



Civil Resolution Tribunal

Date Issued: November 4, 2022

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Type: Strata

Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan LMS 2602 v. Gebauer*, 2022 BCCRT 1211

B E T W E E N :

The Owners, Strata Plan LMS 2602

APPLICANT

A N D :

FAYE MARJORIE MARLENE GEBAUER

RESPONDENT

A N D :

The Owners, Strata Plan LMS 2602

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

J. Garth Cambrey, Vice Chair

INTRODUCTION

1. This is a strata property dispute about water damage repairs charged to an owner.

2. The applicant and respondent by counterclaim, The Owners, Strata Plan LMS 2602 (strata) is a strata corporation existing under the *Strata Property Act* (SPA). The strata is comprised of 39 residential strata lots in a single 4-storey building.
3. The respondent and applicant in the counterclaim, Faye Marjorie Marlene Gebauer, owns strata lot 26 (SL26 or 307) located on the third floor of the building.
4. The strata says water leaked from Ms. Gebauer's SL26 into units 207 and 107, located immediately below SL26 on the second and first floors respectively, causing damage. The strata says Ms. Gebauer is responsible for the water damage under its bylaws. It seeks an order that Ms. Gebauer reimburse the strata \$11,927.46 for expenses it paid to repair water damage resulting from the leak. In submissions, the strata also claims legal fees bringing its total amount claimed to \$24,599.44.
5. Ms. Gebauer denies liability and says the water leak did not come from SL26. She also says the strata improperly charged her strata lot account \$11,927.46. In her counterclaim, she seeks an order that the charged amount be removed from her strata lot account.
6. A strata council member represents the strata. Ms. Gebauer represents herself.
7. As explained below, I dismiss the strata claims, including its claim for legal fees, and grant Ms. Gebauer's counterclaim that the strata remove the \$11,927 from SL26's account.

JURISDICTION AND PROCEDURE

8. 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.

9. 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.
10. 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.
11. 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.

ISSUES

12. The issues in this dispute are:
 - a. Where did the water leak originate?
 - b. If from SL26, is Ms. Gebauer responsible to pay the cost of repairing the water damage?
 - c. Is the strata entitled to reimbursement of legal fees?

BACKGROUND, EVIDENCE AND ANALYSIS

13. As applicant in a civil proceeding such as this, the strata, must prove its claims on a balance of probabilities, meaning more likely than not. Ms. Gebauer must also prove her counterclaim on the same basis. I have read all the submissions and evidence provided by the parties, but refer only to information I find relevant to explain my decision.

14. The strata was created in November 1996 under the *Condominium Act* and continues to exist under the SPA.
15. On March 9, 2017, the strata filed a complete new set of bylaws with the Land Title Office (LTO). I infer the Standard Bylaws under the SPA were repealed and replaced with the 2017 bylaws. Bylaw amendments were filed after March 2017, but I find they are not relevant to this dispute. I discuss the relevant bylaws below as necessary.
16. The following facts are undisputed.
17. In the early morning hours of April 14, 2020, water entered through the bathroom ceilings of 207 and 107. 207 is located immediately below Ms. Gebauer's SL26 and above 107. The strata arranged for a representative from Artisan Plumbing and Heating (Artisan), a plumbing firm, to attend the building. The Artisan representative, and a resident of the building who is plumber by profession, attended 407, immediately above SL26, and turned the water to 407 off.
18. Later the same day, the strata arranged for representatives from On Side Restorations (On Side), a restoration firm, and another plumbing firm, DW OPTIMUM HVAC Services, Ltd. (DW) to also attend the building. Representatives from the 3 firms investigated the damage and attempted to determine the source of the leak.
19. Representatives from the same 3 firms returned to the building on April 21, 2020 and conducted further investigation. A DW representative also attended SL26 and 407 on April 27, 2020 following a reported leak by Ms. Gebauer from the exposed area of the bathroom ceiling of SL26.
20. On Side and DW provided the strata reports of their investigation and work as I discuss below. There is no report or invoice from Artisan in evidence.
21. There is also no statement of account for SL26 in evidence and no breakdown of the claimed \$11,927.46. However, the parties agree this is the amount charged to SL26 for the water leak repairs so I accept it. I also infer from the evidence that the breakdown of the disputed amount is for the following invoices, which are before me:
 - a. \$6,395.85 for On Side "emergency work"

- b. \$1,164.45 for DW to investigate source of water leak
- c. \$1,593.90 for DW to investigate source of water leak
- d. \$2,773.26 for Strata Pro Contracting to repair damage in 207 and 107.

Where did the water leak originate?

- 22. It is important to determine the origin of the water leak to establish responsibility. This is because generally speaking, the strata's bylaw 7.8 says that if an owner is "responsible" for the damage, they must indemnify and save harmless the strata from associated repair costs. For the following reasons, I find the strata has not established that the water leak originated in SL26.
- 23. SPA section 72 says the strata is responsible for repair and maintenance of common property subject to certain exceptions that do not apply here. Bylaw 2.2 also says the strata must repair and maintain common property. Bylaw 1.9 says an owner must repair and maintain their strata lot, except for repair and maintenance that is the strata's responsibility.
- 24. The strata argues that the leak occurred in SL26. It says Ms. Gebauer failed to repair and maintain SL26 as required under bylaw 1.9 and that such failure resulted the April 14, 2020 leak that damaged 207 and 107. It says the reports of its contractors establish the leak originated in the bathroom of SL26. I do not agree. Rather, I agree with Ms. Gebauer that the contractor reports and information are inconclusive about the origin of the water leak.
- 25. As noted, information about the initial investigation was provided by DW and On Side. DW provided 2 invoices numbered Q32620 dated May 21, 2020. One invoice is for \$1,164.45 and the second invoice is for \$1,593.90. Both are identical except the second invoice noted the return visit to SL26 and 407 on April 27, 2020 after Ms. Gebauer reported a leak in her bathroom. I find the second invoice in the amount of \$1,593.90 is a revised version of the first invoice. It provides a detailed description of work performed by DW on all visits to the site. I reproduce the following comments which I find are significant [my emphasis]:

Apr 14 – Arrived on site and found water damage in bathroom 107, 207, & 307. Unit 407 water was shut off by others the night when leak started; others indicated after water isolated stopped. Cut open drywall ceiling above tub in 307; visible leak discovered

Apr 16 – no cause of leak was found on original call

April 21 – [for SL26] Tested all bathroom fixtures 307. While toilet is aged, no leakage present at this time. Toilet isolation valve is leaking from packing, basin faucet is running on as well as drainage plugged. Owner requested technician leave unit due to COVID concerns. Cleaned up in all units accessed 107,207,307,& 407.

26. On Side provided a detailed invoice #10196094 dated June 5, 2020 for “emergency work” in the amount of \$6,395.85. An attached “breakdown of Costs” dated May 14, 2020 state “Damages Due To: Source not found”. In what appears to be a supplementary report dated December 4, 2020, On Side stated, in part [my emphasis]:

Cause of loss – the Strata plumber tried to determine the cause of loss and should have a report advising on the matter. Based on the limited access to unit 307 and the damage we discovered in units 207 and 107, the cause appeared to be coming from the toilet drain, seal or possible overflow of toilet in unit 307. After we removed the ceiling in unit 207, we found water staining on the backside of the subfloor to unit 307 all around the toilet drain and the subfloor had high moisture readings.

27. It is unclear why the supplementary report for On Side was provided over 7 months after the initial inspection, but I find the author of the report is only speculating that the cause of the leak originated in SL26. I am more persuaded by the comments provided by DW in its invoice noted above. This is because DW clearly states it discovered a visible leak in the bathroom ceiling of SL26 and that the source of the leak was not found.

28. I accept that On Side also reported high levels of moisture on the tiles, vanity base, and underside of SL26's bathroom subfloor, but that does not mean the leak originated in SL26.
29. On behalf of the strata, a strata council member conducted an investigation into the water leak and attended SL26 on March 5, 2021, a year after the original leak. In an affidavit, the council member, whom I infer from the evidence is also a lawyer, stated their observations of the condition of the SL26 bathroom, alleging missing caulking and cracked tiles amount other things, and determined that the water leak originated in SL26. I prefer the evidence of the DW invoice over that of the council member for the following reasons.
30. First, there is no evidence the strata council member is knowledgeable or has expertise about water or plumbing leaks. Although the author of the DW comments contained in its invoice is unknown, I find it more likely than not, that the author is the plumber who attended SL26 and has knowledge and expertise in water and plumbing leaks.
31. Second, the DW plumber conducted their investigation within hours and days of the leak occurring and witnessed the water leak firsthand. If the DW plumber had found missing caulking or cracked tiles would have contributed to the water leaking into the strata lots below, I find they likely would have said so.
32. I do not accept the strata's argument that Ms. Gebauer denied access to SL26 during the original investigation of the leak by the strata's trades or later. The evidence does not support such a finding. Nor do I find that Ms. Gebauer's refusal to have a dehumidifier placed in her bathroom means she denied access.
33. For these reasons, I find the strata has failed to prove the April 14, 2020 water leak originated in SL26, so I find Ms. Gebauer is not responsible for the leak. I also find this is sufficient reason for me to dismiss the strata's claims and grant Ms. Gebauer's counterclaim, so I order the strata to immediately remove the \$11,927.46 charge from Ms. Gebauer's SL26's account.

34. Even if I had determined Ms. Gebauer was responsible for the leak, which I have not, there are other reasons I would have found in her favour. They include that under bylaws 1.9 and 7.8, the strata was not responsible to repair the strata lot damage in 207 and 107, as it is clearly the strata lot owner's responsibility, so the strata should not have repaired the damage. Also, the evidence indicates the strata charged Ms. Gebauer for some repair expenses, other than the Strata Pro invoice, without properly following the procedural fairness requirements of SPA section 135. Since the strata alleged Ms. Gebauer breached its bylaws, and appears to have taken steps to remedy the breach under section 133, section 135 requires the strata to give her notice of the alleged breach and an opportunity to respond before charging the repair costs to her. Finally, the evidence suggests there is only 1 DW invoice that was revised, rather than 2 separate invoices, as I have mentioned.

CRT FEES AND EXPENSES

35. Under CRTA section 49 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 not to follow that general rule here.
36. Ms. Gebauer is the successful party and paid \$175 in CRT fees so I order the strata to reimburse her that amount. She did not claim any dispute-related expenses so I order none.
37. The strata claims what I infer is \$12,671.98 in legal fees. This is the strata's total claimed amount in submissions of \$24,599.44, less the strata's original claimed amount of \$11,927.46. In any event, the exact amount of legal fees does not matter because I make no order for reimbursement. I say this because the strata was not successful and CRT rule 9.5(3) says the CRT will not order reimbursement of lawyer's fees in a strata dispute unless there are extraordinary circumstances, which do not exist here. Further, the strata did not provide copies of any legal invoices.
38. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against Ms. Gebauer, including legal fees.

ORDERS

39. I order the strata to:

- a. Reimburse Ms. Gebauer \$175 for CRT fees within 30 days of this decision, and
- b. Immediately remove the \$11,927.46 charge from SL26 for the April 14, 2020 water leak.

40. Ms. Gebauer is entitled to post-judgement interest under the *Court Order Interest Act*, as applicable.

41. Under section 57 of the CRTA, a validated copy of the CRT's order can be enforced through the British Columbia Supreme Court. Under section 58 of the CRTA, the order can be enforced through the British Columbia Provincial Court if it is an order for financial compensation or return of personal property under \$35,000. Once filed, a CRT order has the same force and effect as an order of the court that it is filed in.

J. Garth Cambrey, Vice Chair