

Case Name:

Peel Condominium Corp. No. 452 v. Jaworowski

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

[2010] O.J. No. 2882

2010 ONSC 3850

Court File No. CV-08-704-00

Ontario Superior Court of Justice

T.A. Bielby J.

July 8, 2010.

(28 paras.)

Counsel:

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

P. Wojtis, for the Defendant.

ENDORSEMENT

1 T.A. BIELBY J.:-- The plaintiff seeks summary judgment on its claim for possession, with respect to condominium unit 04, level 2, for Peel Condominium Plan No. 452. The plaintiff also seeks leave to issue a writ of possession.

2 The unit in issue is owned by the defendant. The municipal address of the unit is Suite 204, 335 Webb Drive, Mississauga, Ontario.

3 Between December 2006 and December 2007, the defendant fell into arrears with respect to his share of the common expenses. As a result, the plaintiff filed a lien against the unit.

4 This action prompted the defendant to bring an action in Small Claims Court claiming the "wrongful collection of condo fees and the reimbursement of legal fees, extra costs incurred and to establish the true balance of common element fees."

5 The matter proceeded before Deputy Judge Klein on December 18, 2007. In his written judgment the deputy judge noted that the plaintiff claimed arrears of \$5,880.00 interest in an unknown amount, and legal fees of \$3,520.00. The defendant maintained he owed only \$5,880.00 (nothing for interest and legal costs) but acknowledged when the lien was registered in January 2007 he was in arrears and that the lien was valid.

6 The Small Claims Court action brought by the defendant was dismissed and the plaintiff was awarded costs of \$500.00. The deputy judge noted that the defendants (plaintiff in this action) actual costs exceeded that amount but felt that \$500.00 was the maximum he could order.

7 The plaintiff indicated that at the time it commenced its action the arrears had risen to \$6,532.37 as the defendant missed 2 payments in 2008 (January & September). That evidence was not challenged and I found that amount \$6,532.37 to be the arrears of June 17, 2010, the date of the motion.

8 In the last week or so the defendant has paid the original arrears amount of \$5,880.00 and has paid the \$500.00 in costs. No payment was made on account of interest.

9 Section 85 of the *Condominium Act, 1998*, S.O. 1998, c. 19 is the vehicle by which a lien for arrears is authorized. It allows the lien not only for arrears, but interest on the arrears and reasonable legal costs incurred in the collection or attempted collection of the debt.

10 It should also be noted that the plaintiff commenced a Notice of Sale Proceedings in May 2007. As a result, and since the unit is occupied by the plaintiff, he brought this action for possession.

11 The lien is given priority even over prior registered mortgages (s. 86(1)). The sale process is governed by the *Mortgages Act*, R.S.O. 1990, c. M.40.

12 Interest is claimed at the rate of 18% per annum, as authorized in the condominium by-laws. The plaintiff submits that the interest owing to the date of payment is \$4,413.19. The number was not challenged by the defendant. I also note there is a small portion of the arrears that remain outstanding, being the difference between \$5,880.00 and \$6,532.37, and there is another interest calculation to be made.

13 I find that at least \$4,413.19, on the original amount of \$5,880.00 is owing, with respect to interest.

14 The real issue before me relates to costs. As indicated, reasonable costs are recoverable.

15 The plaintiff was required to defend the defendant's Small Claims Court action. That action related to the issues of the arrears. I find that the defence of the Small Claims Court actions was part of the collection process. Accordingly, the reasonable expenses incurred in the Small Claims Court action are recoverable, over and above the \$500.00 costs award.

16 Before Deputy Judge Klein, the plaintiff advised the court that the total debt owed by the defendant included \$3,520.00 in legal fees.

17 Less than one month later, by letter dated January 9, 2008, from the plaintiff's counsel to the defendant, the total amount owing by the defendant was fixed at \$30,715.86. This amount included costs of \$23,587.51.

18 At this point in time, the plaintiff alleges the reasonable legal costs have risen to over \$60,000.00. Given the size of the claim, this amount is disproportionate to the money in issue and the legal steps taken.

19 Two authorities have been brought to my attention. The first is *York Condominium Corporation 482 v. Christian-sen*, 2003 CarswellOnt 6533. The learned judge concluded that common expenses "are the lifeblood of the condominium" and the failure by one to pay his share of the expenses cause suffering to the other owners. (para 16)

20 The other authority is *Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc.*, 2005 CarswellOnt 1576, a decision of the Ontario Court of Appeal. The Court stated that the philosophy of the *Condominium Act* was to shift the financial burden to the wrongdoer and away from the innocent owner. The Court also ruled, at paragraph 45, that the reasonable costs to be recovered, are between a solicitor and his client and are not limited to costs awarded in any litigation.

21 While the *Skyline* decision considered s. 134 and while s. 134 references the collection of "additional actual costs" as opposed to "reasonable costs", I think the philosophy is the same, to shift the financial burden to the wrongdoer.

22 The Notice of Sale remains outstanding. If the plaintiff were to accept an offer to purchase, it would be bound to complete the deal. In these circumstances a judgment for possession would likely issue even if there is a dispute as to what is owed.

23 In considering a motion for summary judgment, I am to determine if there is a triable issue. There is an issue as to what are the "reasonable costs". Notwithstanding this issue however, the defendant continues in arrears with respect to common expense charges in the amount of \$652.37 interest and of some amount of costs.

24 Until the property is sold, the defendant still has an opportunity to correct the default and maintain possession. He cannot do so until the reasonable costs have been determined either on consent or by the Court.

25 I do note that it is the plaintiff's position that the defendant's motive throughout has been delay and that the defendant has shown no ability to pay up the arrears.

26 Counsel for the defendant submits that his client's recent payment reflects an ability to pay.

27 Given these facts I will not grant an order for possession at this time, and will adjourn the matter, as discussed, as to which counsel took no real issue with, to provide time to deal with the costs issue. However I will, as a condition of the adjournment, require the defendant to pay an amount which he is reasonably liable for.

28 I order the following:

1. The defendant shall pay, within 30 days of the release of this endorsement, to the plaintiff, the sum of \$4,413.18, being the majority of the outstanding interest.
2. The defendant shall, within the 30 day period, pay to the plaintiff, the sum of \$10,000.00, representing a contribution to costs.
3. The defendant shall pay, within the 30 day period, the sum of \$652.37 being the balance of the common element arrears;
4. The order as to costs is without prejudice to either party to argue the quantum issue;
5. This motion is adjourned to a date to be arranged between my office and both counsel to argue the issue of what are "reasonable costs"; and
6. The costs of today are reserved to the next return date.

T.A. BIELBY J.

cp/e/qllxr/qlmxj

