

CITATION: Metropolitan Toronto Condominium Corp. No. 868 v. Pang,
2021 ONSC 2737
COURT FILE NO.: CV-19-00619982
DATE: 20210413

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 868,
Applicant

AND:

CYNTHIA PANG, Defendant

BEFORE: Davies J.

COUNSEL: *Francesco Deo*, for the Application
Newton Wong, for the Respondent

HEARD at Toronto (by video): March 18, 2021

REASONS FOR DECISION

[1] Cynthia Pang owns a unit in the condominium building belonging to Metropolitan Toronto Condominium Corporation No. 868. On January 31, 2019, the Condominium registered a Certificate of Lien against Ms. Pang's unit for unpaid common expenses. Ms. Pang had not paid her common expenses since June 2018.

[2] On May 14, 2019, the Condominium issued a statement of claim seeking vacant possession of Ms. Pang's unit so it could enforce the lien through a power of sale. Ms. Pang filed a statement of defence and counterclaim in which she claimed she paid her common expenses to the Condominium's property manager. In her counterclaim, Ms. Pang sought \$11,350 from the Condominium in damages arising from a flood in her unit.

[3] The Condominium brought a motion for summary judgment, which was scheduled for February 26, 2021.¹ At the start of the hearing, Ms. Pang offered to pay the outstanding common expenses so the hearing was adjourned.

¹ The summary judgment motion was originally scheduled for June 29, 2020 but was adjourned because of the restrictions on court proceedings in response to COVID-19.

[4] By February 26, 2021, Ms. Pang owed \$16,933.26 in unpaid common expenses and \$4,185.18 in interest. Ms. Pang paid the outstanding balance. As a result, the summary judgment motion was not argued. The Condominium agreed that its request for vacant possession of Mr. Pang's unit had been resolved by the payment of the common expenses and Ms. Pang agreed to the dismissal of her counterclaim. However, the parties could not agree on how much Ms. Pang owes in legal fees as part of the certificate of lien.

[5] When a unit owner defaults on their common expenses, the Condominium has a lien against their unit for the unpaid expenses, which must be registered within 3 months of the default: *Condominium Act, 1998*, S.O. 1998, c. 19. Section 85(3) of the *Condominium Act* says that the certificate of lien includes the amount owing at the time the lien is registered plus any common expenses that are not paid thereafter. The certificate of lien also includes interest on the unpaid common expenses plus "all reasonable legal costs and reasonable expenses" the Condominium incurs to collect the outstanding amount.

[6] The Condominium argues that it is entitled to include its full costs, totaling \$56,327.33, in the amount owing by Ms. Pang under the certificate of lien. The Condominium argues that its full fees are reasonable in light of Ms. Pang's history of non-payment of the common expenses, her conduct throughout the litigation and the timing of her payment of the outstanding balance.

[7] Ms. Pang argues that the Condominium should not be entitled to include any costs in the certificate of lien. In the alternative, Ms. Pang argues that no more than \$15,000 in legal costs would be reasonable in this case.

[8] Under s. 131 of the *Courts of Justice Act* and Rule 57 of the *Rules of Civil Procedure*, cost awards are generally intended to compensate the successful party for some of its legal fees. There is a presumption that the successful party will be awarded its costs on a partial indemnity basis: *Bell Canada v. Olympia & York Development*, [1994] O.J. No. 343. Costs can be awarded on a substantial indemnity basis or even a full indemnity basis if the conduct of a party is so reprehensible, scandalous or outrageous to be worthy of sanction by way of an enhanced cost award: *Young v. Young*, [1993] 4 S.C.R. 3 at para. 251.

[9] However, the *Condominium Act* creates a legislative scheme for the recovery of legal costs that is different than the scheme for awarding costs in other litigation: *Carleton Condominium Corp. No. 396 v. Burdet*, 2015 ONSC 1361 at para. 37. Under s. 85(3) of the *Condominium Act*, a unit owner who breaches her statutory obligation to pay common expenses is liable for "all reasonable legal costs and expenses" incurred by the Condominium to collect those expenses. As the Court of Appeal has recognized, *Condominium Act* is designed to ensure that innocent unit owners are not left with the financial burden of legal fees and costs incurred to enforce a debt owing by another unit owner: *Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc.*, 2005 CanLII 13778 (ON CA) at para. 40.

[10] The use of the phrase “all reasonable legal costs” in s. 85(3) of the *Condominium Act* signals that the Condominium is entitled to more than partial indemnity costs in accordance with the tariff under Rule 57 of the *Rules of Civil Procedure*. Rather, subject to the Court’s overriding discretion under s. 131 of the *Courts of Justice Act*, the Condominium is entitled to recover all the legal costs it incurred to enforce the debt owing by Ms. Pang, so long as those costs are reasonable. While the legal fees claimed by the Condominium are high, particularly when compared to the amount owing by Ms. Pang for her unpaid common expenses and interest, I nonetheless find that they are reasonable for several reasons.

[11] First, this is not the first time the Condominium has had to pursue Ms. Pang for unpaid common expenses. Ms. Pang has been the owner of her unit since June 2005. She has repeatedly failed to pay her common expenses. In February 2006, the Condominium registered a certificate a lien on her unit for unpaid common expenses and in March 2006, the Condominium issued a Notice of Sale. Ms. Pang finally paid the outstanding balance in September 2007 and the lien was discharged. In 2014, Ms. Pang failed to pay a special assessment and the Condominium issued a notice of lien on October 27, 2014. Ms. Pang paid the outstanding balance in November 2014. In 2015, Ms. Pang again failed to pay her common expenses and the Condominium issued a certificate of lien on September 29, 2015. On May 3, 2016, the Condominium issued a statement of claim. The Condominium obtained default judgment against Ms. Pang and the Condominium issued a notice demanding vacant possession of her unit. Only then did Ms. Pang pay off the outstanding balance and the lien was discharged in July 2017. Less than a year later, Ms. Pang stopped paying her common expenses again, which led to the current proceedings. Given Ms. Pang’s pattern of defaulting on her common expenses, she is well aware of the consequences of not paying common expenses and the legal steps the Condominium must take to recover any unpaid amount.

[12] Second, the work done by the Condominium’s counsel was necessary to recover the unpaid common expenses in this case. Ms. Pang argues that this is a simple lien enforcement matter that should not result in more than \$56,000 in costs. I agree that this start as a simple lien enforcement matter. According to the Condominium’s cost outline, counsel spent less than 5 hours on the initial steps of preparing the documents to register the lien. However, Ms. Pang decided not to resolve the matter at that point and her response to the Condominium’s attempts to secure payment is what made this matter much more complicated.

[13] Common expenses are the life-blood of any condominium: *York Condominium Corporation No. 482 v. Christiansen*, 2003 CanLII 11152 (ON SC) at para. 16. The Condominium had a duty under s. 17(3) of the *Condominium Act* to take “all reasonable steps” to ensure that Ms. Pang complied with the *Act*, the declaration, the by-laws and the rules, including her obligation to pay common expenses. The Condominium, therefore, had a duty to register its lien. Ms. Pang chose not to pay the outstanding balance to have the lien discharged. In January 2019, Ms. Pang only owned \$3,075, which included the Condominium’s legal costs and expenses.

[14] When Ms. Pang common expenses remained outstanding, the Condominium had a duty to issue a statement of claim to enforce its lien. Ms. Pang again chose not to resolve the matter when she received the statement of claim. Rather, she issued a statement of defence and counterclaim in which she asserted that she had paid her common expenses to the Condominium's property manager. She also claimed that the Condominium's superintendent damaged her floors and furniture while cleaning up after a flood that she says was caused by improper maintenance of the pipes by the Condominium.

[15] The Condominium incurred significant additional legal fees to investigate and respond to Ms. Pang's claims. Counsel for the Condominium spent approximately 70 hours reviewing the statement of defence and counterclaim, investigating Ms. Pang's claim, preparing a reply and defence to the counterclaim, and preparing affidavits in support of the summary judgment motion. This work was all necessitated by the position Ms. Pang took in her statement of defence and counterclaim and those legal expenses are reasonable.

[16] Ms. Pang then chose to respond to the summary judgment motion. She filed a responding motion record without any evidence to substantiate the claim that she had paid her common expenses to the Condominium's property manager. Counsel for the Condominium spent additional 38 hours replying to Ms. Pang's motion record, drafting a factum on the summary judgment motion and preparing for the hearing.

[17] It is important to note that Ms. Pang is statutorily required to pay common expenses as specified in the Condominium's declaration: *Condominium Act*, s. 84(1). She was required to pay her common expenses despite her purported claim for damages against the Condominium: *Condominium Act*, s. 84(3). The fact that Ms. Pang filed a counterclaim for damages did not relieve her of her ongoing obligation to pay common expenses. Ms. Pang's counsel acknowledged during submissions on this motion that there was no legal basis for Ms. Pang to believe that she could withhold her common expenses and use any damages she might recover on her counterclaim to off-set what she owed. I find that Ms. Pang's defence was without any merit and was simply a strategy to delay paying what she was statutorily required to pay.

[18] Ms. Pang chose to withhold her common expense payments and vigorously defend against the Condominium's claim. While litigants should not be penalized for reasonably defending against the case, Ms. Pang's defence was devoid of merit. She cannot complain about the legal costs the Condominium incurred as a result of her litigation strategy. She also cannot expect the innocent unit owners to pay the legal fees that were reasonably incurred by the Condominium to secure payment of her unpaid common expenses.

[19] Finally, Ms. Pang did not make any meaningful effort to settle this matter until just before the hearing. Counsel for Ms. Pang argued that as of March 2020, Ms. Pang wanted to settle this matter but the Condominium did not cooperate. I do not accept this argument.

[20] Counsel for Ms. Pang told Justice Myers in Civil Practice Court on November 18, 2020 (when the February 26, 2020 hearing date was set), that Ms. Pang intended to pay the outstanding common expenses. Counsel for the Condominium made it clear during that hearing that even if Ms. Pang paid the common expenses and interest, the issue of legal costs would still need to be resolved. Despite Counsel's comments in Civil Practice Court, Ms. Pang did not pay the outstanding common expenses in November 2020 or at any time before the scheduled hearing date. Rather, Ms. Pang made an offer to settle on December 28, 2020, just two months before the summary judgment motion. That offer did not specify how much Ms. Pang was willing to pay in legal fees.

[21] On January 19, 2021, the Condominium rejected Ms. Pang's offer because the proposed terms were not clear. However, the Condominium made a counter-offer to settle the matter on the basis that Ms. Pang would pay all outstanding common expenses and interest within 30 days and she would pay \$30,000 in legal fees within 60 days. As a condition of the settlement, the Condominium also wanted Ms. Pang to enrol in the pre-authorized payment plan for her common expenses going forward. Ms. Pang did not respond to the Condominium's January 19, 2021 counter-offer until February 25, 2021, the day before the summary judgment motion as to be argued. Ms. Pang rejected the Condominium's offer but offered to pay \$15,000 in legal fees or an amount to be assessed.

[22] Ms. Pang had many opportunities to settle this matter before the Condominium incurred significant legal costs. She could have settled this matter when the Condominium registered the lien in January 2019 and avoided the legal costs associated with the claim being commenced. She could have settled after receiving the statement of claim in May 2019. Instead, she continued to withhold her common expenses and filed a statement of defence and counterclaim. Ms. Pang could have settled after receiving the summary judgment motion record in January 2020 but chose instead to respond to that motion. Ms. Pang could have settled this matter before counsel spent time preparing a factum and oral submissions on the summary judgment motion. Ms. Pang cannot now complain that the Condominium incurred legal fees given her efforts to settle came at the very last minute and her only detailed offer was delivered on the eve of the summary judgment hearing.

[23] I find that the legal costs incurred by the Condominium are reasonable in the circumstances of this case. Ms. Pang is ordered to pay the Condominium \$56,327.33 in fees within 90 days.

[24] Ms. Pang has agreed that if she does not pay the Condominium \$56,327.33 within 90 days as ordered, the Condominium is entitled to a writ of possession in accordance with the draft Order attached as Schedule "A" without any further hearing.

Davies J.

Date: April 13, 2021

SCHEDULE "A"

Court File No.: CV-19-00619982-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

(Court Seal)

**METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO.
868**

**Plaintiff/
Defendant by Counterclaim**

and

CYNTHIA PANG

**Defendant/
Plaintiff by Counterclaim**

WRIT OF POSSESSION

TO The Sheriff of the City of Toronto,

Under an Order of this Court made on _____ in favour of Metropolitan Toronto Condominium Corporation No. 868, YOU ARE DIRECTED to enter and take possession of the following land and premises in your county or district:

Unit 01, Level 13, Metropolitan Toronto Condominium Plan No. 868, registered in the Land Registry Office for the Land Titles Division of Toronto No. 66 (Teranet LRO# 80) at Toronto, and its appurtenant common interest, municipally known as Suite 1701, 55 Centre Avenue, Toronto, Ontario, M5G 2H5;

AND YOU ARE DIRECTED to give possession of the above land and premises without delay to Metropolitan Toronto Condominium Corporation No. 868.

Date _____ Issued by _____

Local Registrar

Address of
court office: 393 University Avenue, 10th Floor
Toronto, ON M5H 1E6

Renewed by Order made on _____

Local registrar

METROPOLITAN TORONTO CONDOMINIUM
CORPORATION NO. 868
Plaintiff/
Defendant by Counterclaim

-and- CYNTHIA PANG
Defendant/
Plaintiff by Counterclaim

Court File No.: CV-19-00619982-0000

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT
TORONTO

WRIT OF POSSESSION

DEO CONDOMINIUM LAWYERS
Suite 300, 3100 Steeles Avenue West
Vaughan, ON L4K 3R1

FRANCESCO DEO (749820)
fr@fmedea.com
Tel: 905-760-1800 ext. 224
Fax: 905-760-0050

Lawyers for Metropolitan Toronto Condominium
Corporation No. 868