Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan EPS3807 v. Eagle Pacific Developments Inc. et al* 2019 BCCRT 1160

B E T W E E N :

The Owners, Strata Plan EPS3807

APPLICANT

A N D :

EAGLE PACIFIC DEVELOPMENTS INC., NORKESS DEVELOPMENT INC., and DISCOVER LANDSCAPING INC.

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Shelley Lopez, Vice Chair

INTRODUCTION

1. This small claims dispute is about $4,017.09 the applicant strata corporation, The Owners, Strata Plan EPS3807 (strata), says it paid in increased water bills, due to an alleged irrigation leak. The strata says the respondents are responsible for not

fixing the leak promptly. The strata also claims $273 it says it overpaid for May 2017 landscaping services.

2. The respondent Eagle Pacific Developments Inc. (Eagle) was the strata's builder, and Eagle hired the respondent Discover Landscaping Inc. (Discover) to do the strata's landscaping.

3. The respondent Norkess Development Inc. (Norkess) was the strata's developer. Both Eagle and Norkess deny any responsibility for the strata's claims. Discover did not participate in the proceeding as required and is in default, as discussed below.

4. The strata is represented by a council member, Rebekah Bowen. Eagle is represented by Martin Schenk, an employee or principal. Norkess is represented by Norman Kessner, its principal.

JURISDICTION AND PROCEDURE

5. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.

6. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In the circumstances here, I find that I can fairly decide this dispute based on the written evidence and submissions before me.

7. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

8. Under tribunal rule 9.3(2), in resolving this dispute the tribunal may do one or more of the following where permitted under section 118 of the CRTA: order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.

9. I note the strata withdrew the following claims: an allegedly inadequate retaining wall, access to the irrigation system, rekeying of locks, completion of the strata's 'phase 4' building, and provision of the owners' handbook to all owners. So, in this decision I will only address the remaining claims for $273 (about the alleged May 2017 landscaping overpayment) and for $4,017.09 (about increased water bills).

ISSUES

10. The issues in this dispute are to what extent, if any, the respondents owe the applicant strata: a) $273 for landscaping services the strata says it overpaid as it was charged twice for identical work, and b) $4,017.09 for increased water bills.

EVIDENCE AND ANALYSIS

11. In a civil claim such as this, the burden of proof is on the applicant strata to prove its claims on a balance of probabilities. Although I have reviewed all of the parties' evidence and submissions, I have only referenced what I find necessary to give context to my decision.

12. As noted above, Norkess was the strata's developer. It appears Norkess developed the strata in stages, and was still involved in some fashion in 2017 and 2018, after the strata came into existence. However, it is unclear whether Norkess' ongoing involvement was as developer, an owner of common property, owner of one or more strata lots, or a combination of the above.

13. At times, the strata expressly alleged Eagle and Discover are responsible for the claimed amounts. The strata's argument about Norkess appears to be limited to its

stated assumption that Eagle sent invoices to Norkess because Norkess "funded the project" and that Norkess should take responsibility in its role as developer.

14. I find there is no basis to hold Norkess legally responsible for either of the strata's claims. The $273 landscaping charge at issue was paid to Discover, not Norkess and the $4,017.09 claim is based on alleged negligence by Eagle and Discover in failing to promptly fix an alleged leak. There is no evidence of a contract that says Norkess accepts responsibility for Discover's work, and the evidence shows Eagle hired Discover as its independent contractor. Norkess had already sold the strata property at issue when the alleged leak and the increased water bills were discovered. While the strata alleges Norkess failed to reasonably communicate after the leak was discovered, I find that is an insufficient basis to hold Norkess liable. Given all the above, I dismiss the strata's claims against Norkess. The balance of this decision deals with Eagle's and Discover's respective liability for the claims.

May 2017 landscaping - $273 claim for alleged overpayment

15. The strata submits that Discover charged it twice for identical work. In particular, the strata says it paid twice for work done on May 9, 19, 25, and 26, 2017.

16. The strata says it never signed any landscaping contract for Discover's services. I infer this was because the strata was new in 2017, with the individual units sold by Norkess to the respective strata lot owners. The strata says that Eagle's contract with Discover was "grandfathered" to the strata in the spring of 2017. However, there is no contract at all in evidence.

17. I note the strata argues that Discover should never have charged it anything in the first place. However, the strata's claim here is limited to the alleged $273 overpayment, so my findings are limited to that claim. The $273 invoice is from Discover to the strata, dated June 5, 2017. The invoice copies in evidence shows the strata paid that invoice on October 31, 2017 and again on December 20, 2017.

18. As referenced above, the strata served Discover with the tribunal's Dispute Notice by courier at Discover's business address noted on invoice. Discover failed to file a Dispute Response as required. Given the invoices and emails in evidence before me and Discover's default status which means liability is assumed, I find Discover must repay the strata $273 as claimed. The strata is entitled to pre-judgment interest on the $273 under the *Court Order Interest Act* (COIA), from December 20, 2017. This equals $7.71.

19. In the above circumstances, I find the strata has not shown why Eagle should be held responsible for the strata's $273 overpayment to Discover. The fact that Eagle originally retained Discover when the strata was being built is an insufficient connection. The strata in error paid the same invoice twice and there is no basis to hold Eagle responsible. I dismiss the strata's $273 claim as against Eagle.

The $4,017.09 claim for increased water bills

20. The parties refer to the strata as being a townhouse complex, but I have no Land Title Office information in evidence before me. I have no information about the strata's size or its irrigation system's scope. However, it is undisputed the water meter at issue fed only the strata's irrigation system.

21. The strata's first water bill from the Capital Regional District (CRD), covering the period between June 22 and August 25, 2017, was $290.76. The strata says this was "a completely normal amount to pay every 2 months for irrigation purposes". The bill indicates this was for 152 cubic meters of water.

22. The strata's next 2 water bills were $2,943.95 and $1,073.14, which together totals the claimed $4,017.09. The $2,943.95 bill (1,539 cubic meters) covers the period from August 26 to October 20, 2017. The $1,073.14 bill (561 cubic meters) covers from October 21 to December 29, 2017. The strata does not explain why it claims the entirety of the 2 bills and why it is not responsible for some amount for irrigation watering. The strata paid the $2,943.95 bill on November 24, 2017 and the

$1,073.14 bill on February 2, 2018. I accept the 2 water bills at issue were higher than normal, which is undisputed.

23. In the strata's property manager's April 4, 2018 email, it notified Eagle of the high water bills and asked that the system be checked for leaks. Eagle says that when it was notified of the high water bills, it notified Discover to attend at the site to check for leaks.

24. I reject Eagle's submission that the high water bills were simply due to new planting and its frequent watering schedule. I say this given the CRD's email to the strata from its "Risk Insurance & Vehicle Coordinator" that the 2 high water bills, compared to other bills, clearly identified "an aberration or problem at the beginning". I accept there was significantly high water usage, that went well beyond new planting. However, there is simply no evidence before me that there was in fact a leak and that it was repaired. Eagle submits no leaks were found, and I find the applicants have not proved Eagle knew otherwise. The strata's later email correspondence about what they think happened is not evidence that there was a leak. Significantly, the strata did not provide any dates or contemporaneous documentation about when the alleged leak was fixed or when the strata realized it was fixed.

25. The strata says that instead of fixing the problem immediately to mitigate their loss, Eagle and Discover delayed in fixing "an obvious leak", which led the strata to pay the second high water bill referenced above. Yet, elsewhere the strata submits that it was Discover who eventually fixed the irrigation system. The strata also submits that as between Discover and Eagle, "one of these two companies" knew about the leak, fixed it, and never told the strata.

26. On balance, I find the strata has not proved Eagle knew there was a leak and failed to address it, or even that Eagle would be responsible for a particular leak. The fact that Eagle was the strata's builder is not sufficient evidence here to show Eagle is responsible for a timely repair of the leak after the strata came into existence. It is undisputed that Eagle contacted Discover to investigate the strata's concern, but

that also is not sufficient evidence to prove Eagle is responsible for either the alleged leak or Discover's failure to deal with it.

27. The strata also says the leak's cause was Discover's "poor construction techniques". In its reply submission, the strata says a Discover employee, DO, admitted in person that he thought the leak was caused by "the electrician working on site who possibly split or kinked the water line while working". However, the strata provided no evidence from anyone stating the irrigation system was constructed improperly. The strata says Eagle is liable for hiring Discover "that causes this kind of monetary damage to a strata". However, there is no evidence Discover was Eagle's employee such that Eagle might be vicariously responsible for its conduct. Rather, the evidence indicates Discover was an independent contractor. Notably, there is no contract or any documentation showing Eagle is responsible for the strata's irrigation for the time period in question.

28. The strata also says it was unable to turn off the water to mitigate its loss because the strata was never given access to the irrigation junction box located behind a locked gate controlled by Eagle. Yet, there is email evidence that the box was located on Norkess' property. In contrast, Eagle says that the strata was told they could enter the gate and speak with the site foreman at any time for access. In its reply submission, the strata says they were not given access until a new builder (which replaced Eagle) gave them access in the spring of 2019. In any event, there is no evidence before me that the strata ever requested access from Eagle or Norkess and was denied it. Rather, the strata says Discover's employee DO refused to give the strata access to the irrigation system, on the basis he could not warranty his work if the strata had control of the timer. Based on the strata's email evidence, it appears at the time they accepted that outcome while they decided whether they wanted to continue with Discover's services.

29. Given all the above, I dismiss the strata's claims against Eagle.

30. However, as noted Discover is in default and liability is assumed. In this case, I find this means Discover is responsible for the strata's increased water bills. I also note

that while Eagle has denied any leaks, there is no evidence from Discover about what it did and did not do to the strata's irrigation system after Eagle told it about the high water bills. What is known is that the strata's bills dropped back down to normal. That said, I do not allow the full $4,017.09 as claimed.

31. I find the strata should have reasonably expected to pay some amount for irrigation for the 2 months at issue, and the evidence indicates $290 was a normal bill. On a judgment basis, I deduct $580 ($290 x 2) from the $4,017.09 claimed, with a net total of $3,437.09. The strata is entitled to pre-judgment interest under the COIA on the $3,437.09 from April 4, 2018, the date it notified the respondents about the bills. This equals $85.75.

32. According to the CRTA and the tribunal's rules, as the strata was substantially successful in its claims, I find Discover must reimburse the strata $175 in tribunal fees. The strata also claims $97.34 in dispute-related expenses, $84.87 for UPS fees and $12.47 for registered mail, related to service of the Dispute Notice. However, the strata provided no receipts and no information about which respondent was served by registered mail. Since I have dismissed the strata's claims against Eagle and Norkess, on a judgment basis I find Discover must reimburse $12.47 for dispute-related expenses, an amount I find reasonable.

ORDERS

33. Within 14 days of this decision, I order the respondent Discover to pay the applicant strata a total of $3,991.02, broken down as follows:

    a. $273 in debt,

    b. $3,437.09 in damages,

    c. $93.46 in pre-judgment interest under the COIA on the above amounts, and

    d. $187.47, for $175 in tribunal fees and $12.47 in dispute-related expenses.

34. The strata is entitled to post-judgment interest under the COIA, as applicable. I dismiss the strata's claims against Eagle and against Norkess.

35. Under section 48 of the CRTA, the tribunal will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The time for filing a notice of objection is 28 days after the party receives notice of the tribunal's final decision. As Discover is in default, it has no right to make a Notice of Objection, as set out in section 56.1(2.1) of the CRTA.

36. Under section 58.1 of the CRTA, a validated copy of the tribunal's order can be enforced through the Provincial Court of British Columbia. A tribunal order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and the time for filing a notice of objection has passed. Once filed, a tribunal order has the same force and effect as an order of the Provincial Court of British Columbia.

Shelley Lopez, Vice Chair