CITATION: Jeffers v. YCC No. 98, 2010 ONSC 474
COURT FILE NO.: 07-CV-334005SR
DATE: 20100119

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
LIVINGSTON JEFFERS AND PAMELIA JEFFERS	)	The plaintiffs, *in person*
	)	
Plaintiffs	)	
	)	
– **and** –	)	
	)	
YORK CONDOMINIUM CORPORATION NO. 98 AND TD MORTGAGE CORPORATION	)	*James M. Butson*, for the Defendant TD Mortgage Corporation
	)	
Defendants	)	*George F. Vella*, for the Defendant York Condominium Corporation No. 98
	)	
	)	**HEARD:** January 11 to 15, 2009

LOW J.

[1] The plaintiffs are the owners of a condominium unit in York Condominium No. 98. The defendant TD Mortgage Corporation (the Bank) has a registered charge (referred to as the "charge" or the "mortgage") over the unit.

[2] The plaintiffs claim damages against the defendant York Condominium Corporation No. 98 (the Condo Corporation) for property damage and for slander of title.

[3] As against the Bank, the plaintiffs seek judgment discharging the mortgage. The Bank counterclaims for possession and for payment based on continuing default going back to 2006.

[4] At the start of trial my attention was drawn to the endorsement of Brown J. dated June 1, 2009, and I was advised by the plaintiffs and by counsel for the defendants that the Public Guardian and Trustee has not indicated an intention to be involved in this trial on the plaintiffs' behalf.

[5] In order to assist the plaintiffs to focus their case and to minimize costs to the parties, the trial was bifurcated. The issues between the plaintiffs and the Bank occupied the first two days. This was followed by trial of the issues between the plaintiffs and the Condo Corporation.

[6] By previous order of the court, the Bank was permitted to bring on its motion for summary judgment at the commencement of trial. The motion had been made returnable on August 29, 2009 and adjourned to November 9, 2009. Because the plaintiffs were unready to proceed, the motion was not heard that day.

[7] The plaintiff Pamelia Jeffers filed responding affidavit material on the Bank's motion for summary judgment. Mrs. Jeffers was permitted to amplify the record by filing a number of additional documents which were marked as exhibits. The plaintiffs were permitted to cross-examine the Bank's deponent, Helen Truong, and counsel for the Bank was permitted to cross-examine Mrs. Jeffers on her affidavit.

[8] Oral evidence was led in relation to the plaintiffs' claim against the Bank for a discharge of the mortgage. Both plaintiffs testified and they called the evidence of Ms. Natalie Pham and of Ms. Helen Truong, two employees of the Bank. The Bank did not adduce oral evidence in response.

[9] The Bank had served a request to admit on the plaintiffs. Plaintiffs did not serve their response within the time required by the *Rules* but by the order of Stinson J. dated November 9, 2009, the time for doing so was extended to December 4, 2009. A response was served pursuant to the order.

[10] Some material facts are not disputed.

[11] A registered charge dated September 29, 1986 was given by the plaintiffs as chargors to Bayshore Trust Company. The charge had a three year term and secured the principal sum of $72,700 at 10.75%.

[12] The standard charge terms provide, among other things, that if the chargor is in default in payment of an amount due and owing, then, at the option of the chargee, the whole of the principal owing together with accrued interest shall immediately become due and payable.

[13] Article 8 of the standard charge terms provides,

> The chargee may pay all premiums of insurance and all taxes, rates, levies, charges, assessments, utility and heating charges which shall from time to time fall due and be unpaid in respect of the land, and that such payments, together with all costs, charges, legal fees (as between solicitor and client) and expenses which may be incurred in taking, recovering and keeping possession of the land and … shall be, with interest at the rate provided for in the Charge, a charge upon the land in favour of the Chargee pursuant to the terms of the Charge and the Chargee may pay or satisfy any lien, charge or encumbrance now existing or hereafter created or claimed upon the land, which payments with interest at the

> rate provided for in the Charge shall likewise be a charge upon the land in favour of the Chargee. Provided, and it is hereby further agreed, that all amounts paid by the Chargee as aforesaid shall be added to the principal amount secured by the Charge and shall be payable forthwith with interest at the rate provided for in the Charge, and on default all sums secured by the Charge shall immediately become due and payable at the option of the Chargee, and all powers in the Charge conferred shall become exercisable.

[14] Bayshore Trust Company changed its name to Trimark Trust on January 13, 1997. Trimark Trust subsequently transferred the charge to the Toronto-Dominion Bank. The transfer of charge was registered on title on March 9, 2000.

[15] The charge was renewed from time to time on maturity and, following the transfer of the charge to the Bank, it was renewed most recently on October 15, 2002. The document evidencing the renewal agreement is not in evidence as it has not been located either by the Bank or by the plaintiffs. There is consensus, however, that the charge was renewed, that it was for a 5 year term and that the rate was 5.70%.

[16] On November 22, 2005, the Condo Corporation registered a notice of lien on title to the property for arrears of common expense fees and cable charges totaling $967.34.

[17] To preserve the priority of its charge, the Bank paid the sum of $2,588.04 requested by the Condo Corporation to discharge the lien. That sum comprised the arrears of common expenses for September, October, and November 2005 and cable fee, legal fees and disbursements for registration and discharge of the lien and land titles fees. It also included the common expense fee for December 2005.

[18] It is admitted at paragraph 29 of the statement of claim that the plaintiffs have not paid the mortgage since December of 2006. The evidence discloses, however, that the sum of $3,010.60 was paid to the Bank by the plaintiffs through their former solicitor, Mr. Levine, on or about October 25, 2007.

[19] In addition to the payment made by the Bank to discharge the lien referred to at paragraph 17 above, I find that the Bank also paid on plaintiffs' behalf the following amounts for city realty taxes:

> $1,925.73 on or about February 28, 2006,
>
> $856.87 on or about February 28, 2006,
>
> $721.76 on or about June 30, 2006
>
> $789.32 on or about February 28, 2007,
>
> $41.76 on or about June 29, 2007.

[20] I find that the plaintiffs ceased to make payment of their common expense fees in 2006 and that the Bank has been paying the arrears of those fees to the Condo Corporation.

[21] The plaintiffs claim that they are entitled to a discharge of the mortgage. They say that the original charge in favour of Bayshore Trust had a 20 year amortization. They say that they paid their mortgage payments up to the end of 2006 and that the mortgage was therefore fully paid off by that time because 20 years had passed from the date of the original charge.

[22] The plaintiffs argue that the Bank had no right to pay tax to the city without their consent and that the liens placed on title by the Condo Corporation were placed there unlawfully. In addition, Mr. Jeffers alleges that the records relied on by the Bank in support of its claim are forgeries.

[23] Article 8 of the standard charge terms governs what the Bank may pay and add to the mortgage. The Bank had a right to pay realty tax to the city if the taxes were due and unpaid. There was no obligation on the Bank under the charge terms to first seek the plaintiffs' consent.

[24] I am not satisfied, however, that all of the realty tax payments made by the Bank were in compliance with their rights under article 8 of the standard charge terms.

[25] The payment of $1,925.73 on February 28, 2006 was paid by the Bank when the balance owing for 2005 taxes stood at $1,925.73. That payment was in compliance with the Bank's rights. The payment made on February 28, 2006 of $856.87 was for taxes due and unpaid from December 10, 2005. It was also in compliance with the charge terms.

[26] The Bank's payment on June 30, 2006 of $721.76 was not in compliance with its rights under the charge as there was no amount due and outstanding at that date. The plaintiffs had paid $721.76 on June 1, 2006 leaving a zero balance at the time the Bank made its payment. The Bank was refunded this payment, however, and the refund is accounted for by the Bank in its record of accruals and payments.

[27] The Bank's tax payment dated February 28, 2007 in the amount of $789.32 is only partially in compliance with the charge terms because at the date of the payment, only $239.32 was due and unpaid – the plaintiffs had made a part payment of $550 on February 23, 2007, leaving a balance owing of $239.32.

[28] The payment by the Bank of $41.76 on June 29, 2007 was similarly not in compliance with the charge terms in that there was a credit balance in the plaintiffs' tax account of $258.24 at that date and the payment of $41.76, increased the credit balance to $300.00.

[29] Accordingly, of the payments made by the Bank to the city toward the plaintiffs' realty taxes, only the amounts of $1,925.73, $856.87 and $239.32 were in compliance with the charge terms.

[30] The Bank is entitled to interest on those amounts at the mortgage rate. The Bank is not entitled to interest on payments it made toward realty taxes where the payments were for

amounts not due and owing. However, the plaintiffs have had the benefit of the latter amounts (except for the $721.76) by way of a credit to their tax account. I infer that these amounts were paid by the Bank to the city under the mistake of fact that the amounts remained due and unpaid. Accordingly, the principal amounts of such taxes paid under error of fact may be recovered by the Bank but without interest.

[31] Insofar as the Bank paid the Condo Corporation to obtain a discharge of the lien registered on November 22, 2005, the Bank was entitled to make such payments pursuant to article 8 of the standard charge terms. There was no obligation on the Bank to inquire into the merits of the lien. If a lien registered by the Condo Corporation is challenged by the plaintiffs, it is open to them to have the issue determined as between them and the Condo Corporation and if the lien is held to be unsupportable, the plaintiffs have their remedies against the Condo Corporation. The assertion that the Condo Corporation improperly registered the lien is the cause asserted by the plaintiffs in this lawsuit.

[32] There is no evidence before the court that the original charge was given on the basis of a 20 year amortization. There is no agreement, mortgage statement or other document that supports the plaintiffs' contention and the independent evidence shows that the amortization period was not 20 years but longer.

[33] Mrs. Jeffers annexed as an exhibit to her affidavit the annual mortgage statement issued by Trimark to the plaintiffs for the period January 1, 1998 to December 31, 1998. The statement shows that the closing balance at December 31, 1997 was $56,687.90 and that the closing balance at December 32, 1998 was $54,114.04.

[34] The charge was transferred to the Bank in 1999. The Bank issued annual mortgage statements to the plaintiffs the first of which was for the period commencing June 1, 1999 showing a principal balance owing of $52,989.36. The mortgage statement for the period December 31, 2001 to December 31, 2002 shows the principal balance owing at October 15, 2002 (the last renewal date of the charge) as $42,480.53. As shown on the mortgage statement for the period December 30, 2005 to December 29, 2006, there was a principal balance owing of $25,465 as at December 15, 2006. There is no evidence that the plaintiffs ever challenged the data shown on the annual mortgage statements sent to them and in my view, the most reliable evidence before the court as to the principal outstanding at any point in time is the annual mortgage statements.

[35] Mrs. Jeffers states in her affidavit that when the charge was renewed in October, 2002 the principal owing was $38,108. There is no evidence to substantiate this. There is in evidence no copy of the renewal agreement and no document issued by the Bank to state that the principal amount owing at October 15, 2002 was that figure.

[36] The plaintiffs state that they do not have the documents to substantiate their position because their home was broken into at the end of 2008 and that the thieves stole their documents relevant to this lawsuit. Mr. Jeffers states that their home was broken into about 10 times and papers were taken. He also alleged that the Bank has forged documents to support its case.

Mrs. Jeffers testified at one point that every time she left the house, she noticed on return that her locks had been tampered with.

[37] The plaintiffs prepared their affidavit of documents at a time when they were represented by a solicitor. The date of their affidavit of documents is November 28, 2007 which pre-dates the break-in into their house at the end of 2008. They swore the affidavit of documents before their then solicitor, Mr. Levine. The affidavit of documents lists 100 documents. If there was documentary evidence indicating that the principal owing at the date of the renewal in October, 2002 was other than as shown in the Bank's mortgage statement, it would have been a critical piece of evidence and one would expect that if it existed, it would have been listed in the affidavit of documents. When confronted on cross-examination with the fact of her having executed the affidavit of documents, Mrs. Jeffers sought to repudiate it by stating that she did not approve of the work Mr. Levine was doing.

[38] I find that the principal owed at the renewal date of October 2002 was $42,480.53, that as of December 15, 2006, the principal balance was $25,465.287 and that as of the date of trial, it is $24,243,38. The plaintiffs have not demonstrated that they have paid the debt in full. Accordingly, the claim for a judgment discharging the mortgage is dismissed.

[39] The Bank seeks an order for possession and payment.

[40] There has been default under the mortgage. The plaintiffs ceased to pay their mortgage payments as of the end of 2006 at which time there remained a significant amount of principal owing. The plaintiffs have also ceased paying their condominium common expense fees with the result that the Bank has been paying them under the powers given under article 8 of the standard charge terms. The Bank is accordingly entitled to declare all sums secured to be due and payable. The principal and accumulated interest together with amounts paid to discharge liens and on account of arrears of taxes have not been paid. The Bank is entitled to judgment for possession.

[41] The Bank has adduced in evidence an accounting for the period January 15, 2005 (when there was a zero balance) to May 26, 2009 (exhibit O to Ms. Truong's affidavit) showing accruals, payments received from the plaintiffs and payments made by the Bank on behalf of plaintiffs pursuant to the charge. The payment history is uneventful until September 2005 when a monthly payment of $502.35 is returned (dishonoured). That appears to have coincided with the onset of conflict between the plaintiffs and the Condo Corporation.

[42] The plaintiffs assert that they do not owe anything to the Bank. They have no evidence, however, to show that they have paid to the Bank any amounts not reflected in the accounting at Exhibit O to Ms. Truong’s affidavit.

[43] Mrs. Jeffers filed in evidence a photocopy of a draft drawn on the Scotiabank in favour of the Bank. It is dated November 14, 2005 and is in the amount of $1,507.05. She asserts that this amount is not accounted for in the Bank’s accounting. In my view, the $1,507.05 is accounted for at lines 15 through 19 of the accounting. The September 15, 2005 cheque for $502.35 was dishonoured. No payment was made on the due date of October 15. The November 15 draft for $1,507.05 therefore covers the common expense payments due on the 15the day of September,

October and November, 2005 of $502.35 each, bringing the account up to date as of November 15. There was no history of paying mortgage payments in advance and no plausible reason for so doing. I find that the $1,507.05 is accounted for.

[44] Mrs. Jeffers filed in evidence photocopies of a number of copies of negotiable instruments (Exhibit 3). These comprise a draft drawn on the CIBC in favour of the Bank for $602 dated July 16, 2007, a Western Union money order for $500 dated August 15, 2007, a Western Union money order for $102 dated August 15, 2007, a cheque drawn on the plaintiffs' chequing account dated April 11, 2007 for $2,408, a Western Union money order for $500 dated May 15, 2007, a Western Union money order for $102 dated May 15, and a draft on the Scotiabank in favour of the Bank for $602 dated June 15, 2007.

[45] Mrs. Jeffers' evidence was that these instruments were given by her to her own lawyer, then transferred to her new lawyer when she changed lawyers. There is no evidence that the plaintiffs' lawyers delivered the originals of the photocopied instruments to the Bank. The Bank does, however, acknowledge receipt from one of the plaintiffs' former solicitors, Mr. Levine, a payment of $3,010.60 on or about 25 October 2007. The Bank also acknowledges receipt of a cheque for $602 on or about 25 October 2007 which was dishonoured.

[46] It was open to the plaintiffs to call their former solicitor, Mr. Levine, to testify that he paid to the Bank more than the $3,010.60 which is acknowledged. There is no explanation why he was not called. There is no evidence that Mr. Levine paid to the Bank on the plaintiffs' behalf more than the $3,010.60.

[47] The plaintiffs claimed from the Bank an accounting of the mortgage account. I find that the accounting has been delivered by way of Ms. Truong's affidavit.

[48] The plaintiffs have adduced no evidence to demonstrate that they have paid to the Bank any amounts that have not been not accounted for.

[49] The Bank will have judgment for the principal owing on the charge of $24,243.38, interest to June 22, 2009 of $2,366.56, and interest on the principal from June 23, 2009 to the date of judgment at the mortgage rate of 5.7%. The Bank will also have judgment for payment of realty taxes paid on behalf of the plaintiff as follows:

- $1,925.73 with interest under the mortgage from February 28, 2006 to date of judgment
- $856.87 with interest under the mortgage from February 28, 2006 to date of judgment
- $239.32 with interest under the mortgage from February 28, 2007 to date of judgment
- $550 and $41.76 with no interest.

[50] Further, the Bank will have judgment for $16,616.18 comprising amounts paid by the Bank to vacate liens placed by the Condo Corporation and arrears of condo fees. There will be interest on such payments under the mortgage.

[51] The foregoing contemplates a recalculation of the interest. Solicitors for the Bank will prepare the form of judgment and a document showing the interest calculations.

[52] I turn now to the plaintiffs' claim against the Condo Corporation. The plaintiffs claim damages for slander of title and for property damage.

[53] The plaintiffs allege that the registration by the Condo Corporation of a notice of lien for $967 on November 22, 2005 was a slander of title.

[54] The elements of the tort of slander of title are:

(a) that the party registering the offending instrument published words in disparagement of the complaining party's property;

(b) that such words were false;

(c) that the words were published with actual malice in that the words were published with the direct objective of causing damage;

(d) that the complaining party has sustained special damages as a result (see *1224948 Ontario Ltd. v. 448332 Ontario Ltd.*, [1998] O.J. No. 5555 (Gen. Div.) at 148).

[55] The onus of showing that the statement was false rests on the plaintiffs.

[56] The plaintiffs have not met the onus of showing that the Condo Corporation made a false statement.

[57] I find that the plaintiffs had no records of the common expense fees they paid and that they paid amounts from time to time in response to reminders given by the treasurer Ms. Spencer. Ms. Spencer testified that the plaintiffs were chronically in arrears. I accept her evidence. The plaintiffs have no reliable evidence to the contrary. Mrs. Jeffers testified that she simply paid money to the treasurer whenever asked. It is apparent from the Condo Corporation's business records – in particular their bank deposit slips – that the plaintiffs did not pay their common expense fees on a monthly basis during the years in issue.

[58] I am satisfied on a balance of probabilities that the plaintiffs were in arrears of approximately 7 months of common expense fees at the end of 2004 and that their cable fee of $378.18 was unpaid for that year. Their monthly common expense fee in 2004 was $275. There is proof only that for 2004 the plaintiffs paid $1,100 in one cheque.

[59] Mr. Jeffers testified that he paid some fees in cash in 2004. When asked on cross-examination to produce proof of such payments, he produced photocopies of two cheques, one

for $600 dated December 31, 2003 and one for $1,100 dated May 14, 2004. I find that the cheque dated December 31, 2003 was deposited by the Condo Corporation on January 24, 2004, and that the payment was accounted for as referable to arrears of 2003 common expense fees. I find that the cheque for $1,100 dated May 14, 2004 was deposited by the Condo Corporation on June 1, 2004, and that it was accounted for as referable to 2004 common expense fees.

[60] At $275 a month, the total common expense fees payable for 2004 was $3,300. The cable fee was $378.18. The plaintiffs have established that they paid $1,100 in 2004 for 2004 common expense fees. I am not satisfied on a balance of probabilities that the plaintiffs paid to the Condo Corporation any amount over and above that. The balance owing from 2004 at January 1, 2005 is therefore $2,578.18.

[61] The plaintiffs paid a total of $5,000 to the Condo Corporation in 2005 as follows:

January 10, 2005 cheque for $1,500

February 24, 2005 cheque for $1000

June 25, 2005 cheque for $1000

August 30, 2005 cheque for $1,500

[62] As $2,578.18 of the $5,000 was applied to pay off the outstanding fees from 2004, only $2,421,82 of it was available to be applied to 2005. In 2005, the monthly common expense fee was $300 per month and the year's cable fee was $378.34. By August 1, the sum of $2,400 had accrued for common expense fees. Accordingly, by the end of August, the plaintiffs were paid up to date for common expenses with $21.82 available to be applied to the cable fee.

[63] The plaintiffs did not, however, make any further common expense payments in 2005 and the common expense fees for September, October and November were unpaid at the date the lien was registered and a portion of the cable fee was still unpaid.

[64] The plaintiffs have pleaded that in March 2005 they paid $1,000 in cash to Ms. Spencer, the treasurer, toward common expense fees. Had this event taken place, the payment by cheque in August 2005 would have represented a pre-payment of fees for several months and there would have been no arrears at the date of the lien.

[65] The plaintiffs have not proved on a balance of probabilities that they made a cash payment in March 2005 that the Condo Corporation has not accounted for. The documentary evidence indicates that the plaintiffs paid $5,000 in the year 2005. Mrs. Jeffers testified that the plaintiffs paid $5,000 in 2005. Mrs. Jeffers' own evidence is therefore inconsistent with the existence of an additional $1,000 payment in 2005.

[66] I find that the plaintiffs have not proved the existence of a cash payment on account of common expense fees in March 2005. Mrs. Jeffers acknowledged that she was not present when the alleged cash payment was made. Mr. Jeffers gave no evidence that he made a cash payment

in March 2005 for common expense fees. The only evidence on the subject was that of Ms. Diane Byard, a neighbour and friend of the plaintiffs, who testified that from her kitchen, she saw Mr. Jeffers pass cash to Ms. Spencer at Ms. Spencer's front door. There is no evidence of the date, the amount of money, the purpose, or of the physical proximity between her vantage point and Ms. Spencer's door. I find her evidence to be of no assistance to the plaintiffs' contention.

[67] The evidence of Ms. Winnifred Spencer, the treasurer of the Condo Corporation at the relevant time, was that the Condo Corporation did not accept payment in cash and that she did not receive cash from the plaintiffs. I accept her evidence that from the time she assumed the duties of collecting condo fees in 1996, no cash was accepted because of the risk that having cash in the home posed to her and to her family. That the Condo Corporation did not accept cash payments was corroborated by the deposit books.

[68] Ms. Spencer testified that the plaintiffs were chronically in arrears in payment of common expense fees and that she did not receive cash from them for common expense fees. Where her evidence conflicts with that of the plaintiffs, I prefer her evidence and accept it as it accords with the independent evidence whereas the evidence of the plaintiffs does not.

[69] I found the plaintiffs’ evidence logically implausible and not credible. The plaintiffs also made categorical statements that were patently false. For example, Mrs. Jeffers was adamant that the Condo Corporation had wrongfully registered a lien for $2,588. She testified categorically that she had seen it in "government papers". There is no evidence of such a lien. I find that Mrs. Jeffers has confused the amount of the lien ($967) with the amount requested from the Bank by the Condo Corporation to discharge it.

[70] Another example is the plaintiffs' insistence that they paid all their taxes. There is not only no evidence to support this but the tax records of the city demonstrate the contrary.

[71] The plaintiffs repeatedly attributed the absence of evidence to support their case to a break-in at their home in 2008 and/or to multiple break-ins. They also alleged falsification of documents by defendants and a conspiracy to harm them. The latter allegations were without substance. They resisted answering questions on cross-examination. They were unwilling or unable to focus on the issues and attempted to deflect attention to irrelevant matters such as their complaints to city officials, the criminal mischief charge against Mr. Jeffers and an earlier court proceeding brought against them by the Condo Corporation which resulted, among other things, in a costs order against them.

[72] I find that the plaintiffs have not met the onus of proof of showing that the notice of lien was false. There is no need to deal with the other elements of the cause of action. I find that the claim for damages for slander of title fails.

[73] The plaintiffs' claim for damages for property damage is pleaded at paragraph 33 which states:

> On or about December 29, 2005, the Plaintiffs corresponded with counsel for YCC 98 regarding damage suffered to their unit as a result of sewage being leaked or pumped into the Premises by the Defendant YCC 98's agents. To the best of Plaintiffs' knowledge, YCC 98 commissioned the work to be performed and was ultimately responsible for the damages suffered by the Plaintiffs. The letter requested that YCC 98 remedy the offending damage including the odour caused by the leak. No positive response was received from YCC 98.

[74] There is no evidence that the Condo Corporation or its agents pumped sewage into the plaintiffs' premises at any time. There is no evidence of property damage being occasioned by sewage backing up into the plaintiffs' premises.

[75] The plaintiffs testified of sewage odour in their basement in December of 2005. They also testified of sewage backing up into their premises requiring clean-up. Ms. Byard testified, with prompting from Mrs. Jeffers who led her evidence, that she (Ms. Byard) helped the Jeffers do clean-up. There is no evidence that this was other than a unique event, and there is no evidence of property damage.

[76] The drain was located in the plaintiffs' basement and was under their control. The only reliable evidence of the plaintiffs bringing to the attention of the Condo Corporation a problem with the drain is the photocopy of a maintenance request at tab 19 of Exhibit 16. This document is a maintenance work order filled out by Mr. Jeffers dated December 18, 2005. In it, Mr. Jeffers indicates "toilet vent plog". The balance of the document is largely illegible.

[77] Mr. Tyndale Martin, a director of the Condo Corporation, testified that he responded to the maintenance request the same day by calling a contractor and attending with the contractor at the plaintiffs' premises to investigate the problem. He testified that there was no sewage back-up but that there was an odour of visible dog excrement in the basement. He testified that the contractor performed a test to ascertain whether the drain was clear and that the test showed that it was clear.

[78] There is no evidence that there was an ongoing drain problem brought to the attention of the Condo Corporation and neglected by it. While it is possible that at some point in time, the plaintiffs had a back up of the drain in their basement which resulted in bad odour and a need to clean, there is no evidence of property damage. There are no invoices or receipts for repairs.

[79] In the absence of negligence or breach of the Condo Corporation's statutory duty to maintain the common elements resulting in damage, the Condo Corporation is not responsible for damage to an owner's property. There is no strict liability on the Condo Corporation and it is not an insurer.

[80] The plaintiffs gave testimony concerning water damage that occurred in 2008 following torrential rain. That damage occurred after the statement of claim was issued and was not pleaded. There appears to have been insurance involvement in respect of that loss.

[81] With respect to the allegation that condensation from a water pipe was causing water damage to the plaintiffs' property, the matter is not pleaded and strictly speaking, may not be proved. Notwithstanding that, I received evidence that the plaintiffs complained to the Condo Corporation which sent in a contractor to investigate. Shortly thereafter, the plaintiffs, through a letter from their solicitors, prohibited the Condo Corporation from further sending in contractors and the prohibition was not withdrawn until many months had elapsed. To the extent that any property damage was caused between the date of the plaintiffs' prohibiting the Condo Corporation from sending in contractors to investigate and rectify the pipe and the withdrawal of the prohibition, the plaintiffs are the authors of that damage. There is no evidence of property damage in any case.

[82] For the foregoing reasons, the claim in relation to alleged damage to property fails.

[83] The action as against the Condo Corporation is dismissed.

<u>Costs.</u>

[84] This action was brought under the simplified rules. It would have been in the plaintiffs' interest to settle at an early stage to avoid running up costs. Regrettably there was no settlement and, because of the plaintiffs' changes of solicitors and unreadiness to proceed when scheduled, each successive court attendance has caused increased legal costs to the defendants. There was a mediation and two pre-trials, the second of which occupied 6 hours.

[85] The trial was scheduled to take 4 days and occupied 4-½ days. The plaintiffs repeatedly attempted to divert the trial to irrelevant matters. Their unsubstantiated allegations of fraudulent and oppressive conduct against counsel for the defendants were met with composure and restraint.

[86] That said, I am not persuaded that this is a case for substantial indemnity costs. The plaintiffs appear genuinely, although mistakenly, to believe that they have been treated oppressively. On the evidence before the court however, it is apparent that the plaintiffs have been the authors of their own misfortunes through their failure to appreciate the consequences of and to take responsibility for their actions and inactions, their failure to appreciate that their litigation conduct was increasing the costs which might be awarded against them, and their apparent unwillingness to take legal advice.

[87] The issues in the action were not complex and were almost entirely factual and evidentiary. The law was straightforward. The amounts at stake were modest.

[88] The Bank seeks costs of $41,000.

[89] The Condo Corporation seeks substantial indemnity costs of $38,000.

[90] Counsel for the Condo Corporation argues that because this condominium has a small number of units, some members of which are of modest means, a costs award that requires the unit members to bear any significant portion of the costs may have a significant negative impact

on the members. I am not persuaded, however, that the impact on the condominium unit owners is a sufficient legal basis for an award of costs on a substantial indemnity basis.

[91] I therefore fix the costs on a partial indemnity basis in favour of the Condo Corporation at $20,000 and in favour of the Bank at $20,000.

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Low J.

Date: January 19, 2010

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Plaintiffs

– and –

YORK CONDOMINIUM CORPORATION NO. 98 AND TD MORTGAGE CORPORATION

Defendants

REASONS FOR JUDGMENT

Low J.

Released: January 19, 2010