
CANADA / JUDGMENT

Siebring v. The Owners, Strata Plan NW2275

2020 BCCA 268

COURT

British Columbia Court of Appeal

DECIDED

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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Siebring v. The Owners, Strata Plan NW2275,

2020 BCCA 268

Date: 20200928

Docket: CA46136

Between:

Darrell Siebring

Appellant

(Plaintiff)

And

The Owners, Strata Plan NW2275

Respondent

(Defendant)

Before:

The Honourable Madam Justice Fenlon

The Honourable Madam Justice Griffin

The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated May 16, 2019 (Siebring v. The Owners, Strata Plan NW2275, New Westminster Docket S170374).

Oral Reasons for Judgment

The Appellant, appearing in person:

D. Siebring

(L. Keallen, Sign Language Interpreter)

Counsel for the Respondent:

G.T. Palm

C.E. Dubeau

Place and Date of Hearing:

Vancouver, British Columbia

September 28, 2020

Place and Date of Judgment:

Vancouver, British Columbia

September 28, 2020

Summary:

The appellant appeals the dismissal of his claim against the Strata Corporation for damages said to have been caused by the ingress of water from common property areas into the bathroom of his suite. The appellant argues that the judge erred in concluding the pleadings disclosed no cause of action and that he had failed to provide evidence of damage. He also says the summary trial process was unfair to him when the judge permitted the respondent to rely on new affidavit evidence presented on the second day of the hearing without giving him an opportunity to respond. Held: Appeal allowed. The judge erred in finding that the pleadings did not disclose a cause of action. In addition, the procedure followed for the summary trial was unfair to the appellant. While it may have been possible for the action to be determined by summary trial, the reasons did not adequately address the issues of fact and law that required resolution.

[1] BUTLER J.A.: This is an appeal from the dismissal of the appellant's action on a summary trial application brought by the respondent. The appellant is self-represented. His claim against the respondent Strata Corporation is for damages said to have been caused by leaking pipes and the ingress of water from the common property into the bathroom of his suite. His claim posed a challenge for the trial court as his pleadings and affidavits were poorly drafted and he appears to have been reluctant to address or remedy the defects in the

pleadings.

- [2] On appeal, the appellant argues that the trial process was unfair as he was not afforded the opportunity to respond fully to the respondent's evidence and arguments. He also says the judge erred in finding that the respondent had repaired any damage it caused to his bathroom. The appellant also applies to adduce fresh evidence. The respondent submits that the trial process was not flawed and that the appellant had a full opportunity to present his case. It also says the judge did not err in dismissing the claim based on the appellant's failure to prove any damages. In the alternative, the respondent argues that the judgment can be sustained on the basis that the action was brought after the expiry of the applicable limitation period.

Background

- [3] The appellant first commenced his action in the Provincial Small Claims Court on February 6, 2014. His claim was dismissed for want of jurisdiction but he was granted leave to bring the claim in the Supreme Court. This is not fully explained in the material or submissions, but it appears a provincial court judge determined that the claim exceeded the monetary limit in that court and ordered that the claim be transferred to the Supreme Court in accordance with Rule 7.1(1) of the Small Claims Rules. On April 28, 2015, the appellant filed a notice of civil claim in the Supreme Court. In 2016, he applied for judgment by way of summary trial and the respondent applied to dismiss his claim. Those applications did not proceed, but at a case planning conference on July 21, 2016, a Master ordered: 1) the appellant's application be adjourned generally; 2) he file and serve an amended notice of civil claim; and 3) he could not reset his summary trial application until he filed and served affidavit material in support of his claims.
- [4] The appellant's amended notice of civil claim was filed on September 2, 2016. The appellant made attempts to set his summary trial application for hearing in 2017 but those did not proceed. It would appear this was because it took some time for the appellant to provide affidavit evidence to support the application. The respondent's notice of application refers to two affidavits of the appellant sworn in 2016. Those do not appear to form part of the record on this appeal, although I believe counsel has brought copies of them today. However, the appeal record does include what is described as the appellant's first affidavit filed on January 3, 2018. The respondent ultimately filed an application response to the appellant's materials on February 11, 2018, but the appellant's application never proceeded.
- [5] On April 26, 2019, the respondent filed its notice of application to dismiss the appellant's claim. It was supported by two affidavits filed by the respondent (Kate Mitchell and Scott Savellieff). The appellant opposed the application and relied on his affidavit filed on January 3, 2018.

- [6] The affidavit material sets out the long history of the dispute between the parties arising from the appellant's claim that his unit had been damaged by leaks and that he was being unfairly treated by the Strata Council. That long history included numerous proceedings brought by the appellant before the British Columbia Human Rights Tribunal. It is accurate to say that the appellant's affidavit is prolix and difficult to understand.
- [7] The respondent's application to dismiss the claim was eventually heard over two days on May 10 and 16, 2019. The Strata Corporation sought judgment on three bases: the pleadings disclosed no claim; the claims were barred by the expiry of the limitation period; and, alternatively, the claims should be dismissed on the evidence adduced for the summary trial. The respondent relied on the following provisions in the Limitation Act, S.B.C. 2012, c. 13, and the Supreme Court Civil Rules.

Limitation Act

- [8] Section 6 of the Limitation Act (which reproduces s. 3(2) of the repealed Act) provides:
- (1) Subject to this Act, a court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered.
- (2) The 2 year limitation period established under subsection (1) of this section does not apply to a court proceeding referred to in section 7.
- [9] The respondent said the plaintiff began complaining to the Strata Council of a leak in a hot water pipe in July 2010 and his claim was not initiated until February 2014. However, the respondent acknowledges that the appellant also complained of subsequent leaks, including leaks in March and August 2012, and of continuing leaks after the issuance of the notice of civil claim.

Rule 9-5(1)

- [10] Rule 9-5(1) provides:
- (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
- (a) it discloses no reasonable claim or defence, as the case may be,
- and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

- [11] The respondent argued the pleadings disclosed no reasonable claim.

Rule 9-7

- [12] Rule 9-7, the summary trial Rule, provides, in part:
- (15) On the hearing of a summary trial application, the court may

- (a) grant judgment in favour of any party, either on an issue or generally, unless
- (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
- (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
- (b) impose terms respecting enforcement of the judgment, including a stay of execution, and
- (c) award costs.

[13] The respondent submitted that the case was suitable for determination by summary trial. While acknowledging it owed the appellant a duty of care, the respondent denied any breach of that duty or that its actions caused any damage to the appellant's suite. It argued the appellant failed to adduce any evidence of the standard of care or a breach thereof, or any evidence of damage. It submitted the summary trial judge could resolve any issues of credibility or lack of proof on the affidavit evidence.

[14] The respondent's application proceeded for a full day in chambers on May 10, 2019. Toward the end of the parties' submissions, the judge said it was apparent to her that the respondent had been attempting to help the appellant but that he was not allowing them to provide assistance. She noted that the appellant turned away the people who came to address his complaints such that he may be "the author of his own misfortune". She also indicated that she had some sympathy for the appellant's position and made a suggestion to the parties:

So let's see if we can work out some sort of settlement here. Are you open to the strata sending somebody in to fix your ceiling?

[15] When the appellant indicated that he was open to that suggestion, the judge told the respondent of her concerns about that position:

I have a couple of concerns and one is that his bathroom was left like that [with holes in the ceiling]. And I take it that Mr. Siebring is probably the author of his own misfortune with regards to that, but that is something that needs to be fixed.

The other thing is, I know there is no proof of mould but all of these reports, the plumbers found moisture. I mean, I think there should be some investigation to see how safe it is in there. It's just kind of common sense that that might be a concern.

[16] The hearing was adjourned to May 16, 2019 at 9:00 a.m. At that continuation, counsel for the respondent presented three additional affidavits for the court's consideration, all of which were sworn on May 15, 2019. The affidavits were given to the appellant shortly before the hearing on May 16.

[17] Two of the affidavits were from members of the Strata Council, Scott Savelieff and Cheong Kui, who responded to the appellant's submissions that they had not been truthful about the condition of his bathroom when they had inspected it. The third affidavit was from a contractor, Dean Sloat, who attended at the building on May 14 and 15, 2019. He inspected

the appellant's bathroom and the adjoining common areas including the boiler room and laundry room. He used a probe to obtain moisture readings in the walls in the three rooms. He prepared a report indicating that the readings were within the normal range and that there was no problem with excessive moisture.

- [18] Counsel for the respondent made submissions to the court summarizing the new affidavits. He concluded by indicating that the respondent was not prepared to settle the dispute by paying for repairs to the appellant's suite. Counsel submitted that Mr. Sloat's report made it clear there is no moisture problem in the appellant's bathroom and that the respondent was not responsible for any damage to the walls or ceiling. He asked that the action be dismissed with costs and presented a draft bill of costs in the amount of \$14,062.98.
- [19] The judge offered the appellant an opportunity to make submissions. He reiterated his belief that he had been unfairly treated by the Strata Council. He indicated that on May 15 he was given a copy of Mr. Sloat's report indicating the presence of moisture in his bathroom walls. He said he was surprised to hear counsel's submission at the continuation of the hearing to the effect that "it's not substantial enough" to be a problem. The judge then gave oral reasons for judgment dismissing the appellant's claim and awarding costs.

Judgment

- [20] The reasons of the summary trial judge are short. The trial judge dismissed the action "for several reasons".
- [21] First, the materials were "improper" and disclosed no cause of action:
- [2] They are indecipherable. They are contrary to the rules. There are Limitation Act, S.B.C. 2012, c. 13 issues. But, most importantly, they disclose no cause of action.
- [22] Second, the appellant was found to be the "author of his own misfortune":
- [3] The strata has a duty to make reasonable efforts to repair. They sent repair person after repair person. You fired repair people for various reasons. You are unhappy with repairs for other reasons. Even yesterday, you are unhappy with the work that was done yesterday - the contractor that went out to check the moisture. Council tried to inspect your bathroom. You denied entrance for various reasons.
- [4] Basically, what it comes down to, Mr. Siebring - and I am very sad to come to this conclusion - but you have frustrated all of the strata's attempts to assist you.
- [23] Last, the judge observed that there was "absolutely no proof of damages":
- [5] You say there is mould; you have no expert opinion. The evidence with regards to the holes in the ceiling, seems pretty clear that those were fixed by the strata. All in all, I am just not satisfied that you have a cause of action.

Discussion

[24] In my view, the reasons for judgment do not adequately address the appellant's claim for several reasons. This is unfortunate as the evidence in this case may have been sufficient to permit resolution of the issues of fact and law. However, the reasons do not, in my view, describe how the judge grappled with the contested issues before the court. First, I am of the view that the judge erred in concluding that the notice of civil claim does not disclose a cause of action. The judge stated this twice, the second time after considering the evidence, which is not the proper approach. The question of whether the appellant's claim disclosed a cause of action should have been determined on the pleadings alone: *Oh v. Coquitlam (City)*, 2018 BCCA 129 at para. 10. Second, the judge failed to explain whether, and if so, why, the limitation defence should succeed. Third, there is no explanation as to whether the case was suitable for determination by way of summary trial, and if so, how the credibility issues were resolved. Finally, the process was unfair to the appellant as he had no opportunity to respond to Mr. Sloat's report and the new affidavit evidence.

[25] It must not be forgotten that a summary trial application seeks final judgment. Judgment should be pronounced if the judge is satisfied on the whole of the evidence before the court that it is possible to find the facts necessary to decide the issues of fact and law, and the court is of the opinion that it would not be unjust to decide the issues on the application. The Rules prescribe the manner in which evidence is to be adduced on a summary trial and the appropriate notice that must be given of the case to be made out. For example, the Rule 9-7(8) provides:

- (8) A party who applies for judgment under subrule (2)
 - (a) must serve, with the notice of application and the other documents referred to in Rule 8-1 (3), every expert report, not already filed, on which the party will rely in support of the application, and
 - (b) must not serve any further affidavits, expert reports or notices except
 - (i) to tender evidence that would, at a trial, be admitted as rebuttal evidence,
 - (ii) to respond to a notice of application filed and served by another party of record, or
 - (iii) with leave of the court.

[26] While it is not always necessary to expressly address the suitability of a case for summary trial in reasons for judgment, the circumstances of this case called out for express consideration of that issue:

- The appellant's assertions that his bathroom walls were damaged by water originating from the common areas in the building were denied by the respondent. While the appellant's evidence was difficult to follow, the judge's adjournment was based on concerns that the materials raised questions about damage to the ceiling and walls and the possible presence of mould. In other words, the evidence raised questions of fact and credibility that required resolution and, perhaps,

further evidence. However, the reasons offered no explanation as to why it was subsequently appropriate to resolve those questions by way of summary trial.

- The additional evidence adduced by the respondent on May 16, 2019 could not have been considered except with leave of the court in accordance with Rule 9-7(8)(b). The respondent says the decision was made without reference to the three new affidavits. However, the judge appears to have relied on that additional evidence to address the concerns she raised about mould and damage to the ceiling and walls, but offered no explanation as to why she permitted the respondent to adduce it nor why she gave the appellant no opportunity to respond to it.
- The appellant has a hearing disability, as a result of which he may have had more difficulty dealing with the bifurcated hearing and the new evidence.

[27] The failure to explain why it was appropriate to resolve the case by way of summary trial is problematic and was complicated by the procedural concerns arising from the admission of the new evidence on May 16 without giving the appellant an opportunity to respond. In that regard, I note that the appellant's application to adduce fresh evidence includes a report from Precision Restorations Inc. which is responsive to Mr. Sloat's report. It finds evidence of ongoing leaking into the appellant's suite and recommends certain repairs to remedy the water ingress issues.

[28] While the procedural issues I have identified raise concerns about the fairness of the process, there are also substantive reasons for setting aside the order. In my view, the appellant's claim should not have been dismissed for the reasons given by the trial judge.

Rule 9-5(1)

[29] The judge's specific concerns about the deficiency in the pleadings are not identified. The respondent acknowledged it owed a duty of care to the appellant. The appellant alleged that the Strata Corporation was responsible for maintenance of common property and was responsible for "neglecting maintenance". He alleged his unit had been damaged by the ingress of water from the common property and that the Strata Corporation was responsible for paying the cost of repairs to his unit. As the pleadings contained an allegation of a breach of a duty of care to maintain the common property and resultant damage to the appellant's unit, the pleadings disclose a cause of action. In my view, the judge erred in arriving at a contrary conclusion.

Limitation Act

[30] The judge does not appear to have addressed the applicability of the Limitation Act. She found only that "there are Limitation Act issues". There are allegations of continuing leaks from 2010 onwards. The claim was commenced on February 6, 2014 in the Provincial Court and April 28, 2015 in the Supreme Court. A limitation defence may have precluded claims for damages discovered before February 6, 2012 or April 28 2013 (depending on which date is used for the limitation period). The evidence was not examined to determine whether all or

part of the appellant's claim was barred on that basis. Nor did the judge consider which of the two commencement dates of the proceedings was relevant to the limitation issue.

The Appellant's Own Conduct

- [31] The chambers judge dismissed the claim, in part, because the appellant frustrated the respondent's attempts to help him. The basis in law for dismissing the claim on that ground is unclear.
- [32] If the appellant frustrated the efforts to investigate the cause of the damage, that might have been addressed by an application on the part of the Strata Corporation for orders permitting inspection. However, there was evidence before the judge that inspections had been carried out, with the reluctant consent of the appellant.
- [33] While the appellant's own conduct could be the basis for a finding of a failure to mitigate, the judge clearly did not make that finding, because she was of the view that the evidence was insufficient for her to conclude that there was any damage. Although, as I have explained, she arrived at that conclusion without dealing with the appellant's evidence.

Proof of Damages

- [34] The trial judge also noted there was no expert opinion that the appellant's unit was affected by mould. But his claim was for damage to the ceiling and wall of his bathroom, and was not restricted to mould. His affidavits refer to continuing leaks and photographs show damage to the ceiling of his bathroom. There is some contrary evidence from the respondent's witnesses, but the judge does not attempt to resolve those conflicts. While a judge may have been able to address the conflicting evidence in this case with respect to whether Mr. Siebring observed leaks, and if so, the cause of those leaks and the resulting damage suffered, she did not do so. It must be remembered that a summary trial is a trial and it is incumbent on the court to resolve conflicts in the evidence. Having failed to do so, it is my view that it cannot be said there was absolutely no proof of damages.

Disposition

- [35] In my view, the judge erred in dismissing the claim on the basis that the pleadings did not disclose a cause of action. I am also of the view that it was an error to dismiss the claim at a summary trial on the basis that there was no proof of damages. There is no other basis upon which the claim might have been dismissed without addressing the conflicting evidence and that was not done. Having arrived at these conclusions, I need not consider the appellant's application to adduce fresh evidence.

- [36] I would allow the appeal, and set aside the order. However, I would allow the appeal without prejudice to the respondent's right to reapply for judgment pursuant to Rule 9-7. In other words, as provided by Rule 9-7(16), I would grant leave to the respondent to make a further application for judgment by way of summary trial.
- [37] In the unusual circumstances presented, I would also order that each party bear their own costs.
- [38] FENLON J.A.: I agree.
- [39] GRIFFIN J.A.: I agree.
- [40] FENLON J.A.: The appeal is allowed. The order is set aside without prejudice to the respondent's right to reapply for judgment pursuant to Rule 9-7. Each party is to bear their own costs of the appeal.

"The Honourable Mr. Justice Butler"

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