Case Name:
McKenzie v. Condominium First Management Services Ltd.

Between
Karlie Anne Dorothy McKenzie, Plaintiff, and
Condominium First Management Services Ltd., Defendant

[2008] A.J. No. 1355

2008 ABPC 342

Docket: P0790100830

Registry: Calgary

Alberta Provincial Court
Calgary, Alberta

B.K. O'Ferrall Prov. Ct. J.

Heard: December 17, 2007.
Judgment: October 10, 2008.

(14 paras.)

Counsel:

Karlie Anne Dorothy Mckenzie, for the Plaintiff.

Desmond Macmillan, for the Defendant.

Reasons for Judgment

B.K. O'FERRALL PROV. CT. J.:--

Introduction:

1 This is a case of a condominium unit owner suing her condominium corporation's management company for failure to clear snow and ice which had accumulated on the common area driveways of the condominium. As a consequence of such failure, the Plaintiff's 1996 four-wheel drive Toyota Tacoma slid down a hill or incline on the common property and collided with a 2004 Ford F-150 pick up coming up the hill or incline. The accident occurred February 14, 2007 at a multi-condominium development known as Mesa at Crystal Shores in Okotoks, Alberta which at the time of the accident was still under construction. The Plaintiff seeks the cost of repairing her vehicle and the cost of repairing the Ford 1/2 ton which she was required to pay.

Issue:

2 The issue is whether the Plaintiff, as a condo unit owner, has a cause of action (ie. a claim recognized by law in either contract or tort against the condominium corporation's management company.

The Contract Between the Condominium Corporation and the Condominium Management Company:

3 The only contract which was put before me was that between the condominium corporation and the Defendant condominium management company. In that contract (dated November 1, 2006), the Defendant was employed by the condominium corporation to manage the condominium corporations properties, subject to the overall control and direction of the corporation. The contract required the Defendant management company to maintain the condominium corporation's properties, including "*clearing snow, slush and debris from and maintaining the common driveways* ... "The Defendant management company was authorized to engage any person or firm it wished to perform its obligations under the contract. The condominium corporation agreed to indemnify, defend and save harmless the Defendant management company from and against all claims, suits, etc and from liability from damage to property and injuries to or death of any condo unit owner. However, the indemnity clause expressly provided that it did not release the Defendant management company from any liability it had to the condominium corporation for a breach or a default in the performance of any of the condominium management company's covenants in the management agreement (e.g. the covenant to remove snow and slush and to maintain the common driveways).

The Privity of Contract Issue:

4 So while the indemnification clause in condominium management agreement expressly contemplates claims by unit owners against the management corporation, the issue of what cause of action a unit owner can have against a condo management corporation remains.

5 Clearly there is no privity of contract between unit holders and the management company unless the condominium corporation is found to be the agent of the unit holders in entering the management agreement. I sought but did not receive any authority on the issue.

6 While it may be that the condominium corporation is the agent of the condominium unit owners when it contracts with a management company to discharge its (the condominium corporation's) obligations to its unit owners, I was shown no bylaws of the condominium corporation or other documentation which might have established that principal-agent relationship. I do know that condominium corporations have a responsibility under Section 37 of the *Condominium Corporation Act* to manage the condominium property properly and that the unit holders have a civil remedy if the condominium corporation breaches that duty. In contracting with a management company to discharge those duties, it may be that the management company's nonfeasance becomes the condominium corporation's nonfeasance. But this latter logic would suggest that the condominium management company is the condominium corporation's agent and not the unit owners' agent.

7 Suffice it to say that privity of contract is a problem; and without deciding the issue, I question whether a condo unit owner can sue a condominium management company in contract for breach of a covenant made to the condominium corporation. The preferable practice would be to sue the condominium corporation for breach of its statutory duty to properly manage the common property or for breach of a similar obligation in the condominium's bylaws if such an obligation is contained in those bylaws.

Tort:

8 But is there not a claim in tort? Tortious claims are based relationships of sufficient proximity that it can be said that one party owes a duty to the other to take care not to do anything which might reasonably be foreseen to cause the other damage. And, according to *Fridman on Contract* (p.703), proximity can be created by contractual obligations and expectations.

9 I find the Defendant condominium management company did owe a duty of care to the Plaintiff to properly maintain the common driveway by virtue of its contractual obligation to the condominium corporation to do so and by virtue of condo unit owners' reliance on the discharge of that contractual obligation. I find that the management company breached that duty by failing to properly maintain the driveway. On the evidence before me, it had done nothing over a period of many days to address a situation wherein the sloped driveway had become as slippery as a skating rink. Although there was snow overnight, the Plaintiff's testimony and photos disclose a slick ice situation which had been unattended for days. There was no evidence of any sand or salt treatment of the driveway which had to be used by unit owners to access their residences. And, because the unit owners had no choice but to use the driveway, there could be no suggestion of contributory negligence on their part because they did use it. The covenant was to remove the snow from the driveway. At the very least, the unit owners had the right to expect some sort of sand or salt treatment if snow removal was impossible; and there was no evidence that snow removal was impossible in the circumstances of this case.

10 Put another way, the Defendant management company, charged as it was with maintaining the driveway, could have foreseen that its failure to do so could lead to unit owners suffering injury or

property damage. And the condominium management company cannot escape liability by arguing that a contractor it hired to discharge its obligation is deemed by management agreement between it and the condominium corporation to be an employee of the corporation. Such clause does not relieve the management company from liability.

11 The fact that the condominium management company may be able to turn around and seek indemnity from the condominium corporation (and thereby perhaps from the Plaintiff in her proportionate share) is also not a reason for this court not to determine liability in the first instance.

12 Furthermore, for the Defendants argument that the Plaintiff's claim was not framed in negligence is rejected. In this court we often have to infer causes of action in the pleadings of parties not represented by counsel; and we do so, so long as the other side is not taken by surprise by the inference. I had no difficulty inferring a claim in negligence from the statement in the Plaintiff's Civil Claim that the Defendant "*neglected to sand or salt the extremely slippery and dangerous hill or any of the other road ways in the condominium property*". Nor do I believe the Defendant was taken by surprise by what I construed to be the Plaintiff's alternative claim in negligence.

Disposition:

13 There will be judgment against the Defendant in the amount sued for, namely $7,000.00.

14 If costs cannot be agreed upon, the Plaintiff may file with the court and serve Defendant's counsel with her cost submissions on or before October 31, 2008. The Defendant will have until November 15, 2008 to file and serve its response to any costs submission the Plaintiff may make.

B.K. O'FERRALL PROV. CT. J.

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