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Case Name:

Peel Condominium Corp. No. 452 v. Jaworowski

**RE: Peel Condominium Corporation No. 452, and
Marek Jaworowski**

[2010] O.J. No. 3522

2010 ONSC 4567

Court File No. CV-08-704-00

Ontario Superior Court of Justice

T.A. Bielby J.

August 20, 2010.

(39 paras.)

Counsel:

J. Fine and K. Bailey, for the Plaintiff.

P. Wojtis, for the Defendant.

ENDORSEMENT ON REASONABLE COSTS

1 T.A. BIELBY J.:-- The defendant in this matter is the owner of a condominium unit within the plaintiff's building. In 2007 the defendant went into arrears with respect to his proportionate share of the common expenses.

2 As a result of the arrears the plaintiff, quite properly, put a lien against the defendant's unit. The arrears continued for over one year and ultimately the plaintiff commenced enforcement proceedings including registering a lien and power of sale proceedings.

3 The arrears totalled \$6,532.37, which include two missed payments in 2008.

4 The lien filed is authorized by section 85 of the *Condominium Act, 1998*, c. 19. This section allows a lien not only for the arrears but also for interest on those arrears and reasonable legal costs and reasonable expenses incurred in the collection or attempted collection of the debt.

5 My first endorsement in this matter was released on July 8, 2010. This followed the hearing of the plaintiff's motion for summary judgment and possession.

6 The defendant admitted the arrears and in fact had paid the majority of the arrears prior to the hearing of the motion. I ordered the payment of interest on the arrears paid and a \$10,000.00 payment as against the reasonable legal costs, the quantum of which was yet to be determined.

7 The matter was adjourned to August 16, 2010, to argue the issue of legal fees and expenses and what amount is to be considered "*reasonable*."

8 When the plaintiff commenced its collection steps, the defendant started a small claims court action seeking, in effect, an accounting as to the arrears claimed. The action was dismissed with costs of \$500.00 awarded to the defendant, the plaintiff in this action.

9 In his endorsement, dated December 18, 2007, Deputy Small Claims Court Judge Klein noted that the outstanding legal fees to that point were \$3,520.00.

10 In my earlier endorsement I ruled that the costs of defending the small claims court action were incurred as part of the collection process and are therefore recoverable under the lien.

11 As a result, the plaintiff is entitled to recover from the defendant the reasonable costs and expenses incurred in the collection steps it initiated as well as those incurred in the defence of the small claims court action.

12 There also may be interest owing on \$652.37, being the arrears over and above what had initially been paid by the defendant. I have not been given this calculation, and will make no order in this regard.

13 The defendant submits that he wishes to pay off all of what he owes under the lien but argues the costs claimed by the plaintiff are not reasonable. So it falls to the court to determine the reasonable costs and expenses and to provide time to the defendant to redeem, if he is able to do so, by re-mortgaging.

14 In considering the issue I keep in mind that the arrears plus interest amount to no more than \$12,000.00, and that the plaintiff's costs of defending the defendant's action were incurred in small claims court.

15 Counsel for the plaintiff has filed an amended bill of costs relating to the lien procedures and the costs argument, claiming fees, inclusive of taxes in the amount of \$51,371.70. To this he added disbursements of \$4,387.24, inclusive of taxes, for a total of \$55,758.94.

16 For successfully defending the small claims court action, counsel for the plaintiff is claiming fees of \$20,951.18, inclusive of taxes and disbursements of \$1,619.04, inclusive of taxes, for a total of \$22,570.22.

17 The plaintiff argues that the total of these two accounts, being \$78,329.16 are reasonable and are to be added to the amount protected by the lien. This amount is 6.5 times greater than the claim for arrears and interest.

18 I accept that the plaintiff is entitled to the reasonable fees and expenses that it is required to pay to its own lawyers.

19 I conclude however that I have discretion to determine what are the "*reasonable*" costs incurred in the circumstances.

20 The case, *Simcoe Condominium Corporation No. 27 v. Citifinancial*, 2004 CarswellOnt 343, is a decision of Justice DiTomaso of the Ontario Superior Court of Justice. He had to consider section 85 of the *Condominium Act* and exercised a discretion in determining what the reasonable legal expenses were.

21 *Cimmaster Inc. v Piccione*, 2010 CarswellOnt 609, is a decision of Justice Gray. The matter before him was a 6 day trial that originally started under the simplified rules procedure but concluded as an ordinary action. I quote pg 4 of his decision,

The principle of proportionality is important and must be considered by a judge in fixing costs. I have had occasion to apply the principle even before the promulgation of the recent Rule amendments that specifically require it to be considered ... In my view, as in *Pitney Bowes*, the concept of proportionality appropriately applies where a successful party has over resourced a case having regard to what is at stake.

22 The *Pitney Bowes* reference was with respect to an earlier decision of Justice Gray in *Pitney Bowes of Canada Ltd v. Noia*, 2009 CarswellOnt 7098. This case involved a 2 day trial under the simplified rules in which judgment was obtained in the amount of \$13,400.00. Counsel for the plaintiff sought legal fees of \$11,806.00.

23 Justice Gray allowed a fee of \$1,000.00. At paragraph 7 Justice Gray states, "*In my view, having regard to what was at stake, this expenditure of lawyers' hours is entirely disproportionate.*"

24 At paragraph 9, the learned judge refers to the Report of the Civil Justice Reform Project by The Honourable Coulter A. Osborne, wherein it is stated, "*Proportionality, in the context of civil litigation, simply reflects that the time and expense devoted to a proceeding ought to be proportionate to what is at stake.*"

25 Justice Gray, in paragraph 10, stated that in his opinion the principle of proportionality is encompassed in Rule 57.01(1)(0.b) which requires the Court to consider the "*amount of costs that an unsuccessful party could reasonable expect to pay.*"

26 I concur with the comments of Justice Gray and note that Rule 57.01 also allows the Court to consider the complexity of the proceedings and the amount claimed and recovered.

27 The fees requested by the plaintiff in this matter are far from reasonable. To say the least, counsel for the plaintiff has over resourced this case even taking into account the small claims action. When the matter was before me on August 16th, 2010, two lawyers were in attendance on behalf of the plaintiff, which was completely unnecessary. That is just one example of over resourcing.

28 The case of *Mancuso v. York Condominium Corporation*, No. 216, 2008 CanLII 31418 is authority for the proposition, which I accept, that section 85 of the *Condominium Act* allows me a discretion to fix the costs that are appropriate in the circumstances and that I can take into account Rule 57.01 and the reasonable expectation of the parties.

29 In the matter before me counsel for the defendant submitted that costs of \$15,000.00 to \$20,000.00 would be a reasonable amount. With respect to Rule 57.01(1)(0.b), this representation can be considered the amount of costs that an unsuccessful party could reasonably expect to pay.

30 I have also had regard to the plaintiff's argument that whatever the defendant doesn't pay will have to be shared by the other condominium owners. I agree that this is, on its face, an unfairness. However there is an unfairness in the amount of fees claimed. The plaintiff within the lien process is only entitled to reasonable costs and it is for me to determine that amount.

31 Within the plaintiff's supplementary motion record is the bill of costs for the defence of the small claims court action. I do not intend to review the account hour by hour but make the following observation. It is alleged that 35.9 hours were spent preparing for a trial and for attending on the trial for a full half day. I find this to be excessive.

32 I will allow a fee of \$3,000.00 for the time incurred with respect to the small claims court, together with the appropriate amount of taxes which counsel can work out. I will allow the disbursements as claimed in the amount of \$1,619.04, inclusive of taxes.

33 With respect to the lien matters, a review of the amended bill of costs reflects excessive hours spent on the file. Again it is not my intention to review the account hour by hour but can provide, as an example of over resourcing, at page 8, under the heading, "Bill of Costs and Further Affidavits," it is alleged that the hours spent on this sub issue was almost 35 hours, and involved 3 lawyers and a law clerk.

34 There is absolutely no proportionality to this account. It does not reflect the complexities of the issues, the amount claimed or the reasonable expectations of the other party.

35 More to the point the claim is not reasonable.

36 With respect to the lien issues, I fix the reasonable fees collectible under section 85 of the *Condominium Act* in the amount of \$16,000.00, together with the appropriate taxes. I will allow the disbursements as claimed in the amount of \$4,387.24, inclusive of tax.

37 In awarding these costs it is my opinion that the amounts allowed are in the upper range as to what is reasonable.

38 Once the plaintiff has calculated the HST/GST owing on the fees allowed and as advised the defendant in writing thereof, the defendant shall have 14 days to pay balance of the monies owed to the plaintiff. If the funds are not paid in 14 days the plaintiff can move *ex parte* on affidavit evidence as to what has not been paid for an order for possession.

39 I can be spoken to if any clarification is required.

T.A. BIELBY J.

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