Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Estrin v. The Owners, Strata Plan LMS3758*, 2023 BCCRT 350

B E T W E E N :

AVIE ESTRIN

APPLICANT

A N D :

The Owners, Strata Plan LMS3758

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Kristin Gardner

INTRODUCTION

1. This dispute is about bylaw enforcement in a strata corporation. The applicant, Avie Estrin, leases strata lot 28 (SL28) in the respondent strata corporation, The Owners, Strata Plan LMS3758 (strata). The owner of SL28 is not a party in this dispute. Mr. Estrin undisputedly erected a basketball hoop behind SL28, and he says the strata improperly took the position that the hoop violated the strata's bylaws.

2. Mr. Estrin makes 3 claims against the strata: 1) that the strata's actions in enforcing the bylaws against him were arbitrary, inconsistent, unfair, and conducted in bad faith, 2) that bylaw fines imposed against him were invalid because the strata failed to follow procedural requirements set out in section 135 of the *Strata Property Act* (SPA), and 3) the strata unlawfully removed his basketball hoop from limited common property (LCP) and disposed of it. He requests the following orders:
    a. All findings of bylaw contravention relating to the basketball hoop be reversed,
    b. No further bylaw proceedings be commenced relating to the hoop,
    c. All bylaw fines be cancelled,
    d. The strata reimburse him for the basketball hoop, and
    e. Reimbursement of $10,000 in legal fees.
3. The strata says Mr. Estrin's claims should be dismissed. It says that it never applied any bylaw fines, and in any event, Mr. Estrin's claims about the fines are out of time under the *Limitation Act* (LA). Further, the strata says it acted fairly and well within its legal rights when it removed the basketball hoop from LCP to remedy Mr. Estrin's bylaw contraventions.
4. Mr. Estrin is self-represented. The strata is represented by a strata council member.

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.

ISSUES

9. The issues in this dispute are:

    a. Are Mr. Estrin's bylaw enforcement claims out of time?

    b. Are Mr. Estrin's claims about invalid bylaw fines moot?

    c. Was the strata's demand to remove the basketball hoop significantly unfair?

    d. Was the strata entitled to remove the basketball hoop?

    e. Is Mr. Estrin entitled to reimbursement of his legal fees?

BACKGROUND AND EVIDENCE

10. As the applicant a civil proceeding like this one, Mr. Estrin must prove his claims on a balance of probabilities (meaning "more likely than not"). I have read all of the parties' evidence and submissions, but I refer only to what I find is necessary to explain my decision.

11. The strata consists of 78 strata lots in 5 buildings. Buildings 1 through 4 contain townhouse-style strata lots and Building 5 is a 3-storey apartment-style building.

12. SL28 is a townhouse located at one end of Building 4. The strata plan shows each townhouse strata lot, including SL28, has a patio designated as LCP for that strata lot's exclusive use.

13. Mr. Estrin says that the LCP patios are each paved, and together with a grassy yard area, are enclosed by a fence. I find this submission is supported by the photos in evidence and the strata does not dispute it. Based on the strata plan, I find that only the paved patios are LCP, and the grass portion of each enclosed yard is common property.

14. The strata filed a complete set of bylaws with the Land Title Office (LTO) in January 2002 which repealed and replaced all previous bylaws. The strata also filed further bylaw amendments at the LTO, which I find are not relevant to this dispute.

15. Bylaw 2(1) says in part that an owner, tenant, occupant or visitor must not use a strata lot or the common property in a way that (a) causes a nuisance or hazard to another person, (b) causes unreasonable noise, (c) unreasonably interferes with another person's right to use and enjoy the common property or another strata lot, (d) causes damage, other than reasonable wear and tear, (e) is illegal, or (f) is contrary to the strata lot's or common property's intended purpose, as shown expressly or by necessary implication by the strata plan.

16. I discuss other relevant bylaws as necessary below.

Chronology

17. The following chronology is undisputed. Mr. Estrin erected a basketball hoop within the enclosed yard behind SL28 sometime in 2020. In a July 10, 2020 letter, the strata advised Mr. Estrin that it had received a noise complaint about the residents of SL28 playing basketball, and that the basketball hoop was disruptive and an "eye sore".

18. Mr. Estrin responded in a July 16, 2020 letter, disputing that playing basketball created unreasonable noise and that the basketball hoop violated any bylaws. The strata manager emailed Mr. Estrin on July 24, 2020, that the strata had received 2 further noise complaints, and so Mr. Estrin must remove the basketball hoop by July 29 or fines might be imposed.

19. In an August 10, 2020 email, the strata manager advised Mr. Estrin that since the basketball hoop was still up as of August 6, he would be fined $50, plus an additional $100 on August 13, $150 the following week, and $200 for every week following if he did not remove the hoop.

20. In an August 25, 2020 letter, the strata advised Mr. Estrin it had received another complaint of excessive noise from the residents of SL28 playing basketball. The strata also sent a second August 25, 2020 letter to Mr. Estrin advising it received a complaint that he was improperly storing various items on common property, including a basketball hoop on the grass. The letter stated the basketball hoop itself was a nuisance, as it created excessive noise and obstructed views, and it was a hazard, as it could fall and cause damage. The letter demanded that Mr. Estrin remove the basketball hoop and other items from common property by August 28. Mr. Estrin immediately moved the basketball hoop so that it was located solely on the LCP patio.

21. In a September 17, 2020 letter, the strata essentially confirmed its decision that the basketball hoop was not permitted on common property, was a hazard, and had caused a nuisance to other residents. The letter stated that if Mr. Estrin did not remove the basketball hoop by September 23, the strata would remove it.

22. Mr. Estrin hired a lawyer, who sent the strata a September 22, 2020 12-page letter about the basketball hoop and requested a hearing. The lawyer's letter is not before me. The strata held an October 7, 2020 hearing, which Mr. Estrin's lawyer attended by phone. In an October 8 letter, the strata advised Mr. Estrin it maintained its position that the basketball hoop violated bylaw 2(1). The letter stated that "in the spirit of give and take", the strata had decided to reverse all fines imposed, but if the hoop was not

removed by October 12, the strata would remove and dispose of it in accordance with section 133 of the SPA.

23. On October 19, 2020, the strata hired a third party to remove and dispose of Mr. Estrin's basketball hoop.

REASONS AND ANALYSIS

Are Mr. Estrin's bylaw enforcement claims out of time?

24. As noted, the strata says that Mr. Estrin is out of time under the LA to bring his claims about improper bylaw enforcement. Section 13 of the CRTA states that the LA applies to the CRT as if it was a court. Section 6 of the LA says the basic limitation period is 2 years from the date a claim is discovered. A claim is defined in the LA as "a claim to remedy an injury, loss or damage that occurred as a result of an act or omission".

25. Mr. Estrin filed his application for CRT dispute resolution on July 24, 2022. So, I find that Mr. Estrin's claims are out of time if he discovered them before July 24, 2020.

26. The strata argues that Mr. Estrin has been aware that basketball hoops and other sporting equipment is not permitted on any common property since 2013. It is undisputed that in 2013, Mr. Estrin erected a basketball hoop on common property in front of SL28. The strata advised Mr. Estrin in a March 11, 2013 letter that storing basketball hoops, backboards, and other items on common property constituted a breach of bylaw 2(1). After participating in a hearing and receiving the strata's decision that the hoop must be removed, Mr. Estrin undisputedly removed the basketball hoop in 2013.

27. Despite this history, I decline to find that Mr. Estrin first discovered his claim in 2013. Bylaw enforcement is complaint-driven. That is, under section 135 of the SPA, a strata corporation must receive a complaint about a potential bylaw contravention before it commences bylaw enforcement proceedings or imposes a valid fine. So, while the strata may have taken the position in 2013 that a basketball hoop on common property violated the bylaws, I find Mr. Estrin's claims in this dispute are

related to the basketball hoop he erected in a different location 7 years later. In other words, I find Mr. Estrin's claims did not arise until the strata decided to enforce the bylaws against him for the hoop he erected in 2020.

28. The strata also argues that Mr. Estrin's claims are out of time because the Dispute Notice stated he became aware of his claim on July 10, 2020. As noted, that was the date of the strata's initial letter to Mr. Estrin advising it had received a complaint about his new basketball hoop. While the July 10, 2020 letter itself is not in evidence, I find from the parties' subsequent correspondence that it was a "warning letter", and it provided Mr. Estrin with an opportunity to respond to the complaint before the strata decided how to proceed or whether it would impose a fine. I find that Mr. Estrin could not have reasonably known based on the initial letter that he might have a claim against the strata for allegedly improper bylaw enforcement proceedings and fines.

29. Overall, I find that Mr. Estrin could not have reasonably discovered his claims about bylaw enforcement until August 10, 2020, when he received the strata manager's email advising that a $50 fine was being imposed. Up to that point, I find that no "injury, loss or damage" had occurred for which Mr. Estrin could claim a remedy. So, I find Mr. Estrin's bylaw enforcement claims are not out of time under the LA.

Are Mr. Estrin's claims about invalid bylaw fines moot?

30. As noted, one of Mr. Estrin's claims is that the bylaw fines were invalid because the strata failed to follow the procedural requirements in SPA section 135 before imposing the fines. He seeks an order that the strata "cancel" all bylaws fines against him.

31. The strata argues that this claim should be dismissed because the strata ultimately did not apply any fines against Mr. Estrin, as referenced in its October 8, 2020 letter to Mr. Estrin. As Mr. Estrin does not dispute it, I accept that the strata removed all fines related to the basketball hoop from Mr. Estrin's strata lot account.

32. While the strata does not use this word, I find it argues Mr. Estrin's claim about invalid fines and his request to cancel them are moot. A claim is "moot" when there is no longer a live controversy between the parties. The CRT will generally dismiss a moot

claim, though the CRT has discretion to decide the dispute if doing so will have a practical impact and potentially help avoid future disputes. See *Binnersley v. BCSPCA*, 2016 BCCA 259.

33. As the strata has undisputedly already removed the bylaw fines from Mr. Estrin's account, I find that determining whether the strata complied with section 135 before imposing the fines would be a purely academic exercise. I find there is no longer any live issue between the parties about whether the bylaw fines were validly imposed because the remedy Mr. Estrin seeks for the fines to be cancelled has already occurred. I also find there is no compelling reason for me to exercise my discretion to decide this moot issue.

34. For these reasons, I dismiss Mr. Estrin's claims that the strata failed to comply with section 135 of the SPA and for an order that the strata cancel the fines.

Was the strata's demand to remove the basketball hoop significantly unfair?

35. Mr. Estrin says the strata arbitrarily, inconsistently, unfairly, and in bad faith enforced the bylaws against him for having a basketball hoop in the yard behind SL28. I find he is essentially arguing that the strata's demand to remove the basketball hoop was significantly unfair because he says the hoop did not breach the bylaws.

36. The CRT has authority to make orders remedying a strata corporation's significantly unfair act or decision under CRTA section 123(2). That provision contains similar language to SPA section 164, which allows the BC Supreme Court to make orders remedying significantly unfair acts or decisions. The legal test for significant unfairness is the same for CRT disputes and court actions. See *Dolnik v. The Owners, Strata Plan LMS 1350*, 2023 BCSC 113.

37. In *Kunzler v. The Owners, Strata Plan EPS 1433*, 2021 BCCA 173, the court confirmed the legal test for significant unfairness. Significantly unfair actions are those that are burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith, unjust, or inequitable. In applying this test, the owner or tenant's objectively reasonable expectations are a relevant factor but are not determinative. The use of

the word “significant” means that the impugned conduct must go beyond mere prejudice or trifling unfairness.

38. Mr. Estrin says that the strata is a child-friendly community and other resident children regularly make noise outdoors doing various activities. Given this context, Mr. Estrin argues the strata improperly relied on unreasonable complaints of “isolated” noise to justify its demand to remove the basketball hoop.

39. The strata provided evidence of 6 written complaints it received about Mr. Estrin’s basketball hoop from 5 different residents between March 20 and August 21, 2020. The complaints dated March 20, May 28, July 15, and August 20, 2020, noted noise from teenagers playing basketball (both from yelling and from the ball thumping) made working from home challenging or “impossible”. Two of the complainants said the hoop interfered with residents’ views, and one complaint stated the hoop was unsafe and an improper use of common property.

40. SPA section 26 requires the strata to enforce its bylaws. So, when an owner or tenant complains that the bylaws have been breached, I find the strata must reasonably investigate and enforce the bylaws.

41. There is no evidence the strata did any independent investigation of the noise complaints, though I find under the circumstances it was unnecessary to do so. This is because I find noise from teenagers playing basketball is generally within common experience, and because Mr. Estrin admitted in his July 16, 2020 letter that the teenagers were playing up to 4 times per week for up to a couple of hours at any given time, during daylight hours.

42. Nuisance in the strata context is an unreasonable interference, such a noise, with an owner’s or tenant’s use and enjoyment of their property. Whether an interference is unreasonable depends on several factors, such as its nature, severity, duration, and frequency. The interference must also be substantial such that it is intolerable to an ordinary person. See *The Owners, Strata Plan LMS 1162 v. Triple P Enterprises Ltd.*, 2018 BCSC 150 and *St. Lawrence Cement Inc. v. Barrett*e, 2008 SCC 64.

43. I note that Mr. Estrin says he put the basketball hoop in his backyard during the COVID-19 pandemic so that his teenage children and their friends could safely play outside. The strata argues there is an abundance of outdoor recreation space very nearby, including a public park and basketball courts, which Mr. Estrin does not dispute. Further, the strata's evidence indicates that some of the complainants waited to complain about the noise from basketball games until parks had re-opened after pandemic-related closures.

44. Under the circumstances, I find that it was reasonable for the strata to consider the unusual circumstances that the COVID-19 pandemic presented when assessing the noise complaints. Part of this context is that people were encouraged to socialize outdoors. However, many people were also forced to work from home and were generally spending more time at home, as the noise complaints showed. I find these circumstances properly inform the assessment of what an ordinary person would consider unreasonable noise on a summer day.

45. The strata also says the LCP patios are relatively small and were not intended to be used as basketball courts by teenagers, particularly given the proximity between the strata's buildings. I find from the photos in evidence that the strata's apartment building is directly across from the SL28 patio, with only a narrow common property path and small courtyard separating them. So, I find the basketball games would have been occurring within several metres of the strata lots in the apartment building, which is where several of the noise complainants lived.

46. I accept Mr. Estrin's video and photographic evidence showing the strata complex filled with adults and children of all ages gathering and playing on common property driveways, roadways, and grassy areas. The courts have recognized that when living in close quarters like a strata complex, there must be some "give and take" between neighbours using their strata lots and common property. See *Sauve v. McKeage et al*, 2006 BCSC 781. So, I find the question is whether the basketball games caused objectively unreasonable interference in the circumstances.

47. I find the sound of a basketball bouncing repetitively on pavement and against a backboard is of a different quality than the other activities Mr. Estrin's evidence showed, such as children riding bikes, colouring with chalk, and passing a volleyball back and forth. In any event, there is no evidence the strata received any complaints about children engaged in the other outdoor activities Mr. Estrin's evidence depicts. So, contrary to Mr. Estrin's suggestion, I find he has not shown the strata treated him differently than other owners or tenants by enforcing the bylaws against him for his teenagers engaging in outdoor activities. I also note that multiple complaints said the teenagers were yelling loudly while playing basketball, which I accept is likely true.

48. I find that the multiple complaints made from different residents over time about the same behaviour is strong evidence that the noise was objectively unreasonable. Overall, as a group of teenagers admittedly played basketball on the SL28 patio for several hours, up to 4 times per week during the COVID-pandemic, I find they caused unreasonable noise and unreasonably interfered with the rights of others to use and enjoy their strata lots, in breach of bylaws 2(1)(a), (b), and (c).

49. As noted, the strata also alleged that the basketball hoop was a nuisance because it was obstructing some residents' views and that it was a hazard. Based on the photos, I find there was nothing objectively unattractive about the basketball hoop's appearance. Further, I find it unlikely the hoop substantially obstructed anyone's view.

50. As for whether it was a hazard, the strata argued it could "easily" fall over and damage the building or harm people or animals. If it did fall, I find it would likely only be dangerous to those within SL28's fenced yard, given the hoop's location. In any event, I find that expert evidence would be required to prove the likelihood that Mr. Estrin's basketball hoop could fall over, or in what circumstances, as I find that issue is not within common experience. See *Bergen v. Guliker*, 2015 BCCA 283.

51. The strata relies on a printout of a website article about the dangers associated with "low quality" portable basketball hoops. There is no evidence that Mr. Estrin's basketball hoop was of the low-quality variety described in the article. In any event, the article's author is unidentified, and so I find it does not meet the requirements for

expert evidence under the CRT's rules. I place no weight on it. Overall, I find it unproven the hoop was a hazard.

52. So, given the above findings, was the strata's demand that Mr. Estrin remove the basketball hoop significantly unfair? I find it was not. My reasons follow.

53. Generally, noise violations are not considered continuing contraventions for the purpose of assessing bylaw fines when the incidents are observed on different dates, even if they are repeated or serial contraventions. See *The Owners, v. Grabarczyk*, 2006 BCSC 1960. Nevertheless, I find the repeated nature of the noise complaints and Mr. Estrin's admission about the frequency of basketball games are relevant to determining the fairness of the strata's demand for Mr. Estrin to remove the hoop. I also note the evidence shows the teenagers continued to play basketball, even after Mr. Estrin knew his neighbours had complained to the strata about it.

54. Given the proximity of the patio to other strata lots, I find that playing any amount of basketball on it would likely be a nuisance. I also find the basketball hoop was a necessary component of the unreasonable noise and interference violations because it is unlikely the teenagers would have been yelling or bouncing a basketball on the LCP patio behind SL28 if the hoop was not present. Therefore, I find there was little difference between demanding that Mr. Estrin stop playing basketball on the patio and demanding that he remove the hoop.

55. Further, as noted above, bylaw 2(1)(f) says an owner, tenant, occupant or visitor must not use common property in a way that is contrary to its intended purpose, as indicated expressly or by necessary implication on the strata plan. The strata's August 25, 2020 letter referred to this bylaw, and the strata argues it supports the demand to remove the basketball hoop. I agree. Given the size and proximity of the LCP patios to the strata's townhouse and apartment buildings as shown in the strata plan, I find it is necessarily implied that the patios were not intended to be used for playing basketball or storing a full-sized basketball net.

56. For all these reasons, I find the strata's demand that Mr. Estrin remove the basketball hoop from the LCP patio was not harsh, wrongful, lacking in fair dealing, done in bad

faith, unjust, or inequitable. I dismiss Mr. Estrin's claim that the strata's demand to remove the hoop was significantly unfair.

57. I also dismiss Mr. Estrin's requests for orders that all findings of bylaw violations related to the basketball hoop be reversed and that no further bylaw proceedings be commenced relating to the hoop.

Was the strata entitled to remove the basketball hoop?

58. Section 133(1)(b) of the SPA says a strata corporation may do what is reasonably necessary to remedy a bylaw contravention, including removing objects from the common property. Before a strata corporation can require an owner to pay the costs of remedying a bylaw contravention, it must first follow the strict notice requirements set out in SPA section 135. However, contrary to Mr. Estrin's submissions, I find the section 135 notice provisions do not apply here, as no notice is required to remedy a contravention under SPA section 133(1)(b), and there is no evidence the strata required Mr. Estrin to pay any costs.

59. As noted, the strata warned Mr. Estrin in its September 17 and October 8, 2020 letters that if he did not remove the basketball hoop, the strata would take steps to have it removed. While the hoop was undisputedly on the LCP patio, section 1(1) of the SPA says that LCP is a form of common property. Even though Mr. Estrin had the right to exclusive use the patio, he still must not violate the strata's bylaws in doing so. As Mr. Estrin refused to acknowledge that playing basketball on the patio constituted a bylaw violation and refused to remove the hoop, I find the strata was entitled to remove it under the SPA to remedy the bylaw 2(1) violations.

60. I dismiss Mr. Estrin's claim for replacement or reimbursement of the basketball hoop's value.

CRT FEES AND EXPENSES

61. 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. As Mr. Estrin was unsuccessful, I dismiss his claim for reimbursement of paid CRT fees.

62. Mr. Estrin also claims $10,000 in legal fees. He provided no evidence that he incurred the claimed fees, and for the reason alone, I dismiss this claim. Even if he had, I would not have awarded them. CRT rule 9.5(3)(b) say that the CRT will only award legal fees in extraordinary circumstances. Mr. Estrin's submissions relate only to his unsuccessful attempts to change the strata's view that his basketball hoop violated the bylaws. I find this dispute was essentially about a routine noise complaint, and there was nothing overly complex about it. So, I find this dispute was not extraordinary.

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

ORDER

64. I dismiss Mr. Estrin's claims and this dispute.

Kristin Gardner, Tribunal Member