COURT FILE NO.: 05-CV-299685 SR
DATE: 20070223

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
JUDY ZAFIR	)	*Patrick Summers*, for the Plaintiff
	)	
	)	
Plaintiff	)	
	)	
	)	
- and -	)	
	)	
	)	
YORK REGION CONDOMINIUM CORPORATION NO. 632	)	*Christopher J. Jaglowitz*, for the Defendant
	)	
	)	
Defendant	)	
	)	
	)	
	)	**HEARD:** February 21, 2007

Conway J.

REASONS FOR JUDGMENT

Introduction

[1] On January 8, 2005, the plaintiff and her husband went away on vacation. Before they left, they turned off the shut-off valve on the pipe below the kitchen sink in their condominium unit 811 ("**811**"), which all unit owners had been asked to do before leaving on vacation. On January 10, 2005, the superintendent of the building was told that water was leaking into condominium unit 712 ("**712**") which was located one floor beneath 811. It was determined that the leak emanated from 811 and specifically from the pipe in 811 on which the shut-off valve was mounted.

[2] The defendant arranged for the repair of the damages sustained to 712 and replacement of the valve in 811 from which the leak had originated. When the plaintiff was charged for these amounts, she claimed that she was not responsible for them and that they were to be paid by all of the condominium owners in the building as a common expense. Ultimately, the defendant registered a Certificate of Lien (the "**Lien**") against 811 under the *Condominium Act*, 1998, S.O. 1998, c.19 (the "**Act**"). The plaintiff is seeking a declaration that the Lien is invalid, that it be discharged, and that the defendant be restrained from enforcing the Lien.

[3] This case raises several issues. At the simplest level, the question is who should bear the responsibility for the repair costs for the damage arising from the leak in 811- the owner of 811 alone or all of the condominium owners in the building together as a common expense?

[4] For the reasons that follow, I find that on the particular facts of this case, the plaintiff should not have been charged for these amounts and accordingly the defendant was not entitled to register the Lien, the Lien is invalid and should be discharged, and the defendant is to be restrained from enforcing its rights under the Lien.

The Shut-Off Valve

[5] The defendant acknowledges that it posted notices to owners in the building requesting them to turn off the shut-off valve in their units before leaving on vacation. This was intended to minimize the risk of water leakage in the building while people are away.

[6] The plaintiff's husband turned off the valve the day they left, January 8, 2005. He testified that he reached under the kitchen sink, turned the valve a few times, did not notice anything amiss, and then they left on vacation.

[7] The defendant states that it was the responsibility of the plaintiff to maintain the valve in good repair and that unit owners are required to do so under Article V, clause 1, of the declaration of the condominium corporation.

[8] However, there are practical problems here. The defendant's plumber, Mr. Melanson, testified that these types of valves (EMCO valves) can start to drip when they are being opened or closed. There

is an O-ring in the valve which can become brittle and drip if it is disturbed. It is the wear and tear of opening and closing these valves that causes them to drip - the likelihood of leakage is much less when they are not being touched.

[9] This puts the condominium owners in a bind. They are asked by the corporation to turn off the valves when they leave, but this is precisely what increases the risk that the valves will start to drip.

[10] Mr. Melanson further acknowledged that it is difficult to know when these valves need to be replaced – you would not know unless you actually saw them leaking. The only way to avoid this situation would be to conduct preventative maintenance. However, he conceded that this would be impractical for an owner to do that, since the pipes in approximately 10 units in the building would have to be turned off in order to do the work. The replacement would have to be done by a licensed plumber and the coordination of the units involved would have to be done by the condominium corporation.

[11] Mr. Melanson also stated that if the valve was going to leak it would occur right after it was turned off. This was disputed by Mr. Brown, a plumber who testified for the plaintiff and who stated that a leak might not be observed until some time afterwards. The defendant is suggesting that Mr. Zafir should have seen the leak right away – or should have looked for it to occur as soon as he turned off the valve. This would have required Mr. Zafir to look under the sink cupboard since the leak would not otherwise have been visible.

[12] Clearly if there had been a leak right away, Mr. Zafir would not have left the unit. Whether he should have looked for it will be addressed below.

Act or Omission

[13] The defendant states that the water leakage was caused by an "act or omission" of the plaintiff, being one or more of the following: (a) the act of the plaintiff's husband in turning off the valve; (b) the plaintiff's husband not observing or looking to see if there was a leak once the valve was turned off; (c) the plaintiff failing to keep the valve in a good state of repair; or (d) the plaintiff failing to provide a key to the defendant which would provide immediate access to 811 once the leaked was discovered.

[14] The concept of an "act or omission" is relevant to this case as the wording appears in Section 105 of the Act and in the defendant's bylaws, as follows:

> Section 105(2): "If an owner, a lessee of an owner or a person residing in the owner's unit with the permission or knowledge of the owner *through an act or omission* causes damage to the owner's unit, the amount that is the lesser of the cost of repairing the damage and the deductible limit of the insurance policy obtained by the corporation shall be added to the common expenses payable for the owner's unit".
>
> Section 105(3): "The corporation may pass a by-law to extend the circumstances in subsection (2) under which an amount shall be added to the common expenses payable for an owner's unit if the damage to the unit was not caused by *an act or omission* of the

corporation or its directors, officers, agents or employees".

Bylaw No. 10: Pursuant to Section 105(3), the defendant corporation unit passed Bylaw No. 10 ("**Bylaw 10**") which in Article III entitles the defendant to claim from an owner losses (up to the insurance deductible) for damage caused to the common elements or another unit, "where the damage is caused by the *act or omission* of an owner…". Bylaw 10 states that "Without limitation, "*act or omission*" shall be deemed to include failure of the owner to properly maintain and repair the unit and improvements…".

Bylaw No. 1: In Article XIII of Bylaw No. 1, the defendant corporation also has an indemnity from each owner for losses and damages "resulting from or caused by an *act or omission* of such owner".

[emphasis added]

[15] The interplay of these sections of the statute and bylaws, according to the defendant, entitles the defendant to add the cost of the repairs arising from the damage caused by the leak, up to the limit of the insurance deductible, to the common expenses payable by the owner of 811. However, it is clear from the language above that the defendant's position can only come into play if the damage arose from the "act or omission" of the plaintiff.

[16] The plaintiff's counsel argued that the term "act or omission" imports an element of negligence, relying on the case of *Reilly v. Freedom Gardens Condominium Assn*, [2001] A.J. No. 1703 (Q.B.), and that the rule of *contra proferentum* applies to preclude the defendant from relying on a strict liability interpretation of the bylaws. I note, however, that the *Reilly* case states in paragraph 34 only that these words are "usually descriptive of a tort action", and "generally indicate negligence". I do not take the case as authority for the proposition that these words must require negligence.

[17] The defendant distinguished the *Reilly* case, *supra*, on the basis that it was decided in Alberta under a different statute than the Act. Further, the defendant argued that the "without limitation" words in Article III of Bylaw 10 qualify the "act or omission" language in that Article and that those latter words should therefore be read more expansively.

[18] I am not persuaded by the plaintiff that the term "act or omission" necessarily requires a finding of negligence. If the drafters of the Act and the defendant's bylaws had intended the higher standard of negligence to apply, they could have said so and referred to "negligent acts or omissions".

[19] On the other hand, the language of the Act and the bylaws is not strict liability language either. Strict liability language would have provided that the owner is responsible for any damage arising from its unit, however caused.

[20] As such, the wording "act or omission" appears to be more favourable to an owner than if strict liability language had been used. In my opinion, whether damage occurs from an "act or omission" of

an owner in any particular case will depend on the facts of the case at hand.

[21] In this case, I find it difficult to see how the defendant can argue that the "act or omission" for which the plaintiff is responsible is the very act that the defendant required the plaintiff to take. The defendant posted notices requesting the owners to turn off their shutoff valves before leaving on vacation. If this involved a risk that the valves would leak, shouldn't the defendant have alerted the owners of this risk? The defendants could have:

> (a) told the owners that there was a risk of leaking by shutting off these valves. The owners could then have assessed the risk of doing so before turning them off;
>
> (b) advised the owners what procedure to take in turning off the valves – for example, looking under the cupboard and watching for a certain period of time to see if there was a leak (assuming Mr. Melanson is right that the leak would have appeared right away). It is not reasonable to think that a layperson would check for leaks underneath a kitchen sink after shutting off a valve without being told to do so;
>
> (c) coordinated regular inspection programs for shutoff valves in the units and regular replacements of older valves that might be more likely to leak. This is particularly applicable since only licensed plumbers can do this work and it involves many units in the building, as described above; and/or
>
> (d) advised the owners that they needed to have their valves inspected and repaired regularly.

[22] Under the circumstances, I find that the plaintiff's turning off the valve or not waiting to see if a leak developed cannot be construed as an "act or omission" causing the damage for which the plaintiff should be held responsible.

[23] Whether the failure of the plaintiff to repair the valve is an "act or omission" is another question. Clearly, Bylaw 10 provides that failure to properly maintain and repair the unit is an "act or omission". However, given the evidence of Mr. Melanson that these valves are less likely to leak if they are not touched than if they are turned on and off, and since the defendant was the one requiring that they be shut off, the valve may not have required repair but for the defendant's requirements. It would be inequitable to hold the plaintiff responsible for repairing the valve when by Mr. Melanson's own testimony, a leak was more likely to occur due to turning on and off the valve – which was the defendant's requirement.

[24] Further, since preventative maintenance could only be done with the coordination of many other units, then even if the plaintiff had wanted to do so, the defendant would have had to arrange the maintenance. I have trouble holding a unit owner responsible for failure to do preventative work which it could not possibly arrange on its own.

[25] The defendant argued that the delay by the plaintiff in providing access to 811 was an "act or

omission" since it took some additional time for the key to the 811 to be brought to the building and the plaintiff's daughter prevented entry to 811 during that time. It is not entirely clear how much time elapsed before the plumber arrived at the building and entry to 811 was obtained, although it appears to have been in the range of 2 hours.

[26] However, the evidence of Ms. Schlosser, the superintendent for the building, was that the significant water damage to 712 had already occurred by the time she entered 712 on the morning of January 10th – for example, the floors were soaked and had started to buckle and lift. There was no evidence that any additional damage occurred to 712 during the period of time that keys were being obtained for entry to 811.

[27] While it may be that the plaintiff should have provided keys and entry to her unit to the defendant, I do not find that this is an "act or omission" that caused the damage in this case.

[28] Since any claim by the defendant supporting the Lien, whether under Bylaw 10 or the indemnification clause X111 in Bylaw number 1, is predicated on there being an "act or omission" of the plaintiff causing damage, I find that there is nothing to support the Lien registered by the defendant.

Validity of Bylaw 10

[29] Given my conclusion that there was no act or omission for which the plaintiff should be responsible in this case, I do not need to decide whether the enactment of Bylaw 10 pursuant to Section 105(3) of the Act was valid. The plaintiff had challenged the validity of Bylaw 10 which entitles the defendant to add the cost of repairs (up to the deductible) as a common expense payable by an owner where there is damage to another unit or common elements caused by the act or omission of the owner.

[30] I understand that there is conflicting commentary, but no caselaw, on whether Section 105(3) permits a condominium corporation to extend the circumstances under which the lesser of repair costs and the insurance deductible can be charged back to an owner as a common expense for damage caused to other units or common elements, or whether that Section merely permits the condominium corporation to extend the circumstances under which the owner is responsible for repair costs or the deductible arising from damage to its own unit.

[31] While this case does not turn on this issue in light of my analysis above, I do think there is a good argument to be made that Section 105(3) is intended to enable a condominium corporation to establish a regime whereby owners can be held responsible for damages (up to the insurance deductible) to other units and common elements, even where the owner's unit has not been damaged. This would appear to be consistent with the case of *Stevens v. Simcoe Condominium Corporation No*. 60, [1998] O. J. No. 5843 (Div. Ct), which was decided before the new Act came into force and recognized the desirability for condominium owners to be able to apportion liability for the insurance deductibles by making provision to that effect in the declaration, bylaws or rules of the condominium corporation.

[32] I also prefer the reasoning in the commentaries provided by the defendant (Harry Herskowitz and Mark F. Freedman, *Condominiums in Ontario: A Practical Analysis of the New Legislation*; J.

Robert Gardiner, *The Condominium Act, 1998: A Practical Guide*) that a more liberal interpretation of Section 105(3) should be allowed - which would enable a condominium corporation to customize a program of allocating responsibility among owners for insurance deductibles – as it would promote fairness among the unit owners and address the unique and individual requirements of each condominium corporation.

[33] I note the qualifying language at the end of Section 105(3) which restricts the ability of the corporation under a bylaw to add amounts to the owner's common expenses - it can only do so "if the damage to the unit was not caused by the corporation or its directors, officers, agent or employees". The plaintiff states that these words require that there be damage to the owner's unit before the circumstances can be extended.

[34] Again, I prefer the reasoning of Messrs. Herskowitz and Freedman that this language should not be seen as establishing a prerequisite that the damage be caused to the owner's unit before there can be a chargeback to the owner. These words appear only to restrict the corporation from charging an owner for any damage caused by the corporation and its directors, officers, agents or employees, and refer back to the damage first described in Section 105(2) - presumably the owner should never be held responsible for damage caused by the corporation *et al*. However, it does not necessarily follow that there must be damage to the owner's unit before the owner is made responsible for the additional common expenses arising from damage to another unit or common elements.

Other Claims by the Parties

[35] The plaintiff had a claim for damages but withdrew this claim at the commencement of the trial.

[36] The plaintiff further seeks an order under Section 135 of the Act that the conduct of the defendant is oppressive and unfairly prejudicial towards the plaintiff, and unfairly disregards the interest of the plaintiff. The plaintiff has led no evidence on this point. While I have concluded that the registration of the Lien by the defendant may not have been well founded, the higher standard of oppression has not been made out in this case.

[37] The defendant submitted that this action should be stayed and the plaintiff was required to exhaust the mediation and arbitration proceedings of the Act. There was no evidence that the defendant suggested proceeding in this fashion. Further, since the defendant was the one that initiated this by registering the Lien, I see no reason that the plaintiff needed to submit to mediation or arbitration - she was certainly within her rights to pursue this case through legal action.

Decision

[38] For the reasons set forth above, Judgment is granted to the plaintiff as follows:

(a) the Lien registered against 811 is declared to be invalid;

(b) the defendant is ordered to discharge the Lien forthwith; and

(c) the defendant is restrained from taking any steps to enforce the Lien.

[39] If the parties are unable to agree upon costs, I will receive written submissions which are to be no longer than 3 pages, double spaced, per party. The plaintiff's submissions are to be received by no later than March 5th and the defendant's by no later than March 12th.

Conway J.

Released: February 23, 2007

COURT FILE NO.: 05-CV-299685 SR
DATE: 20070223

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

JUDY ZAFIR

Plaintiff

- and -

YORK REGION CONDOMINIUM CORPORATION NO. 632

Defendant

REASONS FOR JUDGMENT

Conway J.

Released: February 23, 2007