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CASE LAW UPDATE, APRIL 2007

Lien for Repair Costs Invalidated Where Corporation's Requirements Are Shown to be the Underlying Cause of Damage

February 23, 2007: *Judy Zafir v. York Region Condominium Corporation No. 623,* (Ontario Superior Court of Justice, Court File No. 05-CV-299685), Conway J.

FACTS

The condominium board posted notices in the condominium building instructing unit owners to turn off the water shut-off valve (EMCO valve) in the unit before extended absences. Prior to leaving on vacation, the unit owner and her husband complied with this request. No problems were apparent at the time, but while they were away the pipe on which the shut-off was mounted leaked causing damage to the unit below.

The condominium corporation's By-law No. 10 provided that the provisions of section 105(2) of the *Condominium Act, 1998* (the "Act") – which requires unit owners to pay (as common expenses) for repairs after damage to their own unit caused by the act or omission of the owner or another person residing in the owner's unit with permission of the owner, up to the deductible amount under the condominium corporation's policy of insurance – would be extended such that the owner would also be responsible to pay where the owner's act or omission resulted in damage to the common elements or another unit. By-law No. 1 of the corporation also required the unit owners to indemnify the corporation where damage is caused by an act or omission of the owner, including the failure to properly maintain or repair the owner's unit.

When the condominium corporation assessed the plaintiff for the costs of repairs to the lower unit, she refused to pay. A lien was registered. The plaintiff brought this action to challenge the validity of the lien and claimed the corporation's conduct was oppressive.

JUDGMENT

The Court did not agree that the condominium corporation's conduct was oppressive, but ultimately decided in favour of the plaintiff unit owner, declaring the lien invalid and ordering the condominium corporation to discharge and not enforce it.

Much of the judgment focused on the question of whether the unit owner had made an "act or omission" that attracted responsibility for the repairs pursuant to section 105 of the Act and the condominium's by-laws.

The Court referred to the opinion it heard from the plumber for the condominium corporation. On the basis of such opinion, the Court determined that the cause of the leak was, in fact, the condominium corporation's instruction to turn off the shut-off valve. The plumber advised that EMCO valves are susceptible to leakage if opened or closed: the O-ring in the valve can become brittle and drip. The plumber indicated the risk of leakage is diminished if the valve remains untouched. The Court therefore concluded that since "the valve may not have required repair but for the [condominium corporation's] requirements[, it] would be inequitable to hold the plaintiff responsible" for the repair.

The plumber also provided the Court with information to determine that it would have been impractical for a unit owner to perform the kind of preventative maintenance which was necessary to avoid the leak in this case, since such maintenance would require coordination with the owners of approximately 10 units whose water would need to be turned off for the work to be done. As a result, the Court concluded that for such preventative maintenance to be done, the condominium corporation would have to be involved. The Court stated it would "have trouble" seeking to hold the unit owner responsible for failing to do work "that it could not possibly arrange on its own."

The plumber for the corporation and a plumber representing the unit owner disagreed as to whether the leakage could have been noticed if the plaintiff's husband had checked for this at the time he turned off the valve. However, the Court determined that even if this could have been done, the plaintiff's husband was not irresponsible for not doing so. The Court stated that if there was a risk of a leak, the defendant condominium corporation, in conjunction with requiring all owners to close the valves, should have taken steps such as alerting the owners of the risk, giving advice as to the procedures for checking this prior to leaving the unit and arranging regular preventative maintenance. Since the corporation failed to take such measures, the Court refused to find that the unit owners were responsible when they had only been following the board's instructions in the first place.

As a supplemental argument, the condominium corporation claimed that the owner delayed providing access to her unit, and therefore should be responsible on account of this "act or omission". However, the Court determined that it was unlikely that this delay significantly (if at all) increased the damage to the lower unit, and therefore was not a basis for imposing responsibility on the owner for the repairs.

Since the owner was ultimately found not to be at fault for the leak or resulting damage, the condominium corporation's lien was declared invalid.

The Court also considered whether the matter should first have been submitted to mediation and arbitration pursuant to the Act. The Court concluded that such processes were not required in this case (a) because the condominium corporation had never (prior to coming to court) suggested proceeding in that manner and (b) due to the fact that the condominium corporation had proceeded by way of lien instead.

APPLICATION

Although in essence the Court's judgment in this case is simple, the Court touched on a handful of different issues that are worth some consideration.

Responsibility, Foresight and Reasonable Requirements

A key point on which this case turns is that, although damage resulted directly from an act performed by a unit owner, since the act was one that the condominium corporation required the unit owner to perform, the owner was not held responsible. Indeed, the Court went to great lengths to explain how unreasonable it would be in the circumstances of this case to hold the unit owner responsible.

Could the condominium corporation have avoided this? The Court seems to indicate the answer should be "yes". The condominium corporation likely could have obtained a different result in this case if the board had done its homework in advance by obtaining professional advice and implementing rules incorporating reasonable requirements based on foresight.

For example, the Court itself suggests that the condominium corporation could have advised unit owners of the risk of leak on account of shutting off the valve, and instructed owners on how to check and the necessity of checking before leaving the unit. Such measures might have imposed a responsibility on the unit owner to do such checking so that leaks could be identified and rectified before property damage could arise.

Of course, that entails the board itself knowing of the risk. Presumably the board did not know. Perhaps the board was as surprised as anyone to hear the statements of the corporation's plumber which indicated that their own requirement to have the valves shut off was the thing which gave rise to the likelihood of a leak.

The lesson for condominium boards and managers here is: find out first!

While, at first blush, it seems utterly sensible to require that the shut-off valves be closed while owners are away, it is probable that if the board had taken time to investigate the issue with the assistance of a plumbing professional before imposing its requirements on the unit owners, they could have implemented the kind of procedures that the Court suggests.

Such suggestions included not only instructing owners about the risk of leakage and how to check for it, but also the setting up of a preventative maintenance process to avoid such leaks. It was especially important in this case that the condominium corporation take the lead in coordinating such maintenance since, as the Court observed, unit owners on their own could not do it.

Therefore, a second lesson here is that boards and managers must consider whether the expectations imposed unit owners are practical and reasonable. For example, it is not practical or reasonable to put the onus on owners for matters, like the one in this case, that can efficiently and effectively only be done by the corporation.

In summary, the general principles illustrated by these aspects of the case and the Courts judgment are to be informed, apply foresight and enact reasonably considered and practical rules, policies and procedures.

It could be said that such principles are simply part and parcel of exercising "*the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances*" (section 37(1)(b) of the Act).

Section 105 By-laws

Although it was unnecessary to reach the ultimate judgment that was made, the Court in this case deals somewhat with the question of the validity of certain by-laws purportedly made pursuant to section 105(3) of the Act.

Section 105(2) of the Act states:

> *If an owner, lessee of an owner or a person residing in the owner's unit with the permission or knowledge of the owner through an act or omission causes damage to the owner's unit, the amount that is the lessor of the cost of repairing the damage and the deductible limit of the insurance policy obtained by the corporation shall be added to the common expenses payable for the owner's unit.*

And section 105(3) then adds:

> *The corporation may pass a by-law to extend the circumstances in subsection (2) under which an amount shall be added to the common expenses payable for an owner's unit if the damage to the unit was not caused by an act or omission of the corporation or its directors, officers, agents or employees.*

In practice, when drafting by-laws pursuant to section 105(3), many condominium lawyers (including yours truly) actually go well beyond what the plain language of this section indicates.

On a plain reading of the section, a by-law made pursuant to section 105(3) should only provide that not only will the unit owner pay up to the deductible amount for damage *to the owner's own unit* that was caused by the owner's (or other resident's) own act or omission, but also for *any* damage that occurs to the owner's own unit provided the condominium corporation itself did not cause it.

However, such by-laws often also require unit owners to pay such amounts in respect of damage that the unit owner (or a resident of the owner's unit) causes to the common elements or to other units. It is highly questionable whether this is a valid application of section 105(3), somewhat questionable whether it is a valid extension of section 105(2), and also questionable whether such provisions could be considered valid without reference to section 105 at all.

The Court noted that there are differences of opinion as to the appropriateness or validity of such by-law provisions. To date, such opinion has been in legal commentary and not case law. The Court's comments in this case, since they are not central to the decision and form only part of the Court's own commentary, also do not determine the law of the matter, but they do take us a step closer to that determination someday being made.

In this case, the Court states, "*there is a good argument to be made that Section 105(3) is intended to enable a condominium corporation to establish a regime whereby owners can be held responsible for damages (up to the insurance deductible) to other units and common elements, even where the owner's unit has not been damaged*."

In the Court's view, such a reading of section 105(3) "*would promote fairness among the unit owners and address the unique and individual requirements of each condominium corporation*."

Such comments are likely very encouraging for those lawyers who draft such by-laws, and those condominium corporations that have, or hereafter will, enact them; but these comments should not be mistaken for law. They are merely one judge's commentary. The law has yet to be determined.

In my view, in most cases it will not be appropriate for a condominium corporation to rely on its extended version of a section 105(3) by-law in order to treat as common expenses and lien for the amounts that, under such by-law, are owed by an owner for damage to the common elements or a unit other than the owner's unit. It is not clear to me that the Act, strictly read, could support a lien in that context (indeed, it seems clear to me that, on strict reading, it does not). The Act, liberally read (as it is generally agreed it should be), might (as the judge in this case suggests), but until that is confirmed by judgment, a more cautious course of action is advisable.

Mediation, Arbitration and Liens

A few points also need to be made of the Court's very short comments on mediation and arbitration. This entire portion of the judgment reads as follows:

> *The defendant submitted that this action should be stayed and the plaintiff was required to exhaust the mediation and arbitration proceedings of the Act. There was no evidence that the defendant suggested proceeding in this fashion. Further, since the defendant was the one that initiated this by registering the Lien, I see no reason that the plaintiff needed to submit to mediation or arbitration – she was certainly within her rights to pursue this case through legal action.*

One thing to consider in respect of this is the message that a party should not wait until the hearing to complain that mediation/arbitration were not tried. If it is believed they are required, then they ought to be tried beforehand.

It is probable that the argument that the corporation's lawyer made in this regard would have had more positive impact on the court if he or she could also have shown that the corporation had, early on in the process, recommended (preferably in writing) such alternative methods of resolution as a means of attempting to settle the case and avoiding court costs.

Also interesting is the Court's suggestion that once lien proceedings have commenced, mediation and arbitration are no longer required. I am not convinced that this is correct.

On the one hand, the Court's view (which is not fully explained in the judgment) might be that this case was a dispute over the validity of a lien, which is not a subject matter in respect of which mediation and arbitration are mandatory pursuant to section 132 of the Act. However, it seems to me that this sort of reasoning (which might not represent what the Court was thinking) should only apply to a case where the lien process itself is being challenged, not where the challenge is to the underlying issues giving rise to the lien.

This case could be framed not as a dispute over a lien, but as a disagreement over the board's application of the condominium's by-laws to impose on the owner an obligation to pay the costs of repairing damage from the leak. That would make it a disagreement between the corporation and a unit owner about the condominium by-laws. Framed this way, the dispute well could be one in respect of which section 132(4) of the Act requires mediation and arbitration to be tried.

If looked at this way, the question becomes whether a condominium corporation should not be entitled to engage lien procedures, in order to protect its interest in what the board determines to be outstanding common expenses, as a *parallel process* to (not in substitution for) the dispute resolution processes (mediation, arbitration and court) required to solve the issue giving rise to such expenses. In my view, it can be argued that the mere fact that a lien is registered should not interfere with the proper application of section 132 of the Act, and that both processes can run simultaneously.

Michael H. Clifton (April 2007)