

Citation: Goodman v. Fitzpatrick
2011 BCPC 0076

Date: 20110404
File No: 1031089
Registry: Vancouver

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

BETWEEN:

GILLIAN GOODMAN

CLAIMANT

AND:

STEPHEN FITZPATRICK

DEFENDANT

**REASONS FOR JUDGMENT
OF
HER WORSHIP M. PRATCHETT**

Appearing on their own behalf:

Gillian Goodman

Appearing on their own behalf:

Stephen Fitzpatrick

Place of Hearing:

Vancouver, B.C.

Date of Hearing:

January 12, 2011

Date of Judgment:

April 4, 2011

[1] The Claimant brings this action for payment of \$3307.20. The sum of \$5000 was placed into trust. According to the Claimant from the said trust funds, the Defendant was entitled to receive \$1692.80 and the balance of \$3307.20 was to be returned to her.

[2] The Defendant claims that he was entitled to \$3744.04 from the said trust fund and that the only amount to which the Claimant is entitled is \$1255.96.

[3] The Claimant was the owner of one of eleven strata units in a strata complex in West Vancouver. In the summer of 2009 the Claimant had her strata unit for sale. On July 28, 2009 a strata meeting was held in which the strata council discussed the need for certain roof and gutter repairs. The minutes disclose that the strata council had received quotations for this work but they were not satisfied with the limited number of quotations received and were going to seek further quotations. The Claimant knew of the quotations as she had assisted in obtaining them for the strata council. The minutes also indicated that a further meeting would be held in August 2009, to consider next steps in relation to these repairs.

[4] On July 29, 2009 the Claimant received an offer to purchase her strata unit from the Defendant. Both parties had engaged the same real estate agent to represent them and had signed a dual agency agreement. The Defendant had been a licensed real estate broker, but did not have a license at the time of this transaction. The initial offer was made subject to the Defendant receiving and being satisfied with among other things, the minutes of strata meetings and the offer had a completion date of September 1, 2009. The Defendant's initial offer also contained the following language:

If a special levy is approved or proposed before the completion date, the seller shall credit the buyer with the entire portion of the special levy that the buyer is obligated to pay under the strata property act and the seller hereby directs the buyer to holdback such credit from the sale proceeds and to remit it to the strata corporation.

[5] The Claimant testified that she advised the real estate agent of the discussions underway in relation to roof and gutter repairs, that she advised the real estate agent of her view that the work was unlikely to be approved and underway before the fall of 2009, and further that although some portion of the work would be paid for from the Strata's Contingency Reserve Fund, it was likely that there would be an assessment or levy for some portion of the costs of this work against the individual strata owners. I accept this evidence.

[6] On August 6, 2009 a further contractual document was signed by the parties. This document removes the Defendant's subjects. The Defendant stated that he did not know how this document came to be prepared. The Claimant stated that it was prepared and presented by the real estate agent acting in his capacity as agent for the Defendant. This is objectively logical as it is the contractual continuation removing the Defendant's subjects. This document contains the following language:

The buyer and seller agree that \$5000 will be held back from the proceeds of the sale in the buyers lawyers trust account until all costs of current building issues (not limited to buy including roof replacement, gutter replacement, crack/leak repairs etc) have been repaired. Should the cost of the repairs be less that the \$5000 the balance will be released to the seller. The buyers lawyer may release these funds to the strata without further notice to the seller to pay these fees for repairs. Accounting of all funds released will be provided to the seller. If prior to completion, the estimated assessment is higher than \$5000 then the higher amount will be held in trust.

[7] The open-ended reference to "current building issues" was according to the Claimant, clarified to mean those issues that had been identified in the minutes.

[8] The Claimant says that her intention and understanding when she signed this further contractual document was that the Defendant was to have security for any assessment or special levy that he might be required to pay for these issues even after the date of closing, she having advised the real estate agent of the likelihood of this assessment arising after the date of closing.

[9] The Defendant has no recollection of his intention at the time or how this came to be generated. He wishes only to enforce the provision in accordance with what he considers to be its plain and proper interpretation.

[10] The issue between the parties then comes to this. In October 2009 at a strata meeting, the owners of the strata passed a resolution approving an assessment or special levy against the individual owners, based on their unit entitlements, to pay for the repairs to the roof and gutters. The assessment or levy against the Defendant was \$1692.80. This assessment was determined by allocating an amount from the Strata's Contingency Reserve Fund to pay for a portion of the cost of repairs and then assessing the balance against the owners as a special levy.

[11] The Defendant's position is that the Claimant is obligated to pay to him, not only the amount of the special levy that he was required to pay, but additionally, a proportionate amount of the money deducted from the Strata's Contingency Reserve Fund. He determines the amount that he alleges is to be paid to him by the Plaintiff by taking the entire cost of repairs, with no offset for amounts paid from the Contingency Reserve Fund, and dividing that entire cost by the unit entitlement. When asked if he was suggesting that the Claimant was obligated to replenish the Contingency Reserve Fund, he stated that this was not his position; his position is that, on a plain-language reading of the contractual provision, he is entitled to the "cost of repair" divided by unit entitlement. He also stated that in his opinion, when he purchased the unit, his purchase included a proportionate entitlement in the Contingency Reserve Funds.

[12] I do not accept the Defendant's proposed interpretation of the contractual arrangement between the parties.

[13] The provision contained in the document dated August 6, 2009 must be read together with the original offer of purchase and sale and in a way that is objectively supported by the facts. It was a provision that was generated when it became known by the real estate agent that a levy or assessment was likely to be made or proposed after the date of the closing. This fact would have meant that, under the terms of the original offer, the buyer and not the seller, would have been obligated to pay the levy and there would be no right of holdback at closing. With knowledge of the likelihood of an assessment, the August 6, 2009 document effectively amends the original offer to protect the buyer from any special levy associated with the roof and gutters, even when that assessment or levy is post closing. To do so, the amendment required security for that levy to be maintained. The reference in this section to "cost of repairs" should be interpreted to mean costs of repairs required to be paid by the Defendant buyer as determined by a special levy or assessment. The first sentence of this provision speaks to the length of time that the holdback will be maintained, which is until the repairs are complete. The second sentence states "Should the cost of the repairs be less than the \$5000....." At the date of this amendment, it was already known by the Claimant, by the real estate agent for both parties that the costs of roof repairs and gutters could, according to the Claimant exceed \$75,000. No one would suggest that roof and gutter repairs for less than \$5000 were under discussion. What was not known was what portion of the total costs that the Strata would incur, would have to be borne by the individual owners through an assessment or levy. The holdback contemplated by this provision was intended to secure the costs of repairs to be borne by the Defendant by assessment or levy. That fact is supported by the reference in the last sentence of this provision to the estimated 'assessment' and by the reference in this provision to 'these fees for repair'.

[14] Notwithstanding that a Contingency Reserve Fund is made up from monies paid by the unit owners (in this case including the Claimant), section 12(5) of the *Strata Property Act* states unequivocally that the Contingency Reserve Fund belongs to the strata corporation, not the individual unit owners. This fact is underscored by the fact that under the *Strata Property Act* an owner is not entitled to any return of funds contributed to the Contingency Reserve Fund. Pursuant to s. 91 of the *Strata Property Act*, the strata corporation is responsible for the common expenses of the strata corporation. To meet these expenses, s. 92 of the *Act* mandates that the strata corporation establish and maintain an operating fund and a Contingency Reserve Fund. The latter is reserved for expenses that occur less often than once a year. When an expense meets this purpose, the strata corporation can pay for the expenditure out of the Contingency Reserve Funds provided it obtains an approval of a ¾ vote at an annual or special general

meeting. If the amount in the Contingency Reserve Funds is insufficient to meet the expense, or the decision is made not to use monies in the Contingency Reserve Funds, the strata corporation can raise additional revenue by means of a special levy paid for by the strata owners. Barring some other method of contribution agreed upon, a strata owner will contribute to the levy by unit entitlement.

[15] The contractual arrangement for the purchase and sale of the unit did not entitle the Defendant to be paid amounts that were paid by the Strata Corporation towards the roof repairs from the Contingency Reserve Fund.

[16] The Claimant is entitled to judgment against the Defendant in the amount of \$3307.20 plus costs in the amount of \$186.00

[17] The Defendant's counterclaim is dismissed.

M. Pratchett
Adjudicator