IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Pham v. The Owners, Strata Plan NW 2003,*** 2007 BCSC 519

Date: 20070418
Docket: S060379
Registry: Vancouver

07 115 152

Between:

Yen Thi Pham

Plaintiff

And

The Owners, Strata Plan NW 2003

Defendant

Before: The Honourable Mr. Justice Maczko

Reasons for Judgment

Counsel for Plaintiff	Andrew Davis
Counsel for Defendant	John D. Shields
Date and Place of Hearing:	March 29 & 30, 2007 Vancouver, B.C.

[1] There are two actions before the court being tried pursuant to Rule 18A. One is by the plaintiff to have approximately $61,500.00, which is being held in trust by the plaintiff's solicitor, paid out to her. The other action is by the defendant, by way of counterclaim, seeking judgment against the plaintiff in the amount of $106,730.39.

[2] The plaintiff owned an apartment in a strata complex at 10732 Guildford Drive, Surrey, British Columbia. She claims that she rented out the apartment to two people who, without her knowledge, operated a marijuana grow operation in the apartment. The defendant alleges that the apartment was never rented and the grow operation was run by the plaintiff. For the purposes of this 18A, I am not required to resolve that disputed fact.

[3] The grow operation caused significant damage to the plaintiff's apartment, to a neighbour's apartment and to common areas. On February 11, 2005, the police raided the apartment and the grow operation was closed down. On February 15, the strata corporation through its agent, the property manager, wrote to the plaintiff telling her about the damage and telling her that she will be obliged to pay the costs of repairs. The letter also advised the plaintiff that she had not paid her strata maintenance payments. At no time did she pay strata maintenance payments. She did not respond to the letter of February 15.

[4] The defendant again, through its property manager, wrote to her on February 28, 2005 outlining in detail the illegal marijuana grow operation and setting out the damages to the neighbour's unit and to the common property, the health hazard

caused by the growing mould and asbestos, and the risk of electrical fire because of modifications that had been made to the electrical system. The letter told her that the work to fix the problems would begin shortly and that she would be charged for the cost. The letter also outlined her breaches of the strata corporation's bylaws, which included:

- causing a nuisance;
- interference with other owners' right to enjoyment of their property;
- illegal activity in her unit;
- using the unit contrary to the purpose for which it was supposed to be used; and
- failing to advise the council that she would not be living in the unit as required by the bylaws.

[5] The plaintiff did not respond to this letter. The defendant wrote to her again on April 26, 2005 notifying her that the work would be commencing that day and would take approximately 2-3 weeks to complete. The letter also informed the plaintiff that the cost of the work would be in excess of $70,000 and that there was a $50,000 deductible on the insurance policy because the damage was caused as a result of a grow-op in the apartment. She was again informed that she would be charged for the cost of repairs. The plaintiff did nothing, said nothing and gave no indication at any time that she objected to the procedure or that she would do the repairs herself.

[6] The work was completed and the plaintiff was sent a bill for $106,730.39. The defendant put a lien on the property. The plaintiff decided to sell the apartment

and netted $61,500.00 after paying out the mortgage. These monies have been held in trust by the plaintiff's solicitor pending the outcome of this action.

[7] The issue before me is whether the defendant had the legal authority to carry out the repairs and to charge the plaintiff for them. The plaintiff's reply to the counterclaim is a bare denial which reads as follows:

> The does [sic] not oppose the granting of the relief set out in the following paragraphs of the Defendant's Notice of Motion dated January 5, 2007: None
>
> The Plaintiff opposes the granting of the relief set out in the following paragraphs of the Defendant's Notice of Motion dated January 5, 2007: All
>
> The Plaintiff will rely on the following affidavits: To follow.

[8] The plaintiff alleges that she rented out the apartment and was not responsible for the damage caused by the marijuana grow operation. However, the bylaws require that she obtain permission from the strata corporation before she is permitted to rent out the apartment. She did not obtain that permission. Section 3 of the ***Strata Property Act***, S.B.C. 1998, c. 43 (the "Act") provides:

> **3** Except as otherwise provided in this Act, the strata corporation is responsible for managing and maintaining the common property and common assets of the strata corporation for the benefit of the owners.

[9] Section 133 of the Act provides:

> **133** (1) The strata corporation may do what is reasonably necessary to remedy a contravention of its bylaws or rules, including
>
> (a) doing work on or to a strata lot, the common property or common assets; and

(b) removing objects from the common property or common assets.

(2) The strata corporation may require that the reasonable costs of remedying the contravention be paid by the person who may be fined for the contravention under section 130.

[10] In my view, the statute and the bylaws provide the corporation with the authority it needed to carry out the repairs and charge the plaintiff for them.

[11] In his argument, counsel for the plaintiff raised a number of defences to the counterclaim which I will deal with one by one.

1. Counsel for the plaintiff argued that the plaintiff was never given written notice demanding payment

[12] Section 112 of the Act provides:

112 (1) Before suing or beginning arbitration to collect money from an owner or tenant, the strata corporation must give the owner or tenant at least 2 weeks' written notice demanding payment and indicating that action may be taken if payment is not made within that 2 week period.

(2) Before the strata corporation registers a lien against an owner's strata lot under section 116, the strata corporation must give the owner at least 2 weeks' written notice demanding payment and indicating that a lien may be registered if payment is not made within that 2 week period.

[13] Counsel for the plaintiff argued that the plaintiff was never given written notice demanding payment. This issue was never pleaded and there is no evidence to support the defence. The plaintiff was notified on February 15, February 28 and April 26 that the work was going to be done and that she would be charged for the cost. In her own affidavit, the plaintiff says that "the defendant purported to incurred [sic] expenses totalling $106,730.39 in respect of the above work. Attached hereto

as Exhibit "G" are copies of the bill and the supporting material." An invoice showing the details of the monies spent, totalling $106,730.39, is exhibited to the affidavit along with all the individual invoices supporting the details of the account. She clearly had received the invoice, but nowhere in her affidavit does she say that there was no written demand or when she received the invoice.

2. The plaintiff argued that the lien was not properly filed

[14] If the lien was filed contrary to law, the problem is now moot because the corporation removed the lien in order to permit the property to be sold.

3. The plaintiff argued that before the strata corporation sues under s. 171 of the Act, the suit must be authorized by a resolution passed by three-quarters vote at an annual or special general meeting

[15] Section 171 provides as follows:

> **171** (1) The strata corporation may sue as representative of all owners, except any who are being sued, about any matter affecting the strata corporation, including any of the following matters:
>
> (a) the interpretation or application of this Act, the regulations, the bylaws or the rules;
>
> (b) the common property or common assets;
>
> (c) the use or enjoyment of a strata lot;
>
> (d) money owing, including money owing as a fine, under this Act, the regulations, the bylaws or the rules.
>
> (2) Before the strata corporation sues under this section, the suit must be authorized by a resolution passed by a ¾ vote at an annual or special general meeting.
>
> (3) For the purpose of the 3/4 vote referred to in subsection (2), a person being sued is not an eligible voter.

[16] This defence was not pleaded and there is no evidence that any such resolution had been obtained. Counsel for the defendant says he first heard about this defence a few days before the trial when plaintiff's counsel showed him his argument.

4. The plaintiff argued that pursuant to s. 135, the strata corporation must not require a person to pay the cost of remedying a contravention of a bylaw or rule unless the strata corporation has received a complaint

[17] Section 135 provides as follows:

> **135** (1) The strata corporation must not
>
> (a) impose a fine against a person,
>
> (b) require a person to pay the costs of remedying a contravention, or
>
> (c) deny a person the use of a recreational facility
>
> for a contravention of a bylaw or rule unless the strata corporation has
>
> (d) received a complaint about the contravention,
>
> (e) given the owner or tenant the particulars of the complaint, in writing, and a reasonable opportunity to answer the complaint, including a hearing if requested by the owner or tenant, and
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> (f) if the person is a tenant, given notice of the complaint to the person's landlord and to the owner.

[18] I find that the letters of February 15, February 28 and April 26 are notice of a complaint in writing. The evidence shows that there was, in fact, a complaint from an owner. The plaintiff had plenty of opportunity to answer the complaint and there is no evidence she requested a hearing.

5. The plaintiff argued that there is a responsibility on the strata corporation to maintain insurance and to pursue diligently any claim that could be made to protect the interests of the owners

[19] The strata corporation, in fact, did have insurance in the amount of $15,255,000. The corporation made a claim. However, it was denied because the insurance company assessed the insurable loss at $27,642.00. Because the damage was caused by growing something in an apartment, the deductible was $50,000. There is no evidence that the defendant could have recovered anything by suing the insurance company. At the very least, that would require some expert opinion that there was a reasonable chance of success against the insurer before I could conclude that the council did not act properly in pursuit of the claim.

6. The plaintiff argued that, pursuant to s. 31, the council members must act honestly and in good faith

[20] Section 31 provides:

> **31** In exercising the powers and performing the duties of the strata corporation, each council member must
>
> (a) act honestly and in good faith with a view to the best interests of the strata corporation, and
>
> (b) exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances.

[21] This defence was not pleaded and there is no evidence that the council members did not act honestly and in good faith, or did not exercise reasonable care and diligence in the performance of their responsibilities.

7. The plaintiff argued that the defendant did not give the plaintiff an opportunity to do the repairs herself

[22] This defence to the counterclaim was not pleaded and neither the statute nor the bylaws require that the defendant give the plaintiff an opportunity to do the repairs. Even if that were a requirement, I find that the plaintiff acquiesced in what the defendant did. On three occasions she was provided with letters informing her of what they intended to do and that the costs would be visited upon her. She made no objection and stood idly by while the defendant did the repairs. I find that even if the defendant did fail to perform any of the procedural requirements, I do not think the plaintiff can benefit from them. I would rely on the principle of equitable fraud to deny the plaintiff's claim.

[23] The principle may be invoked where the court is of the opinion that it would be unconscionable for a person to avail themselves of the benefit obtained through their unfair dealings or unconscionable conduct. In ***First City Capital Ltd. v. British Columbia Building Corp.*** (1989), 43 B.L.R. 29 at 37 (B.C.S.C.) quoted with approval in ***Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.***, [2002] 1 S.C.R. 678, 2002 SCC 19 at para. 39, McLachlin C.J.S.C., as she then was, said that equitable fraud "refers to transactions falling short of deceit but where the Court is of the opinion that it is unconscientious for a person to avail himself of the advantage obtained."

[24] Here, the plaintiff was responsible for the damages. The damage emanated from her apartment. Either she did it or she rented the apartment, contrary to the bylaws of the strata corporation, to tenants who caused the damage. She benefited

from the work done by the defendant, which cost the defendant $106,730.39 to repair the damage for which she was responsible. It would be unconscionable to require the defendant to bear the burden of these costs and thereby permit the plaintiff to benefit from her conduct.

[25] The plaintiff's action is dismissed. The defendant will receive judgment for $106,730.39 plus court order interest.

[26] Costs will follow the event.

"F. Maczko, J."
The Honourable Mr. Justice F. Maczko

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