Court File No. SC-13-00126319

ONTARIO
SUPERIOR COURT OF JUSTICE
SMALL CLAIMS COURT

BETWEEN:

SUSAN UNSWORTH

Plaintiff

-and-

CARLETON CONDOMINIUM CORPORATION 252

Defendant

REASONS FOR JUDGMENT

[1] This case involves a claim by Susan Unsworth against Carleton Condominium Corporation 252, the Corporation which governs the unit which she owns.

[2] Ms. Unsworth resides at 67 Baneberry Crescent, Ottawa.

[3] She is claiming damages from the Defendant in the amount of $25,000.00, representing the repair and replacement of certain items in her basement which basement was subject to a sewer back-up on several occasions, the most serious apparently being on February 18, 2012.

[4] The claim also seeks damages for "loss of time, inconvenience, frustration and mental distress." At the outset of Trial, counsel for the Plaintiff abandoned any claim for loss of diminution of value of the property.

Background

[5] The Plaintiff purchased 67 Baneberry Crescent on November 19, 2011, and obtained a clear Status Certificate from the Defendant on November 25, 2011. She subsequently took possession of her unit on January 27, 2012.

[6] On February 10, 2012, the Plaintiff's basement was subject to some flooding which affected the carpet.

[7] The Defendant used a service provider, Multi-Drain, to service the sanitary sewer line under the Plaintiff's unit. It should be noted that the Plaintiff's unit was part of a row, starting with unit 65 and ending with unit 75. Therefore, the Plaintiff had neighbours on each side of her.

[8] A more significant sewer back-up occurred on February 18, 2012. Again, Multi-Drain was involved in attempting to clear the sanitary sewer line.

[9] On March 8, 2012, minor flooding occurred in the Plaintiff's basement. Damage was not significant as the Plaintiff had moved most of her items from the basement as a result of the February sewer back-up.

[10] On March 21, 2012, the Plaintiff's basement flooded again with raw sewage.

[11] Further back-ups of the Plaintiff's sewer occurred on August 1, 2012, November 24, 2012, March 10, 2013, May 20, 2013, June 16, 2013, October 7, 2013, with a final back-up involving raw sewage on January 20, 2014. There are no corresponding service records for every one of these incidents.

[12] By way of further general background, the Plaintiff was reimbursed by her own property insurer in the amount of $34,099.72. There is no dispute that a $2,000.00 deductible was waived by the Plaintiff's insurer, or, possibly, paid by the Defendant.

[13] A larger historical background reveals that the Condominium Corporation in question had been in existence since 1984.

[14] For many years prior to the Plaintiff's occupancy of 67 Baneberry Crescent, the Defendant had been carrying out maintenance procedures on the sewer drains. Their services were provided by Drain-All, followed by its successor, Multi-Drain.

[15] There was certainly testimony that the sanitary sewer line under units 65 through 75 had experienced back-ups prior to the Plaintiff's occupancy. I will go into more detail concerning that evidence below.

[16] By way of further background, before the Plaintiff purchased her unit, the City of Ottawa had been involved with this Condominium Corporation in terms of trying to make arrangements for a "Protective Plumbing Program", whereby backflow valves would be installed.

Issues

[17] The following have been identified by myself, with the assistance of counsel:

a) Did the Defendant bear a duty to advise the Plaintiff, through the Status Certificate, of prior sewer back-ups with respect to the unit the Plaintiff was about to purchase?

b) Does an obligation exist, as between the Plaintiff and the Defendant, for the Defendant to make all reasonable efforts to maintain in a safe state the sewer line running under the Plaintiff's unit?

c) If such a duty does exist, did the Defendant take all reasonable steps to maintain the sewer line in question?

d) Did the Defendant act in a timely and prudent fashion to correct the structural deficiencies with respect to the sewer drains?

e) Is the Plaintiff entitled to double recovery with respect to the property damages she has claimed?

g) Is there any evidence of damages, other than with respect to the Plaintiff's property? If so, what is the quantum?

Analysis

[18] It is certainly understandable that the Plaintiff would be very upset by the sewage back-up occurring so soon after she moved in and then recurring over a lengthy period of time. She testified that she felt she had been "sucked in."

[19] However, the first question, as in every case, is whether the Defendant Condominium Corporation, through its Board of Directors, bears any responsibility for the sewage finding its way into the Plaintiff's basement.

[20] The evidence is clear that sewers in this complex backed up from time to time before the Plaintiff moved into her unit in January 2012. We did not hear from the owner of the unit who sold to the Plaintiff. I note the Seller Property Information Statement indicated "No" to the question "any problems with the plumbing system?"

[21] However, I accept the Defendant's submission that there was no obligation on the part of the Condominium Corporation to advise the Plaintiff of such back-ups. Rather, any duty of care owed by the Defendant to the Plaintiff first arose with the wording of the Status Certificate.

Status Certificate

[22] The Defendant sent a Status Certificate dated November 25, 2011, to the Plaintiff. The Defendant's submission is that all of the contents of that Status Certificate are true, especially paragraph 12 which states: "The Corporation has no knowledge of any circumstances that may result in an increase in the common expenses for the unit."

[23] It is the Defendant's position that the Status Certificate and any liability flowing from it with respect to the Defendant relates to whether or not the Defendant made an accurate representation to the Plaintiff as to a possible increase in the common expenses.

[24] I have carefully reviewed the relevant provisions of the *Condominium Act*, 1998 SO 1998, C.19, particularly section 76.

[25] There is no requirement under that section for the Condominium Corporation to specifically advise someone like the Plaintiff herein to be aware of a potential sewer back-up. Rather, the approach is of a more global nature relating especially to a possible increase in the common expenses for the unit. I have carefully reviewed the following decisions:

Fisher v Metropolitan Toronto Condo. Corp. #596, [2004] OJ No. 5758 (Div Ct);

Orr v Metro. Toronto Condo. Corp. #1056, [2014] ONCA 855.

[26] The latter case states that the Status (estoppel) Certificate must contain enough information to enable a buyer to make an informed purchase decision. This obligation flows from the common law and not from statute. See paragraph 54 and 55.

[27] I have looked at the Defendant's knowledge of the drain problem at the Plaintiff's Unit 67 (Exhibit 2, Tab 12). Although the dates in that Exhibit only go back to August 2010, there is only one occasion...May 1, 2011...when the line was "snaked" prior to the Plaintiff's occupancy. This information came from Multi-Drain.

[28] The evidence from Mr. Bellefeuille, the President of the Defendant's Board of Directors, was to the effect that the Corporation eventually spent a very large amount of money to rectify the sewer system in 2014. However, these expenses were not incurred until long after the Plaintiff occupied 67 Baneberry Crescent.

[29] Therefore, I find that the Defendant met its obligation, both statutorily and at common law, to provide a proper Status Certificate and no liability attaches to the Defendant from that perspective.

Maintaining the Sewer Line

[30] Did the Defendant take reasonable steps to maintain the sewer line under the Defendant's unit? At first blush, one could certainly say that the number of back-ups, which occurred after occupancy, was not reasonable.

[31] It is trite to say that a condominium corporation is not an insurer of the unit owner's interests. See *Wright v Strata Plan #205* (The Owners), 1998 CanLII 5823 (BCCA), at paragraph 9; *Buskell v Winnipeg Condominium Corporation #52* (QB), at paragraph 19 and *Bear v Condominum Plan No. 9123697*, 2000 ABQB 293, at paragraph 37. However, the sewer line, being a common element, is the responsibility of the Defendant.

[32] I agree with Defendant's counsel that any duty of care to the Plaintiff, with respect to maintaining the sewer line, only arose after the Plaintiff occupied her unit.

[33] As an aside, I note that the vendor of the Plaintiff's unit was not made a party to this claim. I also note that the Plaintiff did not carry out any plumbing inspection of her unit before she occupied it.

[34] With respect to sewer back-ups in any other unit in that row, Pierre Pagé testified. He is the owner of 69 Baneberry Crescent. He has lived in that unit for approximately 10 years. He found that in 2006, after having lived in the unit for about 8 months, there was a "major sewage back-up". In short, Mr. Pagé testified that he thought he had had about 20 sewer back-ups during his occupancy. He testified that he had spoken to Lynda Baldrey, a Board member, early in his occupancy, and she had told him that there had been an ongoing problem with back-ups since the late 1980s. He personally viewed some of the camera work done with respect to the pipe running under this row of units and he said he saw some "porpoising". Although he agreed that regular flushing took place twice per year and on an at -needed basis, he did not believe that flushing was the answer.

[35] With respect to the severity of the back-ups, Mr. Pagé believed that anywhere from one-half to three-quarters of his basement floor could be affected by sewage.

[36] Under cross-examination, Mr. Pagé said that he had had experience with "sewers" in that he had laid weeping tile and also drains to septic tanks. He continued with his belief that he had had over 20 back-ups during his occupancy and that the peak was three to five per month. He believes that he spoke with the property manager, Angela Del Giudice, about 12 times. He agreed that the workers from Multi-Drain were very professional.

[37] Mr. Page testified that, in his opinion, the back flow valves were a "band aid approach".

[38] I found Mr. Pagé to exaggerate. The Defendant's records do not support a reporting and follow up with respect to this number of "back-ups." I also find that many of the back-ups involved his laundry tub, as compared to the floor drain, in terms of "severity."

[39] Liam Power testified on behalf of the Plaintiff. He owns unit 65, next door to the Plaintiff's unit. He has lived in his unit since 2006. Mr. Power was a Board member from 2006 through at least 2007. He testified that "flushing was the answer" in terms of Board policy during his time.

[40] He testified that between 2006 and 2011 he believed there were at least 20 back-ups of his sewer.

[41] Mr. Power admitted that he flushed kitty litter down his drain but testified that it was "flushable" litter.

[42] I found both Mr. Page and Mr. Power to be sincere individuals. However, I have reviewed the extensive documentation relating to various service calls and certain particulars regarding work done by Multi-Drain. The number of back-ups alleged by both gentlemen simply are not borne out by the records. My best view

of their evidence is that "back-ups" might refer to some rising of water in their laundry tubs, as compared to coming from the floor drain in their respective units.

[43] However, with that said, I do accept that there were sewer back-ups from time to time in the line running under Units 65 though 75.

[44] I appreciate the Defendant's evidence that it spent approximately $6,000.00 per year on servicing the sewer lines.

[45] The drainage problem was compounded by the Unit owners in this row flushing inappropriate items down their toilets.

[46] Nevertheless, the Board of Directors was well aware of the sags in the sewer line for many years prior to the Plaintiff's occupancy. Angela Del Giudice bluntly told Mr. Niebergall, counsel for the Plaintiff, in a letter dated September 25, 2012 (Exhibit 2, Tab 15): "The Corporation is aware of sumps in the lines that have been in existence since the property was constructed. As with many Kanata area properties, regular maintenance is performed and will continue to be performed to prevent flooding." The Board of Directors is of the opinion that regular maintenance on the sewer lines meets their obligation to the *Condominium Act* of maintaining and repairing the common elements."

[47] I find that the Plaintiff has failed to establish that there was a less than adequate system in place for the maintenance of the sewer drain under her unit. There was a system of maintenance in place and Multi-Drain attended promptly when a service call was put in.

Maintenance Versus Replacement

[48] The more vexing problem is whether the Defendant ought to have taken much more extensive steps to investigate the sewer matrix with a view of carrying out structural changes. If the Defendant failed in this duty, it would be potentially negligent.

[49] In July 2009, the Defendant began to participate in the City of Ottawa Protective Plumbing Program. Essentially, a back flow valve would be placed in the floor drains of each unit. Testimony from Jacques Bellefeuille and Angela Del Giudice confirmed that the Program was delayed in that some unit owners were not cooperative in terms of allowing entrance to their units. Eventually, the City of Ottawa only approved the installation of one back flow valve, being for the unit which connected to the street sewer (Unit 75).

[50] Additionally, in the Fall of 2010, the City's engineers RV Anderson Associates Limited completed investigation of the Defendant's sewer system. To take as an example, I look at Exhibit 5, Tab 107, which is a letter dated September 26, 2011, to the unit owner of 75 Baneberry Crescent, which letter is from RV Anderson. Multi-Drain provided a quote for work to be done and RV Anderson would inspect the work and, upon approval, the City of Ottawa would reimburse the unit owner up to a maximum of $4,000.00, in that particular case.

[51] Of importance, is that RV Anderson did not identify any major structural issues with the sewer lines.

[52] However, with that said, Mr. Bellefeuille, in his testimony, was quite candid in acknowledging that long-term residents of this Condominium Project were aware that there were "sags" and "sumps" in the sewer lines.

[53] It is essentially the Defendant's position that it received expert advice from Multi-Drain and from RV Anderson with respect to the appropriate course of action to be taken with respect to the sewers, namely flushing and installation of back flow valves.

[54] There was also the continuing issue of various residents putting items down the drain, which items would block or partially block the sewer drain. Such items involved feminine hygiene products, diapers, plastic bags, kitty litter and grease. I have reviewed the evidence and it is clear that the Defendant would send periodic notices to the unit owners advising clearly that these objects were not to be flushed down the toilet. Nevertheless, testimony from Kenneth Seward (Multi-

Drain) and Mr. Bellefeuille and Ms. Del Giudice confirmed that these items were a perennial problem.

[55] The Defendant then retained Keller Engineering Associates Inc. At Exhibit 5, Tab 98, can be found the report from Keller dated July 17, 2013. Keller was retained by the Defendant to carry out an investigation into the "recent sewer back-ups" experienced at Units 65 through 75 Baneberry Crescent.

[56] Heinz Keller, professional engineer, testified. Mr. Keller's company worked with Multi-Drain. A video inspection of the sewer lines was carried out. The video began at unit 65. The line was blocked by kitty litter. Subsequently, a small sag, being 0.9 meters long, was observed. "Various sags and minor ponding in the main line were noted at isolated locations." The inspection then continued in the main sewer running from the block of townhouses to the man hole. "At this time, we observed a major sag in the sanitary line." Essentially, the video revealed "inadequate slope to the manhole on the street." Importantly, on page 3 of his report, Mr. Keller notes that where the two main sewers for the complex meet the main sewer system on Castlefrank Road, the sewers are installed against the sewage flow on Castlefrank Road. "This is an installation flaw and would date back to the original construction."

[57] On page 4 of his report, Mr. Keller states: "We recommend that the sewer replacement work at unit 65-75 be carried out as soon as possible and that the sewer adjustments at Castlefrank be carried out when funds are available. Funding for this work should be allocated in the Corporation's Reserve Fund Study."

[58] Finally, at page 5 of his report, Mr. Keller recommends that the sewer lines at unit 65-75 be flushed every 30 days until major replacement can take place.

[59] I pause to note that this report was written approximately 18 months after the Plaintiff occupied her unit. First, Mr. Keller does estimate that the scope of work would cost $180,000.00, plus HST and engineering. I do not find that this amount was known to the Corporation prior to the Keller report and, therefore, the

Defendant could not be held liable for misrepresentation with respect to paragraph 12 of the Status Certificate of November 25, 2011. Secondly, Mr. Keller was critical of the view that the Protective Plumbing Program addressed the issue involving this row of units and its back-up problems.

[60] Kenneth Seward, with a company called Clean Water Works (which purchased Multi-Drain in August 2015) testified. It is clear from Mr. Seward's testimony that sags in the sewer lines were well known and that is why flushing was required on such a frequent basis. Mr. Seward admitted that a line normally would not need to be flushed more than once every five years.

[61] Looking at Exhibit 5, Tab 96, which is an email from Mr. Seward to Tammy Zollinger, the property manager for the Defendant, Mr. Seward notes that "the most significant reason these rows of houses back-up is due to the major sump in the main sewer line where it exits out of Unit 75 and goes to the sanitary man hole." He goes on to say "this is a serious issue which needs to be addressed by an engineer ASAP." He then goes on to say that "this row of houses **should remain on a monthly flushing** until a plan has been designed by an engineer and executed." This email is dated July 4, 2013.

[62] Jacques Bellefeuille, the long-time Board member and current President of the Defendant, testified. He stated that before November 2011 he believed there had been 20 to 25 sewer back-ups in the entire project (105 units) from approximately 1986 through 2011. He testified that in some years there had been no back-ups. He agreed that the most affected blocks were Units 51 through 63 and 65 through 75.

[63] He admitted that he and other Board members had been aware of sags in the sewer lines since at least the mid-1990s.

[64] The companies which had provided flushing had essentially recommended that approach to the problem.

[65] There had been discussions about structural repairs but it was found that they would be too expensive.

[66] Mr. Bellefeuille testified that the Board in 2013 hoped that the installation of a manhole would help resolve the problem. As mentioned previously, Mr. Bellefeuille had also been involved in the Protective Plumbing Program. The first engineers actually involved in the issue were RV Anderson, who were essentially retained by the City of Ottawa. Mr. Bellefeuille's testimony was never clear as to whether the Protective Plumbing Program was ever "completed." The best evidence is an email from Nathan Fudge, an employee of the City of Ottawa to Mr. Niebergall, dated October 2, 2012. Mr. Fudge writes that a sanitary and storm backwater valve and a sump pump were installed underneath Unit 75. This took place on February 16, 2012, approximately one month after the Plaintiff moved into her Unit 67. My understanding of the decision by the City of Ottawa to install only the one set of devices was that the sewer pipe ran from Unit 75 to the main sewer system.

[67] As I understand the testimony of Jacques Bellefeuille, the Board did not want to follow the recommendations of Mr. Keller's company because they were too expensive. Mr. Bellefeuille believed that it would involve "tearing up whole streets, rows of trees and driveways."

[68] In 2014, the Defendant retained Novatech Engineers who supervised Marsten Equipment Rentals with respect to sanitary sewer repair work.

[69] Ultimately, major renovations took place and the Defendant took out a loan in the amount of approximately $700,000.00 for both sewer and foundation work.

[70] As with so many cases, hindsight now shows us that, had replacement and remediation of sewer pipes been instituted earlier, it is likely that the sewer back-ups would have been lessened. It would appear that, since 2014, the problems have essentially disappeared. The evidence shows that the Defendant did make efforts to maintain a flushing program, obviously in the hope of not having to spend more money to carry out expensive repairs/replacement. I find that the

Defendant took reasonable steps in all of the circumstances, one of the circumstances being that residents would obviously block the lines from time to time by flushing inappropriate objects down the drain.

[71] To conclude with respect to liability, I find that the Defendant was not negligent with respect to representations contained in the Status Certificate prepared by it and sent to the Plaintiff. Further, I did not find the Defendant negligent with respect to its maintenance of the sewer line under the Plaintiff's unit. I do not find the Defendant negligent with respect to the time it took to carry out the replacement of the sewer lines in 2014. I accept that the Defendant relied upon advice from Multi-Drain and RV Anderson. I accept that it did retain the Keller Company as professional engineers in July 2013 and it was not under an absolute obligation to follow Keller's advice. Rather, it eventually took the advice of Novatech and the remediation work was carried out. Mr. Niebergall submitted at the last moment a case he had recently come upon, being *Ryan v York Condominium Corporation No. 340*, 2016 ONSC 2470. There, Mr. Justice Perell was faced with a set of circumstances where the Condominium in question apparently had been built with serious construction defects. Water penetration was the issue. Briefly, in March 2010, water penetrated the Plaintiff's Unit after a storm. After numerous recurrent water damage and mold developing, the problem was finally fixed in or about November 2014.

[72] At paragraph 73 of the decision, His Honour noted that the Defendant Condominium Corporation had known of the water penetration problem for over 30 years and had not fixed the problem. His Honour found "This is patently not reasonable." In short, His Honour found that 4.5 years was too long from the date of complaint to the date of remedy and, consequently, found the Condominium Corporation to be liable for damages incurred by the Plaintiff.

[73] Turning to the case before me, there is a similarity in that CCC 252 seems to have been aware, conservatively, for at least 10 years before the Plaintiff's occupancy that there were sumps in the sewer lines in this complex. However, the distinguishing features, in my respectful opinion, are that the sewer line in

question was blocked or partially blocked from time to time by foreign objects flushed down the toilet by residents unknown. Further, the Board of Directors of the Defendant relied upon advice from individuals experienced with sewers and it was not until Mr. Keller gave his advice to replace sewer lines in July 2013 that this remedy was put forward by an expert. My best calculation is that structural remediation took place less than one year from replacement being recommended.

Oppression

[74] The Plaintiff has urged upon me to find that the Plaintiff was "oppressed" within the meaning of the *Condominium Act*. I do not find it necessary for me to determine whether or not the Small Claims Court has jurisdiction to make a declaration regarding oppression.

[75] I find it unnecessary because, in my respectful opinion, there is no evidence that the Plaintiff was oppressed by the Defendant. I accept the proposition as stated in *Webb v Metropolitan Toronto Condominium Corporation* No. 979, [2003] OJ No. 2581 (SC), at paragraphs 29-30 that "Condominium Corporations are presumed to be operating in good faith and in furtherance of their statutory duties and their decisions are entitled to deference."

[76] I did not find that there was any evidence that the Defendant acted in bad faith. I follow the comments of Justice Perkins in *C.S. v M.S.*, [2007] OJ No. 2164 (SCJ), at paragraph 16, affirmed by 2010 ONCA 196, that "bad faith contemplates a state of mind affirmatively operating with furtive design or ill will." Further, it is stated "the essence of bad faith is the representation that one's actions are directed toward a particular goal while one's secret actual goal is something else, something that is harmful to other persons affected or at least something that they would not willingly have supported or tolerated if they had known."

[77] Specifically, with respect to oppressive behaviour, I do not find any evidence to indicate that the Plaintiff had been oppressed in the sense of having been

unfairly prejudiced, unfairly disregarded, unjustly, and without cause. I rely upon the decision in *Courthouse Block Inc. v Middlesex Condominium Corp.* No. 173, 2011 ONSC 3893, at paragraphs 33-35.

Double Recovery

[78] Despite having found no liability, I do wish to address the question of whether the Plaintiff can receive damages in this type of lawsuit, despite already having been paid for the repair, replacement and storage of her damaged items.

[79] I am indebted to both counsel for their diligent research on this issue. The Plaintiff has provided a number of cases dealing with this issue, dating back to the decision in *Boarelli v Flannigan*, [1973] 3 OR 69, in which the Court of Appeal determined that welfare payments received by a Plaintiff while unemployed as a result of injuries sustained in a motor vehicle accident caused by the Defendant were not deductible from the award against the Defendant.

[80] However, the Defendant has provided me with a copy of *IBM Canada Limited v Waterman*, (2013) SCC 70. At paragraph 73 of that decision, the Supreme Court of Canada states that:

"One widely accepted factor relates to the nature and purpose of the benefit. The more closely the benefit is, in nature and purpose, and indemnity against the type of loss caused by the Defendant's breach, the stronger the case for deduction. The converse is also true."

[81] I accept the Defendant's submission that there is a sound difference between indemnity and non-indemnity insurance benefits. If the insurance indemnifies the Plaintiff for a pecuniary loss, then the Plaintiff cannot seek to also be indemnified by the tortfeasor. If the indemnity is not compensatory but rather as a matter of contract on a contingency (like a life insurance policy), then the insurance benefit may not be seen as having compensated the Plaintiff for that pecuniary loss and there may be a claim against the tortfeasor. See paragraph 62 of the decision.

[82] I am also persuaded that this decision applies to a case founded either in contract or in tort. In a subsequent decision, *Mazzucco v Herer*, 2015 ONSC 7083, at paragraph 7, Justice Skarica opined that the *IBM Canada Limited v Waterman* case "has signaled that a new era has begun regarding the private insurance exception."

[83] I find that the Plaintiff took out an insurance policy which indemnified her for the losses she sustained when the sewer back-up occurred in February 2012. As such, being a policy of indemnification, she is not entitled to recover the same damages from the Defendant, if the Defendant had been found to be liable.

Estoppel and Subrogation

[84] In its submissions, the Defendant advanced the interesting argument that section 8.03 of the Declaration of this Condominium Corporation provides that any insurance policy "shall contain a waiver of subrogation against the Corporation". The Defendant submits that the purpose of this clause is to prevent owners' insurers from claiming against the Corporation after having paid out a claim. The Defendant submits that the Plaintiff is trying to advance a claim which her insurer could not. I would agree that this is another reason why the Plaintiff cannot claim damages for the repair, replacement and storage of her items.

Is the Defendant Liable for Property Damage Beyond That Sustained by a "Standard Unit"

[85] Section 89 of the Condominium Act speaks of the Corporation's obligation to repair the Units and common elements after damage. At section 89 (4), there is a specific definition regarding a "standard unit."

[86] For the purpose of this case before me, I do not find it necessary to deal with whether the Corporation would have any obligation, since the basement owned by the Plaintiff had been "improved." Quite frankly, I would need to have heard further evidence as to what structured features were actually damaged which

would have been considered an "improvement", as compared to personal items which were being kept in the basement.

[87] Due to the fact that I have found no liability on the part of the Defendant, I do not see the need to dwell further on this issue.

Claim for Emotional or Mental Distress

[88] There is no question the Plaintiff endured a great deal of upset due to the damage to her property, the repair and replacement and cleaning of items and the lengthy time items were in storage.

[89] Had I found liability, I would have awarded the Plaintiff $2,500.00 as damages for emotional or mental distress. I do note that the claim for what I would describe to be "personal injuries" (for example, the Plaintiff apparently sustained a heart attack after she had moved in) was not pursued by the Plaintiff. The damages which I would have awarded were based upon the Plaintiff's testimony as to her frustration and upset resulting from the multiple sewer back-ups she endured. Further, the Plaintiff testified about the fact that many of her items were in storage for almost two years and I have no doubt that that circumstance was very frustrating.

Conclusion

[90] The Plaintiff's claim is dismissed.

[91] I have received submissions from both counsel as to costs. I am not surprised, given that the trial took five days and the written submissions were extensive, to find that the Plaintiff may have spent over $57,000.00 in time. There was a further amount of $2,421.55 in disbursements and an account from Mr. Keller of $1,469.00.

[92] The Defendant spent $46,635.49 in time and $2,101.06 with respect to disbursements.

[93] Both parties did try to settle by way of Offers to Settle. The Plaintiff offered to settle for $15,000.00, plus $2,250.00 for costs.

[94] The Defendant made two Offers, the first for $2,000.00 on July 18, 2014, and the second one on November 17, 2015, in the amount of $5,500.00.

[95] The trial took five days with respect to evidence and there were, as noted, extensive written submissions both with respect to legal argument and costs. The trial commenced on November 25 and lasted until November 27, 2015 and then was adjourned to March 15 and was concluded on March 16, 2016. I have no doubt that the adjournment resulted in some further costs in terms of refreshing counsel's mind as to the issues and evidence.

[96] The Defendant has been successful, although I struggled as to whether the Defendant had met its obligation to remediate the back-up problem as quickly as possible in all the circumstances. However, the Defendant has been successful and I do award it costs. I find the efforts by the Defendant to settle to be reasonable. I am mindful of section 29 of the *Courts of Justice Act* and of Rules 14 and 19 of the *Rules of the Small Claims Court*. Taking these provisions into account, I award $7,500.00 in costs to the Defendant, to be payable by the Plaintiff. Additionally, I have reviewed the Defendant's disbursements, being $2,101.06, and I find all of them to be reasonable, given the extensive research and photocopying which was required. The Plaintiff shall pay for these disbursements.

[97] The Defendant has urged upon me to consider section 9.01 of the Declaration of the Defendant Corporation. That section states:

"Each owner shall indemnify and save harmless the Corporation from and against any loss, costs, damage, injury or liability whatsoever which the Corporation may suffer or incur resulting from or caused by an act or omission of such owner, his family or any member thereof, any other resident of his unit or any guest, invitees or licensees of such owner or resident to or with respect to the common elements and/or all other units, except for any loss, costs, damages,

injury or liability caused by an insured (as defined in any policy or policies of insurance) and insured against by the Corporation. All payments pursuant to this clause are deemed to be additional contributions toward the common expenses and recoverable as such."

[98] Essentially, the Defendant seems to be asking me to order the Plaintiff to pay the Defendant for all of the Defendant's costs and disbursements, being $48,736.55.

[99] I was not referred to any case law which interprets this section of the Declaration. I am not prepared to award costs outside of the formula contemplated by the *Courts of Justice Act* and the *Rules of the Small Claims Court.* It would be contrary to proportionality to award in costs almost twice the statutorily imposed maximum amount of the claim.

[100] I cannot, in good conscience, make such an award in the context of a Small Claims Court action. Parties cannot expect to be indemnified in this Court, given the provisions of section 29 of the *Courts of Justice Act* and Rules 1.03 and 19 of the *Rules of Small Claims Court.*

[101] Post-judgment interest set at 2% per annum.

May 10, 2016

Released: June 17/16

I. R.C.

Deputy Judge Ian R. Stauffer