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Case Name:

Zafir v. York Region Condominium Corp. No. 632

RE: Judy Zafir, and
York Region Condominium Corporation No. 632

[2007] O.J. No. 1234

Court File No. 05-CV-299685 SR
Ontario Superior Court of Justice

B.A. Conway J.

Heard: February 21, 2007.
Judgment: March 27, 2007.

(31 paras.)

Counsel:

P. Summers, for the Plaintiff.

C. Jaglowitz, for the Defendant.

ENDORSEMENT ON COSTS

B.A. CONWAY J.:--

Introduction

1 In my judgment released on February 23, 2007, I found for the plaintiff and requested cost submissions from the parties. I have now received and reviewed those costs submissions.

2 This was originally a claim by the plaintiff for damages, a declaration that a lien registered by the defendant was invalid and was to be discharged, and an order that the defendant's conduct was oppressive. The claim for damages was withdrawn at the commencement of trial. I dismissed the claim for the oppression order. I granted the declaration with respect to the lien and ordered that it be discharged.

3 The original amount in issue here was actually very small -- invoices totalling only $1,453.92. The case really became one of principle for both parties, namely, who was responsible for the damage originating from a leak in the plaintiff's unit and did the defendant have the right to register the lien against the plaintiff's unit when she refused to pay for

the damage? The plaintiff was concerned with her own rights; the defendant had a broader interest at stake, as the case involved interpretation of the Condominium Act, 1998 (the "Act") and the defendant's own bylaws and declaration.

4 While the parties have the right to pursue claims based on principle, we must review the issue of costs in this context. There must be some proportionality to the size of the case, the result obtained and the expectations of the unsuccessful party. These factors are expressly recognized as factors in Rule 57.01 where court is exercising its discretion to award costs under section 131 of the Courts of Justice Act.

5 The overriding principle in awarding costs is set out in Boucher et al. v. Public Accountants Council for the Province of Ontario et al. (2004), 71 O.R. (3d) 291 (Ont. C.A.) in which it was stated that "the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant."

6 With this principle and the context in mind, I now turn to the costs submissions.

Preliminary Consideration - Section 92 of the Act

7 The defendant has requested that I consider its argument respecting section 92 of the Act before ruling on costs. The Act states that where a condominium corporation's declaration requires the unit owner to repair after damage and the owner fails to do so within a reasonable time, the corporation may do the work and add it to the owner's contribution to the common expenses.

8 The defendant's declaration provides in clause V(1) that an owner must repair his unit after damage. This ties into the wording in section 92(1) of the Act. The defendant argues that the interaction of section 92 and the declaration entitles the defendant to recover the cost of repairs to the shut-off valve located in the plaintiff's unit.

9 The defendant made the repairs to the valve while the plaintiff was out of town. One was a temporary repair, the other a permanent one. The plaintiff did not have a chance to conduct the repairs. It is difficult to see how the plaintiff can be said to have failed to carry out her repair obligation "within a reasonable time" if not given an opportunity to make the repair before the defendant did it for her.

10 At most, section 92(1) in this case permitted the defendant to enter into the unit and do the temporary repair on an emergency basis. If the temporary repair needed to be done immediately, then there is an argument that "reasonable time" did not permit the defendant to wait until the plaintiff's return. However, there was no evidence that the permanent repair needed to be done before the plaintiff returned.

11 In my reasons, I held that the plaintiff would not be responsible for the damage from the leak since it was the defendant's requirement that the shut-off valve be turned off and it was the turning on and off that caused the valve to leak. Further there was evidence that it would be difficult for an owner to do any preventative maintenance on the valve, as the work involved coordinating with other units in the building.

12 For the same reasons, I would not hold the plaintiff responsible for the cost of repairing the valve itself. I see no reason to distinguish between the cost of repairing the damage in the unit below the plaintiff's (for which the plaintiff is not responsible) and the cost of repairing the valve in her unit under these circumstances.

13 This argument will not affect my disposition of the costs issue.

Procedure - Mediation/Arbitration vs. Court Proceeding

14 The defendant argued that the plaintiff should have proceeded by mediation/arbitration as required by section 132 of the Act and that mediation/arbitration is a pre-requisite to any application under section 134(1). The defendant recognized that this requirement does not apply to an oppression remedy sought under section 135(2).

15 As noted by the plaintiff in its reply submissions, I already addressed the mediation/arbitration issue in my earlier reasons.

16 I note the plaintiff's argument that an action in the Superior Court of Justice for equitable relief brings it outside section 134 which deals only with applications for certain remedies and does not address proceedings for equitable relief.

17 This case involved a claim for a declaration that the lien was invalid, an order discharging the lien, and an order that the defendant's conduct was oppressive. I do not think the Act precluded the plaintiff from proceeding by way of statement of claim for this relief.

18 Having said that, I agree with the defendant that it would have been much preferable for this claim to have, been brought through the procedures envisaged by the Act or by some other more cost effective route. It is indeed unfortunate that this case proceeded as far as it did through the court process.

19 However, I am also mindful of the fact that the defendant registered the lien and threatened power of sale proceedings over such a small monetary amount. The defendant could itself have suggested mediation/arbitration before or after taking these steps and, as mentioned in my earlier reasons, there was no evidence that the defendant suggested this route to the plaintiff.

20 It seems to me that both parties are responsible for this case proceeding through the court system and that both of them could have found a much more practical and efficient resolution to this matter.

21 Therefore, I will not hold this issue as a bar to the plaintiff's request for costs.

Settlement Offers

22 There were 2 settlement offers, one by the defendant dated December 12, 2005 (amended July 21, 2006) and one by the plaintiff dated July 24, 2006. The plaintiff submits that her offer brings her within Rule 49.10. Despite that rule, Rule 49.13 permits the court to take into account any offer to settle, the date it was made and the terms of the offer.

23 While the plaintiff's judgment was more favourable than its settlement offer, I am going to take into account the fact that an earlier offer had been made by the defendant. The defendant's offer was not a huge compromise, though, as it required the plaintiff to pay the original disputed amount of $1,453.92 (not the full lien amount of $2,492.82 which included legal fees and interest).

24 The reality is that this matter could have been settled. The parties were just not that far apart. They both proceeded farther than necessary, as a matter of principle.

25 Accordingly, I am not going to award costs based on Rule 49.10, I will calculate costs only on a partial indemnity basis.

Costs Decision

26 Generally, costs follow the event. The plaintiff was successful in this case with respect to the lien discharge matter. However, various factors as outlined above make me inclined to discount the costs sought by the plaintiff.

27 This could have been resolved far more efficiently. Mediation/arbitration was available. Payment into court or under protest was an option. There was a settlement offer to work with. The plaintiff took her point of principle quite far. She withdrew her damages claim at the beginning of trial and lost on the oppression claim.

28 On the other hand, the defendant did register the lien and threatened power of sale proceedings for a dispute over $1,453.92. The defendant could have found other ways to resolve this dispute. It did not agree to settle the action.

29 Both parties are ultimately responsible for the costs involved in this action.

30 The plaintiff is claiming a total of $11, 316.59 in fees, disbursements and GST. While the time and rates are not unreasonable (and the defendant has expressly said so), they are excessive for this case in view of the fact that it should never have gone this far.

31 Given the above factors and the shared responsibility of the parties, I am awarding costs to the plaintiff on a partial indemnity basis and fixing them at $4,500 (inclusive of disbursements and GST). Costs are payable by the defendant to the plaintiff within 30 days.

B.A. CONWAY J.

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