SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Joseph O'Regan, Plaintiff

AND:

Carleton Condominium Corporation 169, Apollo Property Management Ltd. and Joseph Muchmore, Defendants

BEFORE: Master Kaufman

COUNSEL: Joseph O'Regan, representing himself

Rodrigue Escayola and Graeme MacPherson, for the Defendants

HEARD: January 28, 2021

REASONS FOR DECISION

[1] Three years ago, Mr. O'Regan left his condominium unit while his eggs were cooking on the stove. Two hours later, he received a call from his condominium's superintendent, Mr. Muchmore. Other residents had alerted Mr. Muchmore that there was a smoke odour emanating from Mr. O'Regan's third floor unit and that his fire alarm could be heard from the hallway. Mr. Muchmore entered Mr. O'Regan's unit with a master key, removed the burning pan from the stove and soaked it in water. He also opened the balcony door and windows to let the smoke out.

[2] Mr. O'Regan's condominium corporation, Carleton Condominium Corporation 169 ("the Corporation") retained a contractor to remedy the damage caused by the smoke. The contractor cleaned the 3rd floor hallway walls, ceiling and floor and installed fifteen air scrubbers to remove the smoke odour. The Corporation was charged $8,637.03 for these services, but it only requested $5,000 from Mr. O'Regan. That was the amount of the insurance deductible that Mr. O'Regan would have been required to pay under the condominium's by-laws if the Corporation had submitted a claim to its insurance company.

[3] On January 31, 2020, the Corporation gave Mr. O'Regan 30 days to pay that amount. He did not pay, and the Corporation registered a lien on his unit pursuant to section 85 of the *Condominium Act, 1998*, S.O. 1998, c. 19 (the "Act").

Mr. O'Regan's action and his request for an urgent motion

[4] On November 2, 2020, Mr. O'Regan commenced this action. He contends that if any smoke entered the condominium's hallways or corridors, the resulting damage was caused by the Corporation's superintendent who, he alleges, failed to follow the fire department tactical ventilation entry protocol. He also argues that the remedial costs incurred were unnecessary and excessive. Mr. O'Regan also says that the Corporation's lien was registered too late and that it failed to participate in a mandatory mediation. Mr. O'Regan sought leave to schedule an urgent motion to address these issues.

[5] On November 27, 2020, Justice Gomery denied Mr. O'Regan's request for an urgent motion. Her Honour instead directed the parties to attend a case conference to schedule a hearing and set a timetable for Mr. O'Regan's proposed motion. The parties appeared before me on January 13, 2021. The plaintiff repeated his request that the motion be heard urgently. He explained that the lien registered on his unit's title prevented him from renewing his mortgage. If the lien was not discharged by February 16, 2021, he said, his lender could take steps to foreclose.

[6] I informed the parties that a hearing on all issues could not be scheduled before February 16, 2021 because that short timeframe did not provide sufficient time for the defendants to adequately respond, and moreover the Court had no availability to hear a long motion before that date. I gave the plaintiff a choice between: 1) scheduling a two-hour motion before me on January 28, 2021, limited to his arguments that the lien was invalid, as it was not registered in a timely fashion and because the defendants did not engage in prior mediation; or 2) scheduling a motion on all issues after February 16, 2021. The plaintiff chose the first option.

[7] While this summary judgment motion does not dispose of the entire action, I am satisfied that these two issues are readily bifurcated from the remaining issues in the action. Moreover, proceeding in this manner allowed the plaintiff to obtain an expeditious adjudication of these two issues before his February 16, 2021 deadline.

[8] There are two issues in this motion: whether the Corporation's lien is invalid as a result of 1) the Corporation's failure to mediate and/or 2) the timing of its lien registration.

Requirement to mediate

[9] The Corporation registered a lien against Mr. O'Regan's unit pursuant to s. 85 of the *Condominium Act.* Section 85 creates a lien against an owner's unit when an owner defaults in his obligation to pay common expenses. It reads:

> Lien upon default
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> **85** (1) If an owner defaults in the obligation to contribute to the common expenses payable for the owner's unit, the corporation has a lien against the owner's unit and its appurtenant common interest for the unpaid amount together with all interest owing and all reasonable legal costs and reasonable expenses incurred by the corporation in connection with the collection or

> attempted collection of the unpaid amount. 1998, c. 19, s. 85 (1); 2015, c. 28, Sched. 1, s. 78 (1).

[10] The plaintiff contends that the Corporation was not entitled to charge him for remediation work under that section because it was not a "common expense". He argues that the only expenses that can be charged under section 85 are an owner's regular monthly fees, which cover utilities and general upkeep. Mr. O'Regan argues that the Corporation should have first obtained a compliance order under s. 134 of the *Act*. Any damages or costs awarded to the Corporation following a successful s. 134 application could then be added as common expenses and liened as such.[1]

[11] Section 134 of the *Act* reads:

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

[12] Mr. O'Regan argues that, had the Corporation pursued the appropriate application under s.134 of the *Act,* it would have been required to mediate before commencing an application. Section 134(2) provides that if the mediation and arbitration processes described in s.132 are required, a person is not entitled to apply for a compliance order until the person has exhausted those processes. I do not accept these arguments.

[13] The Corporation was not required to apply for a compliance order before charging for the cost of the remedial work, because section 134 does not apply in these circumstances. Section 134 of the *Act* applies to "compliance orders", which are orders to enforce "compliance with any provision of this *Act*, the declaration, the by-laws […]". Here, the Corporation does not require an order to force Mr. O'Regan to comply with the *Act*, the condominium's declaration or any of its by-laws. The Corporation charged Mr. O'Regan for certain expenses it incurred as a result of Mr. O'Regan leaving his eggs burning on the stove. As will be explained below, these expenses fall within the definition of "common expenses" under the *Act* and the condominium's declaration, and are accordingly subject to the automatic lien provisions under s. 85.

[14] Moreover, as this Court has previously held, a Court Order is not always required to back charge for amounts that do not relate to regular monthly common expenses. There are many provisions in the *Act* which authorize the collection of certain amounts as "common expenses" without a Court order.[2]

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[1] *Condominium Act*, s. 134(5).
[2] *Amlani v. York Condominium Corporation No. 473*, 2020 ONSC 5090 (Div. Ct.) at para 15.

[15] Even if s. 134 applied, the requirement to mediate before commencing an application only arises if the mediation process described in s. 132 is required. Subsection 132(2) identifies three types of agreements deemed to contain a mandatory mediation provision: agreements between a declarant and a corporation, agreements between two or more corporations, and agreements in respect of allocating costs of proposed addition, alteration or improvements of common elements between a corporation and an owner. This dispute does not concern the types of agreements which require prior mediation.

[16] I conclude that the Corporation was not required to participate in a mediation before exercising its rights under s. 85 of the *Act*.

Timeliness of the lien registration

[17] The Corporation registered its lien on title within three months of Mr. O'Regan's default. Its lien is accordingly valid.

[18] The *Act*'s principal object is to achieve fairness among owners, their tenants, their mortgagees and the corporation itself in raising the money to keep the common enterprise solvent.[3] Owners must contribute to a common expenses fund in the proportions specified in the condominium's declaration.[4] This common expense fund is the central mechanism to achieve financial fairness among the owners. If one owner fails to pay, the others must bear his burden.[5] The *Act* aims to place the financial burden created by one unitholder's conduct on him or herself rather than on the Corporation, which would effectively pass on the burden innocent unitholders.[6]

[19] Section 85 of the *Act* provides a condominium corporation with a lien against a defaulting owner's unit for any unpaid amount of common expenses, together with interest and all reasonable legal costs and expenses incurred in connection with the collection or attempted collection of the unpaid amount. The lien takes priority over most encumbrances, including residential mortgages.

[20] Common expenses are defined in s. 1 of the *Act* as those expenses related to the performance of the objects and duties of a corporation *and all expenses specified as common expenses in this Act, in the regulations or in a declaration* (emphasis added). Pursuant to paragraph 7(4)(a) of the *Act*, a declaration may contain a statement specifying the common expenses of the corporation.

[21] Article X of the Corporation's declaration deems expenses incurred by the Corporation to repair damage to common elements caused by an owner to be common expenses:

> X INDEMNIFICATION
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> Each owner shall indemnify and save harmless the Corporation from and against any loss, costs, damage, injury or liability whatsoever which the

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[3] *York Condominium Corporation No. 482 v. Christiansen,* 2003 CanLII 11152 at para 5.
[4] *Condominium Act,* s. 84(1).
[5] *York Condominium Corporation No. 482 v. Christiansen,* 2003 CanLII 11152 at para 5.
[6] *Amlani v. York Condominium Corporation No. 473*, 2020 ONSC 194, at para 31.

> 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 guests, invitees or licencees 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 any insured (as defined in any policy or policies of insurance) and insured against by the Corporation.
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> All-payments pursuant to this clause are deemed to be additional contributions toward the common expense and recoverable as such. (emphasis added).

[22] I agree with the Corporation that the expenses it incurred resulted from Mr. O'Regan's acts or omissions, and that it was accordingly entitled to charge him for the cost of the remediation work as a common expense, pursuant to article X of the declaration.

[23] In late 2019, the Corporation concluded that it would not be fair to require other unitholders to pay for the damage Mr. O'Regan caused by leaving his eggs on the stove unattended. On January 31, 2020, the Corporation informed Mr. O'Regan that it was charging him an amount equivalent to its insurance deductible and requested payment within 30 days (. by March 1, 2020). Mr. O'Regan did not pay by the stated deadline.

[24] Pursuant to s. 85 of the *Act*, a lien against Mr. O'Regan's unit was created automatically upon his default to contribute to common expenses. However, the Corporation must preserve its lien by registering it on title within three months of the default.[7] In addition, the Corporation must give 10 day's written notice of the lien to the affected unitholder. [8] It must also give written notice of the lien to every encumbrancer whose encumbrance is registered on title on or before the day a certificate of lien is registered.[9]

[25] Mr. O'Regan argues that the lien was registered late because the Corporation was invoiced for the work on January 23, 2019. It paid the invoice on August 8, 2019 and only requested payment from Mr. O'Regan on January 31, 2020.

[26] Subsection 85(2) provides that the lien expires three months *after the default* that gave rise to the lien occurred unless the corporation registers a certificate of lien within that time. The three-month period begins to run when the unit owner fails to pay the obligation relied upon to invoke the lien.[10] Until the Corporation charged Mr. O'Regan for these remediation costs, he had no obligation to pay. Mr. O'Regan can only be said to be in default as of March 1, 2020, when the deadline to pay for the remediation costs expired.

[27] The Corporation gave Mr. O'Regan written notice of lien on May 13, 2020. The Corporation then registered the lien on May 29, 2020, which is less than three months from the March 1, 2020

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[7] *Condominium Act*, s. 85(2).
[8] *Condominium Act*, s. 85(4).
[9] *Condominium Act*, s. 86(3).
[10] *CIBC Mortgages Inc. v. York Condominium Corporation No. 385*, 2017 ONCA 542 at para 48.

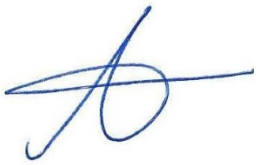
default date. Mr. O'Regan's mortgagee was also notified of the lien's registration on May 29, 2020.

Disposition

[28] Mr. O'Regan's motion for partial summary judgment is dismissed, as I have concluded that the Corporation's lien was validly registered in accordance with section 85 of the *Act.*

[29] I express no views on Mr. O'Regan's arguments that the smoke damage was caused by the superintendent's negligence, and that the remedial costs were excessive and unnecessary. These questions were not before me. However, like many disputes between a condominium corporation and its owners, the costs involved in this proceeding can very quickly escalate out of proportion. Mr. O'Regan advised that he is of modest means and has the option of claiming the remedial costs from his insurance. This would require him to pay a $1,000 deductible. He elected not to make an insurance claim because "launching an action" was "the righteous" thing to do. I would urge him to carefully consider the costs and the risks of continuing this litigation when he has this other alternative.

[30] If the parties cannot reach an agreement on costs, I will entertain submissions in writing. Counsel may obtain further directions on costs submissions from my office within 30 days should that be necessary.



Master Kaufman

Date: February 4, 2021