Case Name:

Pearson (Litigation guardian of) v. Carleton Condominium Corp. No. 178

Between
Lois Pearson (by her litigation guardian Cecily Mary Pearson), Applicant, and
Carleton Condominium Corporation No. 178, Respondent

[2012] O.J. No. 2615

2012 ONSC 3300

Court File No. 12-53366

Ontario Superior Court of Justice
Ottawa, Ontario

R.J. Smith J.

Heard: April 5, 2012.
Judgment: June 4, 2012.

(29 paras.)

Counsel:
James O. Katz, for the Applicant.
Nancy L. Houle, for the Respondent.

REASONS FOR DECISION

1 R.J. SMITH J.:-- The applicant, Lois Pearson ("Pearson"), owns Unit 11, Level 1, Carleton Condominium Plan No. 178 (the "Unit"), which forms part of

Carleton Condominium Corporation No. 178 (the "Corporation").

2 The Corporation has registered a Certificate of Lien for the amount of $6,501.95 against the applicant's Unit. The lien is claimed for legal costs incurred in obtaining legal advice related to three Small Claims Court actions commenced by Pearson against the Corporation. The Small Claims Court actions were all dismissed without costs being awarded to the Corporation. The Corporation claims that its costs for obtaining legal advice are common expenses for which a lien may be registered against Pearson's unit.

3 The applicant argues that the Corporation cannot reasonably interpret either the *Condominium Act*, *1998*, S.O. 1998, c. C-19 (the "Act") or the Declaration to allow it to recover, as common expenses, the costs of obtaining legal advice on defending the Actions commenced by a unit holder to enforce provisions of the *Act* and landscaping bylaw.

4 The applicant further submits that legal costs were not awarded to the Corporation in the legal proceeding, and as a result, the Corporation cannot recover legal costs by registering a lien on Pearson's Unit.

5 The Corporation disagrees and submits that there has been a history of unreasonable behaviour by the applicant, followed by four Small Claims Court actions (the "Actions") and related motions. In three of the Actions, the Deputy Judge held that the Small Claims Court did not have jurisdiction to grant the relief requested and stated that the plaintiff was "free to appeal this ruling if an appeal is available, transfer this proceeding to the Superior Court if available, or abandon this proceeding and issue a claim in the Superior Court". The Deputy Judge also stated that "costs are left to the Appeal Court or the Superior Court as the case may be." The applicant did not appeal or move to transfer the action to the Superior Court as a result no costs order has been made in favour of the Corporation in any of the Actions.

6 The Corporation was self-represented in the Small Claims Court Actions and motions but did incur legal costs in obtaining advice from its legal counsel at various stages throughout the proceedings.

7 The Corporation submits that Article XXIII of the Declaration permits it to recover all legal costs incurred related to the Actions, by adding these costs to the common expenses of Pearson's Unit and by registering a lien against her Unit pursuant to s. 85 of the *Condominium Act, 1998*.

Issue - Does Article XXIII of the Declaration permit the Corporation to recover, as common expenses, its legal costs incurred for advice related to defending against the Applicant's Small Claims Court Actions?

Analysis

8 Pearson had commenced her Actions in the Small Claims Court to enforce compliance by the Corporation with regards to landscaping and financial disclosure in accordance with the *Condominium Act, 1998*, the Declaration and bylaws. The Actions were all dismissed but no costs were ordered in favour of the Corporation.

9 On November 3, 2011, the Corporation registered a Certificate of Lien on title to Pearson's Unit for unpaid common expenses in the amount of $6,501.95, which were for legal costs incurred by the Corporation in obtaining legal advice with regards to defending the Actions commenced by Pearson.

10 The Corporation initially relied on Articles XIX and XXIII of its Declaration but in oral submissions, only relied on Article XXIII. Articles XIX and XXIII read as follows:

> Article XIX
>
> Each residential owner shall indemnify the Corporation against any loss, cost, damages or injury to the common elements caused by or resulting from any act or omission of such residential owner or the residents of his unit, or by any guest or tenant of such owner or resident, except to the extent that such loss, costs, damages or injury is covered by insurance purchased by the Corporation.
>
> Article XXIII
>
> All costs, charges and expenses and all solicitors' charges (as between a solicitor and his client) which may be incurred by the Corporation in taking any action, including summary proceedings, against an owner shall immediately become due and payable by such owner and may be added to and recovered in the same manner as recovery in the case of an owners default in his obligations to contribute towards the common expenses of the Corporation. [Emphasis added.]

11 I find that Article XIX is not applicable to the present case as there has been no loss, or damage or injury to the common elements caused by any act or omission of Ms. Pearson. In addition, this provision does not give the Corporation the express right to add any such amounts to a unit holder's common expenses and to collect the amount by registering a lien. Therefore I find that Article XIX does not give the Corporation authority to place a lien on the title to the Unit for obtaining legal advice related to Pearson's enforcement Actions

12 In *Niedermeier v. York Condominium Corp. No. 50*, [2006] O.J. No. 4135 (S.C.J.), Shaw J. held that where a corporation relies on its declaration to establish its indemnification rights, the Court's approach has been to interpret the scope of its provisions strictly and expressly by its wording, taking into account the individual circumstances of each case.

13 In *Metropolitan Toronto Condominium Corp. No. 699 v. 1177 Yonge Street Inc.*, (1998), 39 O.R. (3d) 473 (C.A.), at para. 7, the Ontario Court of Appeal held

that, in interpreting a condominium corporation's declaration, the words must be given their plain and ordinary meaning, and not an expanded meaning. The Court went on to say that "[a] declaration, made pursuant to the Act, governing as it does important aspects of the continuing operation of a condominium, should be read as reasonably well-informed unit holders would read it and not in a technical or specialized sense."

14 Article XXIII of the Declaration sets out the circumstances where the Corporation has a right to full indemnity for all legal expenses incurred. The Article states that "all costs, charges and expenses and all solicitors' charges (as between a solicitor and his client) which may be incurred by the Corporation in taking any action, including summary proceedings, against an owner, shall immediately become due and payable by such owner and may be added to and recovered in the same manner as recovery in the case of an owner's default in his obligations to contribute towards the common expenses of the Corporation." [Emphasis added.]

15 The Corporation submits that it can interpret its own Declaration and the court should not interfere with its interpretation as long as it is not unreasonable. The Corporation relies on the case of *London Condominium Corporation No. 13 v. Awaraji*, 2007 ONCA 154, para. 6. In that case, the Court of Appeal dealt with the issue of whether the wording of the Declaration prohibited the installation of satellite dishes on the condominium corporation units. The Declaration contained a restriction on the occupation and use of the units under para. 7.(1)(h) which read as follows:

> ...
>
> (h) No television antennae, aerial, tower similar structure and appurtenances thereto shall be erected on or fastened to any units, *except for or in connection with a common television cable system.* [Emphasis added.]

16 The facts in the case before me do not deal with a restriction of use provision in the Declaration or with an issue of whether a satellite dish could be installed on a unit when it was prohibited by the Declaration. The Corporation submits that it can reasonably interpret Article XXIII to apply to cases where the corporation decides to obtain legal advice to assist it in defending a claim made against it by a unit owner for enforcement of the provision of the *Act* and bylaws. The Corporation argues that it took action by seeking legal advice about how to defend itself against the legal Actions commenced in the Small Claims Court for enforcement by Ms. Pearson.

17 Section XXIII of the Declaration deals with all costs charges and solicitors charges and refers to costs as between a solicitor and his client scale. The context of the Article relates to recovery of costs for legal proceedings taken against an owner by the Corporation. To interpret the meaning of the phrase "in taking any

action", the whole sentence must be read in context. The relevant parts are "all solicitors' charges (as between a Solicitor and his client) which may be incurred by the Corporation in taking any action, including summary proceedings, against an owner shall immediately become due and payable..." The inclusion of the words "summary proceedings" imply that the action contemplated to be taken by the Corporation is a legal action.

18 The principle underlying this provision in the Declaration is that the remaining condominium unit holders should not have to pay for the Corporation's legal expenses, where a unit holder has failed to comply with his or her obligations and the Corporation is required to take legal action and incur legal expenses to enforce compliance. Under those circumstances, the Article states that such costs may be added to and recovered in the same manner as a default in obligations to contribute towards the common expenses of the Corporation. However, in the circumstances before me, the Corporation didn't take action to enforce compliance with the *Act*, Declaration or bylaws, but rather Ms. Pearson took action against the Corporation. Further, no order for costs was obtained by the Corporation.

19 On a plain reading of Article XXIII, it does not provide for indemnification against all legal expenses incurred by the Corporation in relation to any unit holder. Further, Article XXIII does not state that if the Corporation is a defendant in legal proceedings, it may simply claim full indemnification for its legal costs incurred in defending (as between a solicitor and his client), whether costs are awarded or not and whether or not the Corporation was successful. The interpretation urged by the Corporation would allow it to recover its full legal costs of defending an action commenced by a Unit holder by way of lien, even if the Unit holder was successful in its Action. This interpretation is not consistent with the plain and ordinary meaning of the words used or with commercial reasonableness.

20 Subsections (1) and (5) of s. 134 of the *Condominium Act*, *1998* deal with adding the legal costs of the Corporation incurred in ensuring compliance with the *Act*, Declaration or bylaws of a condominium corporation and reads as follows:

> Compliance order
>
> 134. (1) Subject to subsection (2), an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of a leasehold condominium corporation or a mortgagee of a unit may make an application to the Superior Court of Justice for an order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules or an agreement between two or more corporations for the mutual use, provision or maintenance or the cost-sharing of facilities or services of any of the parties to the agreement. [Emphasis added.]

...

Addition to common expenses

(5) If a corporation obtains an award of damages or costs in an order made against an owner or occupier of a unit, the damages or costs, together with any additional actual costs to the corporation in obtaining the order, shall be added to the common expenses for the unit and the corporation may specify a time for payment by the owner of the unit. [Emphasis added.]

21 Ms. Pearson's Actions were legal proceedings commenced by an owner against the Corporation to enforce compliance with the *Act,* Declaration or bylaws. The Corporation did not commence a proceeding to enforce compliance but Ms. Pearson, as a unit holder, did seek enforcement as contemplated by s. 134 of the *Condominium Act, 1998,* however not before the Superior Court. Ms. Pearson sought to enforce financial disclosure provisions under the *Act* and landscaping under the bylaw.

22 If the Corporation had obtained an award of costs in the Actions commenced by Pearson to enforce her rights under the Declaration, then the Corporation could recover the costs awarded plus additional costs it incurred and they could be added to the common expenses pursuant to s. 134(5) of the *Act*. However, the Corporation did not recover any award of costs and so is unable to rely on this section. If a unit owner commences frivolous actions against a corporation, it should seek an award of costs and possibly damages, if any are incurred, from the Court.

23 The Corporation submits that Article XXIII allows it to recover any legal costs it incurs in defending any proceeding, including seeking general advice in terms of how to respond to a complaint or Action commenced by a unit holder. The Declaration must be interpreted by giving the words used their plain and ordinary meaning, and not an expanded meaning, and as a reasonably informed unit holder would read it. The Corporation is seeking to establish indemnification rights pursuant to the Declaration and therefore, in this situation, the words should be interpreted strictly.

24 The Corporation submits that I should not interfere with its interpretation that Article XXIII of the Declaration allows it to charge all legal costs incurred by it for general advice related to defending an action commenced by the unit holder, as common expenses. I find that this interpretation of Article XXIII is not reasonable as the plain and ordinary meaning of the words used in Article XXIII state that it applies where the corporation is taking legal action against a unit owner. The Corporation did not take legal action against the unit holder; rather, it was the unit holder who took action against the Corporation. While the Actions were dismissed, no order of costs was obtained in favour of the Corporation.

25 I find it would be reasonable to interpret Article XXIII of the Declaration to allow the condominium corporation to recover any costs, charges and legal expenses and all solicitors' charges where it takes action and is successful in its legal proceedings and obtains an award of costs as provided for in s. 134(5) of the *Act*. Legal costs in a proceeding are usually awarded on a partial indemnity scale. This provision would allow the Corporation to recover its costs on a solicitor and his client scale. However, if the Corporation was unsuccessful in its legal action or where the Corporation was ordered to pay costs to a unit holder, then I find it would be an unreasonable interpretation to allow a Corporation to be fully indemnified for its legal costs in those circumstances.

26 In *Jeffers v. York Condominium Corp. No. 98*, 2010 ONSC 1878, (S.C.J.), a similar conclusion was reached where the Court held that unless a condominium declaration expressly provides otherwise, the condominium corporation can only be fully indemnified for "actual legal expenses" where it has brought a successful application for a compliance order under s. 134(5) of the *Condominium Act, 1998*. I agree with the interpretation and find that it would also apply if the unit holder brought an unsuccessful action to enforce compliance with the *Act*, Declaration or bylaws and an award of costs was obtained by the Corporation.

Disposition

27 Therefore, I grant a Declaration that the Certificate of Lien registered as instrument number OC 1302189 on title to Ms. Pearson's Unit is invalid and order that the lien be discharged from title to her Unit.

Costs

28 The applicant seeks costs of $9,361.67 and the Corporation seeks $8,790.12 if it was successful. The applicant was successful on her application and the issue was of general importance to condominium owners, the Condominium Corporation, and to the parties.

29 I have considered the time spent, and the hourly rate charged by the parties. Both parties sought similar amounts of costs and therefore they don't disagree on the amount the unsuccessful party would reasonably expect to pay. Considering the above factors and the fact that the applicant's Actions were all dismissed, and that no cost award was made, the respondent Corporation is ordered to pay costs in the amount of $5,000.00 plus HST, plus disbursements inclusive of HST in the amount of $465.18.

R.J. SMITH J.

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