respect to those new issues. So, I decline to address the late ceiling, noise, and CHOA fee requests, because they are not properly before me. Further, I find that deciding them would be procedurally unfair to the strata.

ISSUE

17. The issue in this dispute is whether the strata's contractor damaged Mr. Szeto's wall and toilet, and if so, is the strata is responsible for investigating and repairing that damage?

EVIDENCE AND ANALYSIS

18. In a civil proceeding like this one, Mr. Szeto, as the applicant, must prove his claims on a balance of probabilities (meaning "more likely than not"). I have read and weighed the parties' evidence and submissions, but I refer only to that which I find necessary to explain my decision. Both parties cited case law, which I reviewed, although I find it is not necessary to identify and discuss all of those decisions.

19. The strata was formed in 1974 and presently exists under the SPA. It consists of 39 apartment-style strata lots in a 3-storey building, plus underground parking. A title document in evidence shows that Mr. Szeto purchased SL8 in 2012.

20. On October 10, 2002, the strata repealed all of its bylaws and registered a new set of bylaws at the Land Title Office (LTO). The strata subsequently registered several bylaw amendments with the LTO, but none of them are relevant to this dispute. I find the relevant bylaws are the October 10, 2002 bylaws.

21. Bylaw 9 says that the strata must repair and maintain common property (CP), and certain aspects of strata lots and limited common property (LCP). Under bylaw 9, the strata's strata lot repair and maintenance responsibilities are limited to a building's structure and exterior, including certain things attached to a building's exterior, as well as fences and similar outdoor structures. Bylaw 2(1) says that an owner must repair and maintain the owner's strata lot, except for repair and maintenance that is the strata's responsibility. I find these bylaws are consistent with SPA sections 3 and 72. Under the bylaws and the SPA, I find Mr. Szeto is generally responsible for maintaining and repairing the interior of his strata lot.

22. As noted, Mr. Szeto says there are cracks in his bedroom wall, which is an exterior wall. The strata plan shows that the building exterior surrounding SL8 is CP. Under SPA section 68(1), if a strata lot is separated from CP by a wall, the strata lot's boundary is midway between the surface of the structural portion of the wall that faces the strata lot, and the surface of the structural portion of the wall that faces CP. Photos and video in evidence show 1 or more long, straight, vertical drywall cracks near the corner of an interior wall. I find there is no evidence before me suggesting that the

cracks run deeper than the drywall. So, I find the cracks are entirely within Mr. Szeto's strata lot, and it is generally his responsibility to repair and maintain that interior wall.

23. Also as noted, Mr. Szeto says his toilet vibrates and makes an unusual flushing noise. Under the bylaws and the SPA, I also find that Mr. Szeto's toilet is entirely within SL8, and he is generally responsible for maintaining and repairing it. See, for example, *The Owners, Strata Plan BCS 2785 v. Wei*, 2021 BCCRT 927 at paragraph 36.

24. So, except in the case of strata negligence discussed below, I find the strata is not responsible for maintaining and repairing Mr. Szeto's bedroom wall or toilet under the SPA or strata bylaws.

25. Mr. Szeto says that cracks appeared in the wall, and the toilet began vibrating when flushed, around the time the strata's contractor, Grantson Construction Group Inc. (Grantson), was performing building envelope repairs. Mr. Szeto says Grantson's exterior building work caused those issues. Grantson is not named as a party to this dispute. None of the evidence before me suggests that Mr. Szeto claimed compensation or repairs directly from Grantson. However, Mr. Szeto says the strata hired Grantson, so it should be responsible for the damage Grantson allegedly caused.

26. Grantson's April 25, 2022 report said that the strata building was nearly 50 years old, and that cracks are common with the passage of time, due to settlement of the structure and building component moisture content changes. Following the November 1, 2021 hearing, the strata offered to repair the drywall cracks to a paint-ready condition, which Mr. Szeto undisputedly declined. The strata says the crack repair offer was gratuitous and the strata was not responsible for the cracks. I find the strata did not admit responsibility for the cracks in its November 10, 2021 repair offer letter. Further, the strata says Mr. Szeto also refused its offer to investigate the alleged toilet vibrations if Mr. Szeto agreed to pay for the investigation costs if the issue was unconnected to the strata. The strata says the 2 issues were not caused by Grantson's work, and the strata is not responsible for them.

27. A strata corporation is not an insurer, and as noted it is only responsible for strata lot damage if it has been negligent. To show that the strata was responsible for the wall cracks and alleged toilet vibration in SL8, Mr. Szeto must prove that the strata was negligent in performing its statutory duty to maintain and repair CP. To prove such negligence here, Mr. Szeto must also prove that Grantson's work caused the wall cracks and alleged toilet vibration.

28. For the following reasons, I find the evidence does not show that Grantson failed to do its work properly, or that it caused the alleged damage.

29. Expert evidence is normally required to assess the quality of a professional's work (see *Bergen v. Guliker*, 2015 BCCA 283 at paragraph 124). Exceptions to this usual rule are where a deficiency is non-technical and within an ordinary person's knowledge and experience, or if the work is obviously substandard (see *Schellenberg v. Wawanesa Mutual Insurance Company*, 2019 BCSC 196 at paragraph 112). I find that the causes of the bedroom wall cracks and the alleged toilet vibration are not obvious, and are technical subjects outside of ordinary knowledge and experience, so expert evidence is required.

30. The strata gave Mr. Szeto's representative, RS, documentation on Grantson's strata work. Correspondence in evidence shows Mr. Szeto intended to obtain an expert opinion on that work. However, there is no such opinion in evidence. I find there is no expert evidence before me that suggests either Grantson or the strata caused the wall cracks or alleged toilet vibration. Further, I find none of the evidence before me shows that there was any unusual flushing noise or vibration. I find Mr. Szeto's submission that construction "pounding and thumping" likely caused the wall cracks and alleged toilet vibrations is speculative and is not supported with required expert evidence. So, I find Mr. Szeto has not met his burden of proving that Grantson or the strata caused the wall cracks or alleged toilet vibration.

31. Further, in maintaining and repairing CP under SPA section 72, the strata must act reasonably, and may generally rely on professional contractors' advice (see *Wright v. The Owners, Strata Plan #205*, 1996 CanLII 2460 (BCSC) at paragraph 30). So

long as the strata acted reasonably in the circumstances, it cannot be held responsible for work that such professionals failed to carry out effectively or correctly.

32. Here, even if had found that Grantson caused the alleged damage, and I do not, I find the strata acted reasonably in the circumstances. I find none of the evidence before me shows that Grantson was unqualified for the strata work. I find the strata reasonably investigated the toilet issue, given the lack of evidence showing that Grantson caused any toilet damage and the declined strata offer to investigate further. I also find the strata reasonably investigated Mr. Szeto's wall crack concerns, given the lack of evidence showing that the cracks arose after Grantson began its work or that the work caused the cracks.

33. For the above reasons, I find the evidence does not show that Grantson's repair work caused the alleged SL8 damage, or that the strata failed to meet its section 72 and bylaw 9 obligations to reasonably maintain and repair CP. I find Mr. Szeto has not met his burden of proving, with required evidence, that the strata was negligent in either hiring Grantson, relying on Grantson's advice, or supervising Grantson's work. I dismiss Mr. Szeto's claims.

CRT Fees and Expenses

34. Neither party paid CRT fees, so I order no CRT fee reimbursement.

35. The strata claims $4,573.50 in legal expenses and disbursements as CRT dispute-related expenses. The strata does not further explain these legal expenses and disbursements. Further, the strata submitted no evidence showing that it owed or paid the claimed amount. I find those legal expenses and disbursements are unproven, and I decline to order Mr. Szeto to pay them. Further, I note that under CRT rule 9.5(3) lawyer fees are generally not recoverable in strata disputes except in extraordinary circumstances, as determined under rule 9.5(4). I find this dispute was not extraordinary, and involved relatively typical claims for alleged strata lot damage.

36. The strata must comply with SPA section 189.4, which includes not charging dispute-related expenses against Mr. Szeto.

ORDER

37. I dismiss Mr. Szeto's claims, and this dispute.

Chad McCarthy, Tribunal Member