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The parrot is really a red herring

Toronto real estate law guru Jeffrey Lem has a knack for making court cases both entertaining and educational at the same time.

His latest effort, which appeared in the *Law Times* last month, is about the $40,000 parrot. Although the bird, which was housed in a Toronto condominium in violation of the no-pets rules, was the focal point of the case, Lem says it was no more than a red herring for condominium lawyers. (Read the story here.)

Michael and Margarita Bazilinsky live in a condo unit on Holly St., near Yonge St. and Eglinton Ave. In November 2010, the corporation contacted them about a bird believed to have been in their unit. Michael responded that he had had a bird for two weeks but it had since been returned to its owner.

In December 2010, and again in February 2011, the condominium lawyers wrote the Bazilinskys demanding that they remove the bird from the unit. The lawyers threatened court proceedings to enforce compliance.

In May last year, the corporation placed a $3,330 lien on the owners' unit for legal fees incurred in attempting to evict the bird.

The corporation then brought a court application alleging that the Bazilinskys were keeping a bird in their unit in violation of the "no pet" provision of the corporation's declaration and rules. The condominium asked the court for an order forcing the Bazilinskys to comply with its declaration and rules, as well as its legal costs of $16,487.94.

When the case was heard in August, the Bazilinskys consented to the removal of the bird but disputed the amount of costs claimed by the board. The condominium asked for $8,800 but was awarded only $3,000 by the judge. Subsequently, the corporation refused to accept the $3,000 offered by the owners, and all subsequent common expense payments.

By February of this year, the legal costs claimed by the corporation had escalated to $41,599.45. The Bazilinskys then brought the case back to court seeking a discharge of the lien against their unit and removal of any claim for legal costs beyond the $3,000 ordered last August.

The condominium board based its claim on section 134(5) of the Condominium Act which entitles the corporation to recover legal costs of obtaining a compliance order against an owner.

Following the hearing in February, Justice Nancy Backhouse ruled that the legislation "is not an invitation to counsel to aggressively work a file or unreasonably build up costs. . . . This was a simple application, the substance of which was consented to before the court date. In my opinion, the value of legal work . . . is no more than $6,500" including the $3,000 costs awarded in August 2011.

Backhouse awarded $5,000 in costs against the condominium corporation, ordered the lien discharged and ruled that the owners did not have to pay interest on the outstanding common expenses which the board refused to accept.

When the smoke cleared, the condo actually owed the Bazilinskys $1,800 in legal fees.

With the case resolved, the Bazilinskys have sold their unit and are moving out of the building. "I feel sorry for the people who live here," Michael told me last week.

Back to the red herring. In his analysis of the decision, Lem wrote that the case really has nothing to do with parrots, since the principles could have applied equally to the enforcement of any provisions of a condominium's declaration, bylaws or rules.

The real issue is the extent to which condominium boards can recover their legal costs against allegedly wayward owners.

In a similar case last year, the court ruled the board could not go on a legal rampage and incur wildly outrageous legal bills. It drastically reduced the claimed legal fees.

Condominium corporations are typically successful in recovering all their legal fees against offending owners.

But, says Lem, these new cases "warn condominium managers and their boards that they can't undertake such litigation so recklessly and aggressively as to prompt the courts to deem their tactics as part of a scorched-earth strategy giving rise to unreasonable and disproportionate legal bills."

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Metropolitan Toronto Condominium Corporation No. 744 v. Bazilinsky, 2012 ONSC 1187 (CanLII)

Date:	2012-02-17
Docket:	CV-11-425809; 744
URL:	http://canlii.ca/t/fq4pp
Citation:	Metropolitan Toronto Condominium Corporation No. 744 v. Bazilinsky, 2012 ONSC 1187 (CanLII), <http://canlii.ca/t/fq4pp> retrieved on 2012-05-13
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CITATION: Metropolitan Toronto Condominium Corporation No. 744 v. Bazilinsky, 2012 ONSC 1187

COURT FILE NO.: CV-11-425809

DATE: 20120217

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
Metropolitan Toronto Condominium Corporation No.744	)	Patrick Greco, for the Applicant
	)	
	)	
Applicant	)	
	)	
	)	
- and -	)	
	)	
	)	John De Vellis, for the Respondents
Michael Bazilinsky and Margarita Bazilinsky	)	
	)	
	)	
Respondents	)	
	)	
	)	
	)	
	)	**HEARD:** February 15, 2012

Backhouse, J.

[1] The respondents ("the Bazilinskys") seek an order requiring the applicant ("the corporation") to remove the Certificate of Lien registered against their condominium unit and correction of their status certificate to remove any claim for legal costs other than those ordered by me on August 17, 2011. The corporation opposes the relief sought on the basis that it is entitled to its actual costs pursuant to section 134(5) of the *Condominium Act, 1998* in obtaining an order for compliance with its Declaration and Rules. It claims $41,599.45 in this regard.

[2] The parties agree that if further costs are to be assessed pursuant to section 134(5), then I should do so.

[3] In November, 2010, the corporation contacted the Bazilinskys regarding a bird it alleged had been in their condominium unit. Mr. Bazilinsky responded that he had had a bird for two weeks but it had since been returned to its owner. In December, 2010 and February, 2011, counsel for the corporation wrote to the Bazilinskys demanding that they remove the bird from their unit. In both letters, the Bazilinskys were warned that court proceedings would be commenced to enforce compliance and that the legal costs would be claimed against them personally and/or their unit.

[4] In April, 2011, the corporation placed a lien on the Bazilinskys' unit. That lien was discharged following a payment by the Bazilinskys' mortgage lender in the amount of $3,330.47. Mr. Bazilinsky's evidence is that this was without his consent and this amount was added to his line of credit.

[5] In May, 2011, the corporation updated its status certificate and claimed that the Bazilinskys owed approximately $16,500 in addition to the $3,330.47 already paid.

[6] On May 5, 2011, the corporation brought an application in this court alleging that the Bazilinskys were keeping a bird in their unit, in violation of the "no pet" provision of the corporation's declaration and sought, among other things, an order that the Bazilinskys comply with the corporation's Declaration and Rules and Regulations and costs on a substantial indemnity basis. The grounds for the application included Section 134(5) of the *Condominium Act, 1998*. The affidavit in support of the application referred to the outstanding legal costs as $16,487.94.

[7] By offer to settle dated June 29, 2011, the Bazilinskys offered to settle the application on the basis of a payment of $3000. On August 11, 2001, counsel for the Bazilinskys emailed the corporation's counsel as follows:

> "You have not communicated your client's position in respect of my client's settlement offer until now.
>
> There is consent to the substantive order being sought by your client. I believe that this is without need for admission or further contradiction of your client's alleged facts.
>
> The only issue to be determined is that of costs. I propose that we determine an expeditious and efficient manner of resolving that outstanding issue."

On August 11, 2011, counsel for the corporation responded:

> "…my client rejects your clients' settlement offer. Given the money they have already spent as a result of your clients' conduct, they are content to proceed to the hearing of the application next Wednesday…."

[8] In support of the Bazilinskys' position in the application, Mr. Bazilinsky deposed:

"I have no objection to consenting to an order for removal of any bird or disallowed pet because there is no such bird or pet kept in our suite nor has there been at any time since fall, 2010. I do, however, object to the amount of costs claimed by the property manager and condominium corporation herein."

[9] On the morning of the hearing of the application on August 17, 2011, the corporation's lawyer provided the Bazilinskys' lawyer with a bill of costs seeking costs of $8,815.49 on a partial indemnity basis. During the hearing, the Bazilinskys' lawyer consented to an order that they comply with the corporation's declaration and rules. The hearing consisted of argument on the issue of costs only.

[10] After hearing submissions from both lawyers, I awarded the corporation $3000 in costs. I made the following endorsement on August 17, 2011:

"The respondent consented to the relief sought on June 29, 2011 including an offer of costs of $3000. The applicant seeks $8,815.49 on a partial indemnity basis. Its bill of costs was presented for the first time this morning. In my view, taking proportionality into account and the respondent's offer well before the return date, costs of $3000 is appropriate."

[11] Regrettably, this did not end the matter. On October 13, 2011, the Bazilinskys' counsel received a letter from the corporation's counsel which stated in part:

"We are also instructed to demand collection of legal fees above and beyond those ordered by Madam Justice Backhouse pursuant to section 134(5) of the *Condominium Act,1998*. The total fees incurred in pursuing this matter are $21,897.11 (inclusive of the $3000 cost award.)."

[12] Section 134(5) of the *Condominium Act,* 1998 provides:

> S.134(5) If a corporation obtains an award of damages or costs in an order made against an owner or occupier of a unit, the damages or costs, together with any additional actual costs to the corporation in obtaining the order, shall be added to the common expenses for the unit and the corporation may specify a time for payment by the owner of the unit.

[13] The corporation has refused to accept the Bazilinskys' $3000 payment in respect of my order and since December, 2011, has also refused to accept any of their payments towards their monthly common element fees. On November 24, 2011, the corporation registered a lien in the amount of $23,698.18 against title to the Bazilinskys' unit which by December 28, 2011 had increased to $27,557.98, including interest on payments that the Bazilinskys had attempted to make but which were returned.

[14] The Bazilinskys have been attempting to sell their unit since June, 2011. According to Mr. Bazilinsky's evidence and a letter from the Bazilinskys' realtor, by persisting with the lien registered against title, the corporation has prevented the Bazilinskys from selling their unit.

[15] The Bazilinskys submit that it is clear from their offer and the emails that all the costs the corporation was claiming including costs pursuant to section 134(5) of the *Condominium Act, 1998* were before the court on August 17, 2011. They further submit that the corporation is not entitled to invoke section 134(5) because it has not tried to initiate or schedule mediation in this matter.

[16] The corporation submits that it required an award of damages or costs to be entitled to add to the common expenses for the unit its actual costs in obtaining the order under section 134(5) and that submissions made on August 17, 2011 were only in regard to partial indemnity costs and not actual costs. It further submits that if mediation or arbitration was required before section 134(5) could be invoked, the Bazilinskys waived this.

Analysis

[17] Even if this matter was subject to the mediation/arbitration provisions of the *Condominium Act, 1998,* in my view having taken part in the court proceedings, the Bazilinskys cannot now take the position that the matter ought to have been referred to mediation/arbitration.

[18] The Bazilinskys may have believed that all issues of costs were resolved on August 17, 2011, given the reference to Section 134(5) of the *Condominium Act, 1998* in the corporation's Notice of Application, the reference to the outstanding legal costs of $16,500 in the affidavit in support and the exchange of emails. However, in awarding costs of $3000, no submissions were made to me regarding Section 134(5) and I did not take it into account.

[19] In *Metropolitan Toronto Condominium Corp. No.1385 v. Skyline Executive Properties Inc.* [2005] O.J.No.1604 Doherty, J.A. stated at para.51:

> My conclusion that "additional actual costs" in s.134(5) can include legal costs beyond those ordered or assessed by the court does not mean that all legal costs properly owed by MTCC to its lawyers can be added to the common expenses of the Skyline unit. As the motions judge held, the section refers only to costs incurred "in obtaining the order." Those who made the case for an enforcement provision like that contained in s.134(5) before the enactment of the present Act, argued that it should include costs associated with either obtaining or enforcing the compliance order. However, the Legislature chose to include only the word "obtaining" in s.134(5). The process of obtaining a court order is distinct from the process of enforcing that order. On a plain reading of s.134(5) it does not extend to costs associated with the enforcement of the compliance order. MTCC's legal costs are recoverable only if properly charged by its lawyers and incurred in obtaining the order."

[20] I have considered the corporation's bill of costs claiming $41,599.45 and heard submissions from the parties.

[21] The costs of obtaining the order essentially ended in June, 2011 when the Bazilinskys made their offer to settle. As stated in *Metropolitan Toronto Condominium Corp. No.1385 v. Skyline Executive Properties Inc.*, supra, legal costs are recoverable only if properly charged by its lawyers and incurred in obtaining the order. Section 134(5) is not an invitation to counsel to aggressively work a file or unreasonably build up costs. The corporation's costs incurred in the dispute over s.134(5) that arose after August 17, 2011 did not relate to obtaining or holding the order which the Bazilinskys were content with and tried to pay. This was a simple application, the substance of which was consented to before the court date. In my opinion, the value of legal work performed on a solicitor and client basis is no more than $6500 (inclusive of the $3000 costs award of August 17, 2011). The Bazilinskys have paid $3330.47 through their mortgage lender, leaving a balance owing of $3169.53.

[22] Both counsel made submissions about the costs of the attendance on February 15, 2012. The Bazilinskys were largely successful on this application. The corporation has to pay these costs because its claim was unreasonable. I fix the costs of today's application at $5000. These costs can be set off against what the Bazilinskys owe.

[23] An order will issue that the Certificate of Lien registered against the Bazilinskys' condominium unit shall be vacated and their status certificate corrected to remove any claim for legal costs forthwith upon the Bazilinskys paying the outstanding common expenses (without interest because the Bazilinskys sought but were refused the right to pay them) less the net balance owed by the corporation for costs ($5000 less $3169.53=$1830.47).

Backhouse, J.

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B E T W E E N:

Metropolitan Toronto Condominium Corporation No.744

-and-

Michael Bazilinsky and Margarita Bazilinsky

REASONS FOR DECISION

Backhouse, J.

Released: February 17, 2012