



Civil Resolution Tribunal

Date Issued: December 7, 2023

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Type: Strata

Civil Resolution Tribunal

Indexed as: *Montgomery v. The Owners, Strata Plan VIS 2036*, 2023 BCCRT 1072

B E T W E E N :

DONALD MONTGOMERY

APPLICANT

A N D :

The Owners, Strata Plan VIS 2036

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Kate Campbell

INTRODUCTION

1. This dispute is about flood damage in a strata corporation.
2. Donald Montgomery co-owns residential strata lot 15 (SL15) in the strata corporation, The Owners, Strata Plan VIS 2036 (strata).

3. Mr. Montgomery is self-represented in this dispute. The strata is represented by a strata council member.
4. Mr. Montgomery says the strata has failed to repair and maintain common property drainage and sewer pipes. He says he reported drainage and sewer problems in 2020, but the strata failed to act. Mr. Montgomery says SL15 flooded in November and December 2021, due the strata's lack of maintenance. Mr. Montgomery says the strata was negligent.
5. In his Civil Resolution Tribunal (CRT) submissions, Mr. Montgomery requests \$47,052.11 in damages for SL15 repairs, lost rental income, and lost wages. He also requests reimbursement of legal fees.
6. The strata says it was not negligent and is not liable for any damages. The strata says Mr. Montgomery has not proven his claims, and the CRT should dismiss them.
7. For the reasons set out below, I dismiss Mr. Montgomery's claims.

JURISDICTION AND PROCEDURE

8. The CRT has jurisdiction over strata property claims under *Civil Resolution Tribunal Act* (CRTA) section 121. The CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly.
9. The CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, or a combination of these. I am satisfied an oral hearing is not required as I can fairly decide this dispute based on the evidence and submissions provided.
10. The CRT may accept as evidence information that it considers relevant, necessary, and appropriate, even if the information would not be admissible in court.
11. In his initial dispute application, Mr. Montgomery requested \$50,750 in damages. However, in his later submissions, he requested \$47,052.11 in damages. Since it was

provided most recently, in this decision I will consider only the claim for \$47,052.11 in damages.

Statement of SB

12. In this dispute, the strata relies on a September 8, 2023 statement from its plumber, SB. Mr. Montgomery says SB's statement, or the part of it about industry standards for flushing sewer lines, should not be accepted as expert evidence. He says the report was provided late, and that SB is not neutral because he makes income from the strata.
13. Mr. Montgomery cites CRT rule 8.3(1), which says a party may only rely on an expert opinion if the party includes the expert's evidence in the Tribunal Decision Plan by the deadline set by the case manager.
14. I find no indication that SB's report was provided late. Rather, it was uploaded with the rest of the strata's evidence, by the deadline set by CRT staff. In any event, rule 1.2(2) says the CRT can waive the application of a rule to facilitate the fair, affordable and efficient resolution of disputes. I would find it appropriate to do so here. SB directly observed the pipes and drainage systems at issue in this dispute, and worked on them at the time of the events in question. So, I find his evidence very helpful in deciding this dispute. Mr. Montgomery had an opportunity to respond to SB's report. Also, it was open to Mr. Montgomery to ask for an extension of time, or obtain a contrary report.
15. SB's report contains his qualifications as a plumber, as required under rule 8.3(2). I find SB's report is clearly written and objective, and I find the fact that he works as a contractor for the strata does not mean he is advocating for the strata's position in this dispute. Again, it was open to Mr. Montgomery to provide a different expert report.
16. For these reasons, I accept SB's report as expert evidence.

ISSUES

17. The issues in this dispute are:

- a. Was the strata negligent in repairing and maintaining the drainage and sewer pipes around SL15?
- b. If so, how much must the strata pay Mr. Montgomery in damages?

REASONS AND ANALYSIS

18. In a civil claim like this one, Mr. Montgomery, as applicant, must prove his claims on a balance of probabilities (meaning “more likely than not”). I have reviewed all the parties' evidence and submissions, but I only refer to what is necessary to explain my decision.
19. The strata was created in 1990, and consists of 108 residential strata lots located in 6 separate buildings, plus 8 commercial strata lots in another building. Mr. Montgomery's SL15 is a ground floor unit located on the south end of the “500 building”.
20. The strata repealed and replaced its bylaws by filing new bylaws at the Land Title Office in November 2014. The strata filed some bylaw amendments after that, which I find are not relevant to this dispute.
21. The strata's duty to repair and maintain common property is set out in *Strata Property Act* (SPA) section 72, and strata bylaw 11. Section 72 and bylaw 11 say the strata must repair and maintain all common property. There is an exception for some limited common property, which is not relevant to this dispute.
22. Bylaw 5(1) says an owner must repair and maintain their strata lot, except for repair and maintenance that is the strata's responsibility under the bylaws. Bylaw 11(e) says the strata's responsibility to repair and maintain strata lots is restricted to building structure, building exteriors, and specific items such as chimneys, stairs, balconies, exterior doors, windows, skylights, and fences.
23. Numerous BC Supreme Court decisions have said a strata corporation is not an insurer, and unless required under strata bylaws, is only liable to pay for repairs to a strata lot where it has been negligent: see *Kayne v. The Owners, Strata Plan LMS*

2374, 2013 BCSC 51; *John Campbell Law Corporation v. Owners, Strata Plan 1350*, 2001 BCSC 1342; *Basic v. Strata Plan LMS 0304*, 2011 BCCA 231; *Wright v. The Owners, Strata Plan #205*, 1996 CanLII 2460 (BC SC). This is the case even where the strata lot damage was caused by a common property failure: see *Wawanesa Mutual Ins. Co. v. Keiran*, 2007 BCSC 727.

24. To prove negligence, Mr. Montgomery must establish that the strata breached its duty to reasonably fulfill its repair and maintenance duties, that SL15 was damaged, and that the strata's breach caused the damage: see *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27.
25. In its submissions, the strata admits that the drainage and sewer pipes at issue in this dispute are common assets or common property that the strata is responsible to repair and maintain under SPA section 72. However, the strata says it was not negligent. The strata also says Mr. Montgomery has not proved the claimed damages.
26. In his CRT submissions, Mr. Montgomery says there were 3 separate flooding incidents in SL15, on November 4, November 15, and December 27, 2021. I will address these 3 incidents in turn, below.

November 4, 2021

27. Mr. Montgomery submits that on November 4, 2021, there was a flood in SL15 due to a failure in the perimeter drainage system. The strata says there was no flood on this date, and notes that Mr. Montgomery did not mention this incident in his original CRT dispute application.
28. The strata is correct on this point. Mr. Montgomery's dispute application says the first flood occurred in mid-November 2021, due to perimeter drain failure. The dispute application says the second flood occurred in December 2021, due to a blocked common property sewer line. He only mentions these 2 flooding incidents in the dispute application, not 3.

29. Mr. Montgomery emailed the strata twice on November 4, 2021. He sent photos showing the ongoing renovations in SL15. The photos show the flooring was removed, and some of the drywall was also missing. Mr. Montgomery wrote that the new flooring was going to be installed on November 15, 2021. He said he had dug out the rocks lying beside the outside wall, and found that water had been running down the wall. He wrote, "this has definitely been happening for sometime." He said he had been concerned about the drainage for the past couple of years. Mr. Montgomery noted that black mould can be extremely dangerous, and he asked what he could do to help.
30. I find that these 2 emails from November 4, 2021, do not support the conclusion that there was a flooding incident on November 4, 2021. While the photos show some rotted wood framing along the floor, there is no sign of water or active leaking. The emails do not mention flooding or active water ingress, which I find Mr. Montgomery would have included if there had been a flood on November 4, 2021, as he now claims.
31. Finally, strata contractor MF provided a statement dated September 12, 2023. The statement says MF attended SL15 on November 5, 2021, at the strata's request. MF says they replaced the rotted interior wood. MF says that when they arrived, SL15 was dry, and not flooded.
32. In summary, Mr. Montgomery did not mention a November 4, 2021 flood in his dispute application or emails, and there is no contractor's report or other evidence documenting an active leak into SL15 on that date. MF specifically said SL15 was dry the following day.
33. Also, MF's invoice shows that MF repaired the damage from any ongoing water ingress that occurred before November 4, 2021.
34. So, I find Mr. Montgomery has not proven that a leak occurred on November 4, 2021, or that this alleged leak damaged SL15.

35. For these reasons, I dismiss Mr. Montgomery's claim for damages arising from an alleged flood on November 4, 2021.

November 15, 2021

36. Mr. Montgomery says SL15 flooded on November 15, 2021, due to inadequately maintained perimeter drainage. Mr. Montgomery says this damaged SL15, and delayed the ongoing renovations by about 9 weeks.
37. The strata admits that rainwater entered SL15 on November 15, 2021. This is confirmed in the September 8, 2023 statement of strata plumber SB. SB says he attended SL15 on November 15, 2021, and saw water pooling on the patio deck next to the sliding glass doors, and that water had entered SL15.
38. Mr. Montgomery says the strata was negligent because it failed to investigate the drainage problem or maintain the perimeter drainage outside SL15. He says the strata should have investigated and repaired the drainage before November 2021, since he had emailed in June and July 2020 to complain about water pooling after heavy rain. He also emailed the strata in October 2020 and January 2021 to report that water had leaked into SL15 after storms.
39. The strata says the flooding on November 15, 2021, was caused by an unusually heavy "atmospheric river" rainfall. The strata also relies on SB's statement, which says that when he investigated on November 15, 2021, he dug down and discovered there was no perimeter drain in the area outside SL15. SB says that at the strata's request, he installed an extensive drainage system.
40. The strata says that since there never was a perimeter drain, it had no duty to repair or maintain it. I disagree. The strata has a duty to repair and maintain the common property, including the building exterior. If there was pooling water, as reported in Mr. Montgomery's June and July 2020 emails, the strata would be negligent if it took no action and that pooling water later damaged SL15. Again, I note that Mr. Montgomery informed the strata in his October 18, 2020 and January 27, 2021 emails that rainwater had entered SL15.

41. After receiving those emails, the strata had a duty to investigate the perimeter drainage. The evidence indicates it did hire SB to do some drain investigation before November 2021. However, the extent of this work is not clear, and SB did not provide a report about it. In any event, it was clearly inadequate, since SB did not discover until November 15, 2021, that there was no perimeter drainage around SL15. SB's September 8, 2023 statement confirms there were "drainage issues", which he fixed after the November 15, 2021 flooding incident.
42. I find that if the strata had adequately investigated the drainage problems Mr. Montgomery reported in 2020 and January 2021, it would have discovered the lack of perimeter drainage around SL15 and likely prevented the November 15, 2021 flood. So, I find the strata was negligent.
43. However, I find Mr. Montgomery has not proven any damage arising from the November 15, 2021 flood. As shown in the November 4, 2021 photos, SL15 was undergoing renovations at the time. The floors were stripped down to concrete, and some of the drywall was removed. There is no evidence before me establishing that any part of SL15 was damaged. Also, while Mr. Montgomery says the renovations were delayed, he did not provide evidence confirming this. For example, there is no statement from the renovation contractor.
44. Since SL15 was being renovated, I find Mr. Montgomery would not have rented it out during that time, so is not entitled to lost rent. Also, while Mr. Montgomery claims lost wages arising from the flood, I find he has not proven that he was unable to work due to water entering SL15. In making this finding, I note that SL15 is not Mr. Montgomery's permanent residence.
45. For these reasons, I dismiss Mr. Montgomery's claim for damages arising from the November 15, 2021 flood.

December 27, 2021

46. The strata admits that on December 27, 2021, sewage backed up into SL15 and caused damage. However, the strata says it was not negligent because it had no

previous knowledge of the problem that led to the blockage, and did not fail to reasonably repair and maintain the sewer pipes.

47. Mr. Montgomery says he had previously complained to the strata about sewer blockages, and the strata failed to investigate or flush the sewer pipes. So, he says the strata was negligent. He says the sewage backup significantly damaged SL15, resulting in \$16,252.68 in repair costs, plus \$13,968.50 for immediate flood mitigation by a restoration contractor.
48. The parties agree that the December 27, 2021 sewer backup is unrelated to the perimeter drainage problems that were repaired by SB in November 2021. SB's statement confirms that the sewer pipes are a separate system.
49. SB wrote that SL15 is at the south end of the 500 building. SL15's interior drains feed into a common sewer pipe that runs under the building to a lift station near the building's north end.
50. The evidence shows that other ground floor strata lots in building 500 also had sewage backups on December 27, 2021. SB says he accessed the sewer line and discovered a blockage about 175 to 200 feet away from SL15. SB says he extracted a volume of material, including non-flushable sanitary and paper products, which "obviously had contributed to the problem." SB said he also discovered there was a "belly" in the part of the sewer pipe where the blockage occurred. SB explained that a belly is a sag in the sewer pipe, typically caused by the surrounding ground settling or loosening. SB said bellies are "more prone to blockages", and once discovered, it is sensible to view the line with a camera and flush the lines if required.
51. SB also said bellies can develop over a lengthy period, or more rapidly, and there is no way to predict if a belly will occur.
52. SB confirmed that in his years as the strata's plumber, he had not done any previous work on the building 500 sewer lines, and was not aware of previous problems.
53. Mr. Montgomery says the strata was negligent because he had previously complained about sewer problems in SL15, and the strata had not acted. He also

says the strata failed to reasonably maintain the sewer lines because they not been flushed in the 4 years before December 2021.

54. In his July 13, 2020 email to the strata, Mr. Montgomery said the toilet in SL15 was not draining, and was not fixed with a plunger. He said he might need to call a plumber. He asked if this was a “strata issue” or his responsibility. The strata manager replied that blockage in the sewer line from SL15 would be the owner’s responsibility unless a blockage was found in the common property line. The strata manager noted they had not heard about sewer problems from any others in the 500 building.
55. Mr. Montgomery argues that because of this email, the strata knew there was a problem with the sewer line, and should have investigated and repaired the line before the blockage caused the flood on December 27, 2021.
56. I am not persuaded by this argument. There is no indication that Mr. Montgomery, or any other 500 building occupant, complained of further sewer problems until December 27, 2021. Based on the July 13, 2020 email, and the lack of any further correspondence on the subject, I find it was reasonable for the strata to assume that any blockage was located solely within SL15, and not the common property sewer pipe. It would be unreasonable for the strata to undertake extensive work, such as sewer line scoping or flushing, after one complaint of a of a blocked toilet.
57. Mr. Montgomery notes that the strata emailed all owners on February 26, 2021, warning them not to flush “inappropriate items” such as disinfecting wipes, as these had led to a blockage in another building. Mr. Montgomery argues that this knowledge ought to have alerted the strata of the need for regular sewer line maintenance, such as line flushing, in building 500.
58. I find the fact that occupants flushed inappropriate items almost a year earlier in a different building does not lead to the conclusion that the strata was negligent in maintaining the building 500 sewer line. There was no evidence suggesting there was anything wrong with the line. As explained above, Mr. Montgomery’s July 13, 2020 report of a blocked toilet does not prove there was a problem with the sewer line. Frequent flushing of all sewer lines might be ideal. However, courts have held that a

strata's standard for repair and maintenance duties is reasonableness, not perfection: *Weir v. The Owners, Strata Plan NW 17*, 2010 BCSC 784. A strata corporation is entitled to prioritize its repairs, and there is no indication in the evidence before me that the building 500 sewer line needed maintenance before December 27, 2021. SB notes that he was unaware of the sewer line belly before that, and there was no reason to think it might exist. The strata's caretaker, ER, also provided a statement confirming he was unaware of any sewer problems in building 500 before December 27, 2021.

59. There is no expert opinion or contractor's report before me suggesting that the strata should have known about sewer pipe problems in building 500 before December 27, 2021. Mr. Montgomery submits that the industry standard is to flush sewer lines every 2 years. However, Mr. Montgomery is not a plumbing expert, and there is no expert report before me confirming that such a standard exists. SB's statement directly contradicts this assertion. SB says there is no such standard, but scoping and flushing are "sensible" after a belly is discovered. Since SB is a certified plumber with industry experience, I place significant weight on his opinion.
60. Mr. Montgomery argues that since the strata had the building 200 and 700 sewer lines flushed, it should reasonably have had the building 500 lines flushed also. However, in his statement SB explained that buildings 200 and 700 have significantly different sewer pipe systems from building 500, with multiple floors connected in a vertically "stacked" set up. SB said he flushes the building 200 and 700 pipes annually because of that set up, and because of a history of prior backups in those buildings.
61. Since there is no expert evidence before me suggesting that the strata should have flushed or otherwise maintained the building 500 sewer line, I find the strata acted reasonably.
62. For all these reasons, I find the strata was not negligent. So, I find it is not liable for any damages.
63. Even if I had found the strata negligent, I would not have ordered all the requested damages. The evidence shows that SL15 was still being renovated on December 27,

2021. Mr. Montgomery claims reimbursement for damaged flooring, drywall, and cabinetry, but it is unclear from the evidence before me what flooring and cabinetry were in SL15 at the time. Also, at least some of the drywall was already removed. There is no contractor's report or other objective evidence specifically explaining what parts of SL15 were permanently damaged by the December 27, 2021 flood.

64. I dismiss Mr. Montgomery's claim for damage arising from the December 27, 2021 flood.

Legal Fees

65. Mr. Montgomery requests reimbursement of \$7,804.90 in dispute-related legal fees. The strata opposes this request, in part because the claim was not included in the Dispute Notice, and instead was raised later in submissions.

66. The Dispute Notice includes a standard claim for dispute-related fees and expenses, which I find includes the legal fees claim. However, CRT rule 9.5(3) says the CRT will not order a party to pay another party's legal fees in a strata property dispute unless there are extraordinary circumstances that make it appropriate to do so. Rule 9.5(4) says that in determining whether there are extraordinary circumstances, the CRT may consider the complexity of the dispute, the degree of involvement by the representative, whether a party or representative's conduct caused unnecessary delay or expense, and other factors.

67. I find the circumstances of this dispute are not extraordinary. There was a typical volume of evidence and submissions. Mr. Montgomery says the negligence and SPA section 72 analysis was unusually complex, but I do not agree. Rather, those issues arise routinely in CRT strata property disputes. There is no evidence the strata caused unnecessary delay or expense in this proceeding.

68. Also, I note CRT rule 9.5(1), which says that generally only a successful party will be awarded reimbursement of dispute-related expenses. Mr. Montgomery's claims were unsuccessful.

69. Mr. Montgomery also included an unspecified claim for “insurance”, but did not provide an amount, or explain the claim. I find this claim is unproven.

70. For these reasons, I dismiss Mr. Montgomery’s claim for legal fees and insurance.

CRT FEES AND EXPENSES

71. 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. The strata is the successful party. It paid no CRT fees and claims no dispute-related expenses, so I award no reimbursement.

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

ORDER

73. I dismiss Mr. Montgomery’s claims and this dispute.

Kate Campbell, Tribunal Member