

CANADA / JUDGMENT

625536 B.C. Ltd. v. The Owners, Strata Plan LMS4385

2020 BCSC 633

COURT

Supreme Court of British Columbia

DECIDED

24 April 2020

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2020 BCSC 633 625536 B.C. Ltd. v. The Owners, Strata Plan LMS4385 IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: 625536 B.C. Ltd. v. The Owners, Strata Plan LMS4385, 2020 BCSC 633 Date: 20200424 Docket: S1812337 Registry: Vancouver Between: 625536 B.C. Ltd., 1052387 B.C. Ltd. and 581163 B.C. Ltd. Petitioners And The Owners, Strata Plan LMS4385 Respondent Corrected Judgment: The text of the judgment was corrected at paragraph 29 on May 8, 2020 Before: The Honourable Mr. Justice Ball Reasons for Judgment In Chambers Counsel for Petitioners: J.E. Shragge Counsel for Respondent: V.S. Chahal Place and Date of Hearing: Vancouver, B.C. July 4, 2019 Place and Date of Judgment: Vancouver, B.C. April 24, 2020

Introduction

- [1] This petition was brought under various provisions of the Strata Property Act, S.B.C. 1998, c. 43 [SPA]. The petition involves a claim for a small amount of legal fees, and the facts of the case are essentially not in dispute. The issue is whether or not a strata corporation is entitled to recover legal fees, in any amount, for the act of writing a demand letter to an owner of a strata unit said to be delinquent.

Facts

- [2] The petitioners are owners of strata property units in a commercial strata development. The respondent is the Strata Corporation. In 2018, the Strata Corporation hired a law firm to send demand letters to the owners of the strata units owned by the three petitioners. The demand letters demanded payment of arrears of strata fees, together with an unspecified amount of legal fees. In very short compass, one of the petitioners, who was in the process of selling a unit and required a Form F to complete the sale under the SPA, tendered a cheque without conditions in the full amount of the arrears, but without any legal fees. Legal fees had not been specified.

- [3] Counsel for the strata, a few days later, returned the cheque for the arrears stating that the legal fees were \$800. Later, the legal fees were reduced by letter from the same law firm to \$620. No explanation has been provided for the amount of the legal fees claimed in the first place, nor the reduction of the legal fees claimed.
- [4] In this case, no lien under the SPA was filed, nor were legal proceedings commenced to enforce the arrears of strata fees.

Issues

- [5] There are two overarching issues in this case. The first is a question of law alone: Is the Strata Corporation legally entitled to unilaterally charge an owner untaxed legal expenses in any amount incurred as a cost of remedying the contravention of a bylaw requiring payment of strata fees on time? A related question arises: Does s. 133 of the SPA, read in context, allow a strata corporation to unilaterally determine and recover legal expenses incurred outside of any legal proceedings?
- [6] On the facts of this case, the second issue is: Is the Strata Corporation entitled to require the petitioner, 1052387 B.C. Ltd., the owner of a strata lot, to pay legal costs of remedying a contravention where the entire amount of arrears was paid without conditions following the service of a demand under s. 112 of the SPA and prior to the filing of a lien under the SPA? Applicable Law
- [7] Several sections of the SPA inform the decision in this case and those are set out below:
Strata corporation responsible for common expenses 91 The strata corporation is responsible for the common expenses of the strata corporation. Operating fund and contingency reserve fund 92 To meet its expenses the strata corporation must establish, and the owners must contribute, by means of strata fees, to
 - (a) an operating fund for common expenses that
 - (i) usually occur either once a year or more often than once a year, or (ii) are necessary to obtain a depreciation report under section 94, and
 - (b) a contingency reserve fund for common expenses that usually occur less often than once a year or that do not usually occur. Calculating strata fees 99 (1) Subject to section 100, owners must contribute to the strata corporation their strata lots' shares of the total contributions budgeted for the operating fund and contingency reserve fund by means of strata fees calculated in accordance with this section and the regulations.
- (2) Subject to the regulations, the strata fees for a strata lot's share of the contribution to the operating fund and contingency reserve fund are calculated as follows: Notice to owner or tenant of money owing to strata corporation 112 (1) Before suing or beginning arbitration to collect money from an owner or tenant or before an initiating notice is given by the tribunal under section 6 (1) of the Civil Resolution Tribunal Act in respect of the collection of money from an owner or tenant, the strata corporation must give the owner or tenant at least 2

weeks' written notice demanding payment and indicating that action may be taken if payment is not made within that 2 week period.

- (2) Before the strata corporation registers a lien against an owner's strata lot under section 116, the strata corporation must give the owner at least 2 weeks' written notice demanding payment and indicating that a lien may be registered if payment is not made within that 2 week period. Notice to mortgagee 113 If a mortgagee has given the strata corporation a Mortgagee's Request for Notification under section 60, the strata corporation
 - (a) may give the mortgagee written notice that the strata lot owner has failed to pay money owing to the strata corporation for more than 60 days, and
 - (b) must give the mortgagee a copy of any notice given to the owner under section 112. Disputed debt 114 (1) If there is a dispute over whether an owner or tenant owes money to the strata corporation, the owner or tenant may pay the disputed amount
 - (a) into court if court proceedings have been started and the Supreme Court Civil Rules allow payment into court, or
 - (b) to the strata corporation to hold in trust if
 - (i) the matter has been referred to arbitration, (ii) an initiating notice has been given under section 6 of the Civil Resolution Tribunal Act, or (iii) court proceedings have been started.
- (2) On receipt of an amount under subsection (1) (b), the strata corporation holds the money and any interest on the money in trust for the parties to the dispute until the dispute is resolved.
- (3) After the dispute is resolved, the strata corporation must pay the amount to the party entitled to it as set out in the decision of the arbitrator, the civil resolution tribunal or the court. Certificate of Payment 115 (1) Within one week of the request of an owner or purchaser, or a person authorized by an owner or purchaser, the strata corporation must give the person making the request a Certificate of Payment in the prescribed form if
 - (a) the owner does not owe money to the strata corporation, or
 - (b) the owner does owe money but
 - (i) the money claimed by the strata corporation has been paid into court, or to the strata corporation in trust, under section 114, or (ii) arrangements satisfactory to the strata corporation have been made to pay the money owing.
- (2) The certificate is current for the purposes of section 256 for a period of 60 days from the date it is issued.
- (3) The strata corporation may charge a fee for the certificate, but the fee must not exceed the amount set out in the regulations.

- (4) In completing the certificate, the strata corporation may include money owing in respect of
 - (a) the matters set out in section 116, and
 - (b) fines and the costs of remedying a contravention of a bylaw or rule charged against the owner or fines and costs for which the owner is responsible under section 131.
- (5) A certificate must not include claims of damages against an owner that have not been determined by a court, by arbitration or by the civil resolution tribunal. Certificate of Lien 116 (1) The strata corporation may register a lien against an owner's strata lot by registering in the land title office a Certificate of Lien in the prescribed form if the owner fails to pay the strata corporation any of the following with respect to that strata lot:
 - (a) strata fees;
 - (b) a special levy;
 - (c) a reimbursement of the cost of work referred to in section 85;
 - (d) the strata lot's share of a judgment against the strata corporation;
 - (e) [Repealed 1999-21-25.]
- (2) The strata corporation may register a lien against any strata lot, but only one strata lot, owned by an owner as owner developer, by registering in the land title office a Certificate of Lien in the prescribed form if the owner developer fails to pay an amount payable to the strata corporation under section 14 (4) or (5), 17 (b) or 20 (3).
- (3) Subsections (1) and (2) do not apply if
 - (a) the amount owing has, under section 114, been paid into court or to the strata corporation in trust,
 - (b) arrangements satisfactory to the strata corporation have been made to pay the money owing, or
 - (c) the amount owing is in respect of a fine or the costs of remedying a contravention.
- (4) On registration the certificate creates a lien against the owner's strata lot in favour of the strata corporation for the amount owing.
- (5) The strata corporation's lien ranks in priority to every other lien or registered charge except
 - (a) to the extent that the strata corporation's lien is for a strata lot's share of a judgment against the strata corporation,
 - (b) if the other lien or charge is in favour of the Crown and is not a mortgage of land, or
 - (c) if the other lien or charge is made under the Builders Lien Act.

- (6) On receiving the amount owing, the strata corporation must within one week remove the lien by registering in the land title office an Acknowledgement of Payment in the prescribed form. Forced sale of owner's strata lot to collect money owing 117 (1) After the strata corporation has registered a Certificate of Lien against a strata lot, the strata corporation may apply to the Supreme Court for an order for the sale of the strata lot.
- (2) If the strata corporation has obtained a judgment for the amount owing, the court may, after considering all the circumstances, make an order for the sale of the strata lot.
- (3) If the strata corporation has not obtained a judgment for the amount owing, the court may try the issue and may
 - (a) order that judgment be entered against the owner in favour of the strata corporation for the amount of the lien or for an amount that the court, as a result of the trial, finds owing, and
 - (b) if judgment is entered against the owner, make an order for the sale of the strata lot after considering all the circumstances.
- (4) An order for the sale of a strata lot must provide that, if the amount owing is not paid within the time period required by the order, the strata corporation may sell the strata lot at a price and on terms to be approved by the court. Costs added to amount owing 118 The following costs of registering a lien against an owner's strata lot under section 116 or enforcing a lien under section 117 may be added to the amount owing to the strata corporation under a Certificate of Lien:
 - (a) reasonable legal costs;
 - (b) land title and court registry fees;
 - (c) other reasonable disbursements. Strata corporation may remedy a contravention 133 (1) The strata corporation may do what is reasonably necessary to remedy a contravention of its bylaws or rules, including
 - (a) doing work on or to a strata lot, the common property or common assets, and,
 - (b) removing objects from the common property or common assets.
- (2) The strata corporation may require that the reasonable costs of remedying the contravention be paid by the person who may be fined for the contravention under section 130. Complaint, right to answer and notice of decision 135 (1) The strata corporation must not
 - (a) impose a fine against a person,
 - (b) require a person to pay the costs of remedying a contravention, or
 - (c) deny a person the use of a recreational facility for a contravention of a bylaw or rule unless the strata corporation has

- (d) received a complaint about the contravention,
 - (e) given the owner or tenant the particulars of the complaint, in writing, and a reasonable opportunity to answer the complaint, including a hearing if requested by the owner or tenant, and
 - (f) if the person is a tenant, given notice of the complaint to the person's landlord and to the owner.
- (2) The strata corporation must, as soon as feasible, give notice in writing of a decision on a matter referred to in subsection (1) (a), (b) or (c) to the persons referred to in subsection (1) (e) and (f).
- (3) Once a strata corporation has complied with this section in respect of a contravention of a bylaw or rule, it may impose a fine or other penalty for a continuing contravention of that bylaw or rule without further compliance with this section. Positions of the Parties
- [8] It is the position of the petitioner that the Strata Corporation has no right, as a matter of law, to claim the legal fees which have been claimed here.
- [9] The respondent argues that based on *The Owners Strata Plan KAS2428 v. Baettig*, 2017 BCCA 377, the SPA supports the position of the respondent that the Strata Corporation is entitled to legal fees notwithstanding, in the case at bar, that the Strata Corporation has not filed, nor registered a lien against the owners strata lot for unpaid fees and has not commenced a proceeding to enforce that lien.
- [10] *Baettig* is a case where Ms. Baettig failed to pay strata fees. The Strata Corporation in that case registered a lien against her strata lot pursuant to s. 116 of the SPA. The lien was not paid. The Strata Corporation brought an application for judgment in the amount of the lien, together with an order for sale of that lot, pursuant to s. 117 of the SPA. Although Ms. Baettig did not participate in the proceeding at all, the question arose of what the appropriate level of costs that should attach to the enforcement proceedings. Weatherill J. decided that the legal costs of enforcing a lien after it is filed are dealt with as court costs, pursuant to Rule 14-1 of the Supreme Court Civil Rules, relying on the reasoning of Betton J. in *First West Credit Union v. Milligan*, 2012 BCSC 610 and concluding that the phrase "reasonable legal costs" in s. 118 of the SPA, did not signal an intention to indemnify strata corporations for the actual reasonable legal costs incurred, rather party and party costs.
- [11] *Fitch J.A.*, having reviewed the decisions cited above and the relevant statutory provisions, said at para. 33: My conclusion on this issue favours interpreting s. 118(a) of the SPA as encompassing actual reasonable legal costs, but it is not determinative of the measure of costs that may be added to the amount owing under a lien once enforcement proceedings have been commenced.

- [12] At para. 42, Fitch J.A. stated: In my view, the words of s. 118(a) of the SPA, when examined in light of the sections' legislative history, purpose, and context, support an interpretation that permits a strata corporation to add the actual reasonable legal costs of registering and enforcing a lien to the amount owing under the lien.
- [13] As is evident from the contents of the reasons above, the ability to claim "actual legal fees" does not arise under the SPA until s. 118, where the phrase "reasonable legal fees" appears, and that phrase only applies to a situation, as noted in the reasons above, where the strata corporation is permitted to "add the actual reasonable costs of registering and enforcing a lien to the amount owing under the lien."
- [14] The ability to claim legal costs under ss. 116 or 117 does not come into effect until the strata corporation has registered the lien. At para. 50, the Court of Appeal continues with this theme, stating: It is clear that 'reasonable legal costs' in s. 118 (a) applies to both costs incurred in registering a lien out of court and those incurred in enforcing a lien in court. In my view, the legislature's decision to amend s. 118 in this way supports the view that the quantum of legal costs that may be added to a lien is now the same in both contexts. There is no mention of legal costs which may be payable prior to the filing of a Claim of Lien.
- [15] Counsel for the respondent relies on the language of the Court of Appeal at para. 77 of Baettig: First, for the reasons given, I am unable to agree that the change in wording from the old CA and the SPA did not signal an intention on the part of the legislature to change the law by permitting a strata corporation to recover its reasonable legal costs attributable to steps it was obliged to take to extract unpaid strata fees from a delinquent owner
- [16] Paragraph 81 of Baettig notes that "there exists a mechanism for the assessment of legal costs to ensure that what is added to the amount owing under the lien reflects only those costs reasonable necessary to register the lien and conduct the enforcement proceeding". However, there is no such assessment process available for a strata lot owner who provides payment following the demand for payment of strata fees in arrears under the written notice provision.
- [17] The submission of the respondent is that that statement should apply to the circumstances of this case. Again, referring to the language of s. 118, that section starts with the phrase "the following costs of registering a lien against an owners' strata lot .". No lien was registered or filed in this case.
- [18] As noted above, s. 112 requires that before registering a lien against an owner's strata lot under s. 116, the strata corporation must give the owner at least two weeks written notice demanding payment and indicating that a lien may be registered if payment is not made within the two-week period.
- [19] Counsel for the respondent acknowledged during submissions that there was no requirement that the written notice demanding payment required the involvement of legal counsel. In my view, a reasonable and purposive interpretation of s. 112(a) is that the

purpose of the section is to obtain payment from the delinquent tenant without the involvement of the courts or other legal proceedings. Therefore, while Baettig and related cases are very instructive when proceedings have gone beyond the filing of a lien, they are not applicable where no lien is filed. The language of s. 112 provides for a means to solve problems between the strata corporation and the strata lot owner simply and efficiently.

- [20] It should be noted that beginning at para. 78, the court in Baettig discusses at length the ability of parties affected by lien provisions to have protection against "excessive charges under the umbrella of the lien". The court notes that there are safeguards built into the SPA which only allow reasonable legal costs to be added to the amount owing under a lien. Where there is no lien filed, there is no similar protection.
- [21] Counsel also drew the court's attention to the case of *The Owners, Strata Plan NW 2089 v. Ruby*, 2019 BCSC 143 for principles upon which a registrar could assess costs with respect to enforcement of a lien for default in payment of the petitioner's share of common expenses in that case. Again, it is noted that Ruby involved a case where a lien had already been filed and enforcement proceedings taken. The facts of Ruby are distinguishable from the case at bar.
- [22] Counsel also drew to the court's attention the case of *Strata Plan BCS 3372 v. Manji*, 2015 BCSC 2503 for the purpose of pointing out the direct means of providing notice under s. 112 of the SPA. Again, a lien was filed in each of the four cases referred to in Manji. In Manji, following the issuance of a demand letter, however defective for reasons which are not germane to the present case, no payment was made within the 14 days. However, thereafter, and following the filing of the liens, the owner paid the sum of \$18,689.94 on or about February 27, 2014. That payment was sufficient to pay to all the outstanding strata fees, up to and including February 2014, but did not take into account the costs of filing the lien. The costs included a title search, a lien release, GST on lien charges and a lien administrative charge of \$400. There is no reference to legal fees. Later, in May 2014, following confusion over a preauthorized payment plan which the owner had set up to ensure timely payment, a second set of demand letters were sent. These letters, apart from the charges indicated above, claimed an additional payment of \$675 for legal costs.
- [23] The owner, shocked that the preauthorized payments had not been made, obtained a bank draft for the total amount of the then outstanding strata fees, in the amount of \$6,231.78. This cheque was sent to the solicitor for the petitioner explaining, among other things, that the automatic payment system had been set up. Curiously, the petitioner in that case rejected the cheque for three months of arrears, when in fact there were only two at that point in time. In June, Mr. Manji sent a further bank draft, which by then was for four months of strata fees.
- [24] In Manji, the court found that proper notice was not given under the SPA. The court also concluded that the filing of the certificate of lien was not proper because notice had not been properly given prior to filing the lien, and the amount set out in the notice was not only

strata fees but included other additional "lien charges", including a cost for releasing a lien which could not have been incurred at the time of filing the liens and the lien administration charge which was completely unexplained. At para. 88, the court found that the Form G or certificate of lien does not permit combining of the s. 116 claim for outstanding strata fees with the costs claimed under s. 118, being "amounts owing on the face of the lien". Further, at para. 90, the court notes that s. 116(3)(c) does not allow lien to be registered if the amount owing is in respect to a "fine or the cost of remedying a contravention". Paragraph 91 is also germane to the present case: Clearly no one can know what the s. 118 taxable costs of registration and enforcement are before the lien is filed. It therefore would not make sense for the strata corporation to be able to unilaterally calculate and roll some or all of these costs into the "amount owing" figure inserted on the face of the lien. Doing so would also confuse the owner who would not know what portion of the "amount owing" relates to a s. 116 claim and what portion relates to s. 118 claimed costs. An owner is entitled to know the distinction between these amounts.

- [25] Finally, the court noted that the petitioner in that case was in error in refusing to accept attempts for payment of strata fees: Manji at para. 100.
- [26] Following the Manji decision, if it is not lawful to include addition costs such as a lien administration charge, not dissimilar from a claim for legal fees, for the issuance of a notice under s. 112, then the claim for legal fees in the case at bar is equally not permitted under the SPA.

Orders

- [27] In my view, when the strata fees in the full amount were tendered by way of a trust cheque from the petitioner's law firm, those fees ought to have been accepted by the Strata Corporation.
- [28] The Strata Corporation had a duty to accept that payment as it was not entitled, as a matter of law, to charge any legal costs for sending the statutory notice to the strata lot owner, pursuant to the provisions of the SPA. The ability to claim legal costs does not arise unless and until: first, the Strata Corporation gives proper notice under the section 112(2) of SPA; second, the strata unit owner fails to pay the strata fees demanded; and third, the Strata Corporation files, in due course, a Claim of Lien also as provided under the SPA.
- [29] Therefore, in the circumstances of this case, as outlined above, and based on the submissions of counsel and the authorities cited there, I make the following orders:
- 1) The respondent shall forthwith refund and pay to the petitioner, 1052387 B.C. Ltd., legal fees and disbursements that the respondent received from the said petitioner as a result of the sale of strata lot 92, in the amount of \$1,870.67, together with interest, in accordance with the Court Order Interest Act; and

- 2) The respondent shall pay to the petitioners the costs of this proceeding forthwith, after assessment, pursuant Appendix "B", as a matter of ordinary difficulty. "Ball J."
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