

**BEFORE THE  
COMMISSION ON COMMON OWNERSHIP COMMUNITIES  
FOR MONTGOMERY COUNTY, MARYLAND**

RUBY TANG	)	
	)	
Complainant	)	
	)	
v.	)	Case No. 22-13
	)	
THE ELIZABETH CONDOMINIUM ASSOCIATION	)	November 1, 2013
	)	
Respondent	)	
	)	

**DECISION AND FINAL ORDER**

The above-captioned case came before a Hearing Panel of the Commission on Common Ownership Communities for Montgomery County, Maryland for hearing on October 16, 2013, pursuant to Chapter 10B of the Montgomery County Code. Respondent The Elizabeth Condominium Association (Respondent or the Condominium or the Association) was represented by counsel; complainant Ruby Tang (Complainant or Ms. Tang) was not.

**I. Background**

Complainant owns and resides in a lower-level condominium unit within the Elizabeth condominium (the Condominium). Respondent maintains the Condominium's common elements. Ms. Tang has complained for several years about water infiltrating her unit from outside. She brought an earlier case before the Commission which was settled at mediation. When she perceived that the infiltration problems persisted, she brought this case. Specifically, she claims that water ponds on a section of the roof near her unit and has infiltrated her unit through a window; that her balcony is incorrectly graded and water has infiltrated through sliding glass doors; and that HVAC condensation occasionally backs up in the drain within her unit.

The Association responds that Ms. Tang's current complaint is barred by the parties' earlier settlement; it has already re-graded the roof; it denies that there is current water infiltration from any other source; and it is in the midst of a major renovation project that will eventually re-grade the balconies and replace all windows and sliding glass doors.

Prior to the hearing Complainant requested the Commission to issue a number of subpoenas to witnesses she wished to call at the hearing. (The Panel Chair must authorize - hearing subpoenas. See Mont. Cnty. Code Section 2A-8(c), 10B-10(a).) Among the witnesses she proposed were Brian Weber, an insurance adjuster, and Michael Swank, a building contractor. She represented that both individuals had inspected her condominium unit and would testify as to their observations about water infiltration into her unit. The Panel Chair ruled that Weber's and Swank's proposed testimony would be duplicative and that Complainant should choose only one. She chose Mr. Weber.

A subpoena to Mr. Weber was issued by the Commission staff and mailed to him via both certified and regular mail at an address in Maryland provided by Complainant. Although the Commission never received the return receipt card for the certified mailing, neither envelope has been returned as undeliverable and the Panel assumes he was duly served.

Mr. Weber did not appear at the hearing. Complainant noted his absence and explained that she intended to offer letters written to her by Messrs. Weber and Swank on the basis that the letters contained the same information as their expected testimony. When she offered those letters (marked as Cmpl. Ex. 16 and 17 for identification), Respondent objected on hearsay grounds, arguing that if the letters were admitted, he would have no opportunity to cross-examine the letters' authors as to their qualifications. Although hearsay is not automatically excluded in Commission hearings (Mont. Cnty. Code Section 2A-8(e)), the Panel Chair ruled that it would be unfair in this case to allow unsworn evidence on a critical issue with no opportunity for cross-examination. Accordingly, Cmpl. Exhibits 16 and 17 were not admitted in evidence.

At the end of Complainant's case-in-chief, Respondent moved for judgment on the ground that the earlier settlement agreement barred the current claim. At the end of the hearing Complainant requested that the record be kept open to allow her to present live testimony from Messrs. Weber and Swank. The Panel took both matters under advisement.

## **II. Findings of Fact**

Based on the sworn testimony at the hearing and the exhibits admitted in evidence, the Panel finds the following facts:

1. The Association is a condominium as defined in the Maryland Condominium Act, Md. Code, Real Prop. Section 11-101, and it is a common ownership community as defined in Mont. Cnty. Code Section 10B-2(b).

2. The Condominium is a 353-unit, multi-story residential structure located in Chevy Chase, Maryland.

3. According to the Association's Master Deed by which the Condominium was created (Commission Ex. 1, pp. 107-138), the "common elements" consist of the entire condominium project except individual units. "Limited common elements" include balconies reserved for individual unit owners

4. The Bylaws of the Association (Comm. Ex. 1, pp. 139-176) impose on the Association's Board of Directors the power and duty to "provide for the care, upkeep and surveillance of the condominium and its general and limited common elements. . . ."

5. The Association is professionally managed by Legum & Norman, Inc.

6. Ms. Tang owns and resides in a unit that is part of the Condominium. Her unit is on a lower level. A portion of the Condominium's roof is below the top of her unit.

7. Ms. Tang filed an earlier complaint against the Association, Case No. 50-12, in which she alleged, among other things, that her unit suffered water damage, in part due to water infiltration from common elements.

8. Ms. Tang's complaint in Case No. 50-12 was resolved at mediation. In October 2012 the parties executed a Settlement Agreement and Release (the "Settlement Agreement") which provided in part as follows:

5. **Tang's General Release.** In consideration of the sum of Three Thousand Dollars (\$3,000), the mutual promises and agreements contained herein made by or on behalf of Elizabeth Condominium to the Releasor [Ms. Tang], the mutual promises and agreements of the parties contained herein, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Releasor does remise, release and forever discharge, and does for her predecessors and successors, agents, insureds, servants, employees, heirs, executors, administrators, trustees and assigns, remise, release and forever discharge Elizabeth Condominium and Legum & Norman and both entity=s respective agents, servants, employees, independent contractors,

shareholders, stockholders, officers, directors, members, partners, associates, insurers (past and present), parents, subsidiaries, affiliates, predecessors and successors, executors, administrators, trustees, guardians, representatives, heirs, and/or assigns (hereafter collectively referred to as the Released Parties), of and from all and every manner of acts and actions, cause and causes of actions, suits, arbitrations, mediations, conciliations, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialities, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims and demands whatsoever in law or in equity, which against the Released Parties the Releasor ever had, now has, or her predecessors and successors, heirs, executors, administrators, assigns, related entities, persons and/or entities hereafter can, shall or may have, *from the beginning of the world to the date of this the Release*, whether known or unknown, suspected or unsuspected, fixed or contingent, including, but not limited to, all allegations that were or could have been asserted against the Released Parties in connection with the Action [Case No. 50-12] or in any way arising out of or related to the Incidents [acts and omissions of which Ms. Tang was complaining].

Cmplt. Ex. 3 (emphasis added).

9. The Settlement Agreement requires the Association to pay Ms. Tang \$3,000, but it does not require the Association to make any repairs or take any other action.

10. Beginning shortly after Case No. 50-12 was settled, Ms. Tang made numerous complaints to the Association that the Association had failed to fix the conditions causing the water intrusions that were the subject of her prior complaint.

11. Dr. David Robinson, President of the Association since May 2013, testified that while he was Vice President of the Association, he received complaints from Ms. Tang concerning water infiltration. He referred those complaints to James M. Santos, an employee of Legum & Norman who has served as the Condominium's general manager.

12. Dr. Robinson acknowledged, and the Panel so finds, that Ms. Tang's windows and the roof near her unit are common elements and that her balcony is a limited common element.

13. In April 2013, about six months after Case No. 50-12 was settled, Ms. Tang filed her current complaint with the Commission, raising issues of water intrusion from the roof

through her bedroom window, sandbags on her balcony to prevent water intrusion through her sliding glass doors, and backup of the HVAC condensation drain. Comm. Ex. 1, pp. 1-6.

14. At the time Ms. Tang's current complaint was filed with the Commission the following conditions prevailed at the Condominium:

a. the roof outside her bedroom window was improperly graded, resulting in water ponding on the roof and creating a potential for water intrusion into Ms. Tang's bedroom;

b. many balconies, including Ms. Tang's, were improperly graded, creating a potential for water intrusion into the adjoining units;

c. the windows and sliding glass doors throughout the Condominium, including Ms. Tang's, were old, leaky, and in need of replacement and upgrading; and

d. the HVAC condensation drains, especially in lower-level units such as Ms. Tang's, occasionally back up, such as when the Condominium HVAC system switches from heat to air conditioning.

15. A photograph of ponding water on the roof was admitted as Cmplt. Ex. 11.

16. A photograph of the condensation drain for Ms. Tang's unit, which is tied to the Condominium's main condensation drain, was admitted as Cmplt. Ex. 10.

17. The Association has committed to a \$5-6 million renovation project which includes "fenestration" (replacing all windows and sliding glass balcony doors) and includes re-grading of all balconies. See minutes of Board meetings on 1-22-13, 2-26-13, 3-19-13, 4-23-13 and 7-25-13 (Cmplt. Ex. 7a through 7e).

18. Mr. Santos testified without contradiction, and the Panel so finds, that funds for the renovation project have been raised, bids are about to be requested, and window replacement should take place during the first quarter of 2014.

19. In response to Ms. Tang's most recent complaints, the Mr. Santos inspected Ms. Tang's unit and (in his opinion), found no water damage. When Ms. Tang expressed dissatisfaction with Mr. Santos's finding, he hired an outside engineering firm, Wiss Janney, Elstner Associates (WJE) to perform water penetration tests. WJE is the same firm that is doing the engineering work for the renovation project.

20. WJE submitted a written report dated March 29, 2013. According WJE's report, as confirmed by testimony of WJE employees John Nuttman and Kenneth Kosteva, there was no visible water penetration but a testing paper inserted between the interior wall and floor of Ms. Tang's bedroom became wet during the water penetration test. The written report is part of Comm. Ex. 1, pp. 43-51. A photograph of the testing paper is Cmplt. Ex. 9.

21. Mr. Kosteva, who is a licensed Professional Engineer, recommended that, in light of the planned renovation project, no action be taken at Ms. Tang's unit at this time.

22. On June 1 or 2, 2013, in preparation for another inspection, Ms. Tang personally removed drywall on the exterior wall of her bedroom.

23. Ms. Tang also complained to the Montgomery County Department of Housing and Community Affairs. In response, Mr. Robert Goff, a Code enforcement inspector, inspected her unit on April 5, 2013 and he and his supervisor re-inspected on July 9, 2013.

24. Mr. Goff testified that he saw no water on any floor, he saw no signs of mold, no water stains, and no blackening of Ms. Tang's parquet floor. He testified that he has no jurisdiction over high-rise condominiums, but that he inspected as a courtesy to Ms. Tang after his department had received numerous telephone calls from her.

25. Mr. James Keating, a building maintenance engineer employed by the Association, testified that he visited Ms. Tang's unit and observed that the condensation drain was draining slowly, but it was not backing up. He cleared the drain which, according to him, solved the problem.

26. Mr. Earl Kelly, another building maintenance engineer employed by the Association, testified that he visited Ms. Tang's unit in the summer of 2013. He inspected the area where drywall had been removed and saw "sweat" on the concrete wall but no running water and not even enough water to wipe down.

27. During the summer and fall of 2013 the Association took the following repair and maintenance actions with respect to Ms. Tang's unit:

a. it temporarily placed sandbags and plastic sheeting on the roof section near her unit her unit (see Rspt. Ex. 2);

b. it placed sandbags on her balcony;

c. it replaced her window with a new window similar in style to the windows it anticipates installing throughout the Condominium; and

d. on October 3, 2013, shortly prior to the hearing in this matter, it re-graded the roof to prevent future water ponding.

28. At the hearing, in response to a Panel member's question, Ms. Tang testified that there is no current water infiltration into her unit. Nevertheless, the Panel finds that condensation drains are likely to become plugged from time to time and that Ms. Tang's ill-fitting balcony doors and the improper sloping of her balcony have the potential for causing water damage.

29. Ms. Tang proffered that had Messrs. Weber and Swank been available to testify, their testimony would be the same as letters (Cmplt. Ex. 16 and 17, respectively) that they wrote to her. Those letters were not admitted in evidence and they are relied upon by the Panel for the limited purpose of answering Ms. Tang's request to schedule an additional hearing to take their testimony.

30. Mr. Weber's letter, dated July 5, 2013, says in pertinent part:

Our investigation indicates that damage to your property is the result of water seepage through the exterior wall and entering the bedroom at the bottom. Water is draining towards the bedroom wall and not draining into the exterior drain.

31. Mr. Swank's letter, dated July 16, 2013, says:

Roofing-Flat roof inspection outside clients [sic] window. Water penetration has occurred in client's home. Existing roofing membrane is worn and has potential for future water penetration. Temporary repairs have been made to eliminate water penetration. Roof slope is not acceptable. Water is being directed towards the client=s home. Slope should divert water toward drainage. Sealant where flashing connects to wall is cracking and ineffective. Recommended action is to remove existing roof area approximately 54' x 18' and replace.

Window-Sliding window inspection. Existing window is composed of an aluminum frame. All seals and perimeter weatherstriping [sic] has failed and is no longer affective [sic]. Client is experienceing [sic] significant energy loss.

This condition is causing heating and cooling systems to over work. Window replacement is recommended.

### III. Conclusions of Law

#### A. Does the Prior Settlement Agreement Bar These Claims?

The Association's Bylaws and Maryland state law require the Association to maintain common elements. Bylaws Section 3 (Comm. Ex. 1, p. 144); Md. Code, Real Prop. Section 11-108.1. *See* Mont. Cnty. Code Section 10B-8(4)(B) (defining "dispute" over which the Commission has jurisdiction to include a claim that a common ownership community has failed to "maintain or repair a common element if the failure results in significant personal injury or property damage"). During the hearing, the parties stipulated that the Association has a duty to maintain and repair common elements.

Failure to maintain and repair amounts to a breach of the Association's fiduciary duty to unit owners. *Moshyedi v. Annapolis Road Medical Center Condo.*, 132 Md. App. 184, 204 (2000). On the other hand, a common ownership community is not strictly liable for all damages to units caused by the failure of a common element. Stated differently, a common ownership community must fulfill its maintenance and repair duties in a reasonable manner; only when it breaches a mandatory duty or is negligent will liability be imposed. *Id.*; *Prentice v. Sierra Landing Condo.*, CCOC Case No. 15-08 (Feb. 6, 2009); Section 11-114(g), Real Property Article, Code of Maryland.

The Settlement Agreement in this case does not purport to relieve the Association from an ongoing duty to maintain and repair common elements. The Panel understands the Settlement Agreement only as releasing the Association from liability for damages to Ms. Tang's unit caused by any *prior failures* to maintain and repair the common elements. Whether or not a private agreement could protect a common ownership community from *future breaches of duty* is not before the Panel. *Compare, Seigneur v. National Fitness Inst., Inc.*, 132 Md. App. 271 (2000) (exculpatory clause in health club's participation agreement validly released club from all liability for injuries to member caused by club's negligence).

The Panel therefore concludes that the Settlement Agreement is no bar to Ms. Tang's current claims. Respondent's motion to dismiss Ms. Tang's complaint will be denied.

#### B. Should Ms. Tang Be Allowed to Call Additional Witnesses?

Based on Ms. Tang's proffer that Mr. Weber's testimony would be the same as his letter, such testimony would be insufficient to establish any of Ms. Tang's claims. First, that

testimony would be limited to the roof grading problem and would not address either of her other claims. Second, Mr. Weber's inspection took place in June or July of 2013, well prior to the roof re-grading work the Association performed in October 2013. (It is unclear from the record whether the inspection occurred before or after Ms. Tang's window was replaced.) Finally, the reference to "damage to your property" does not describe the damage and does not state when any such damage occurred, *i.e.*, before or after the Settlement Agreement and the Association's \$3000 payment to Ms. Tang.

The Swank letter addresses both the roof and sliding door problems. As to the roof, the inspection occurred prior the October re-grading and is therefore irrelevant. As to the sliding doors, the letter mentions only energy loss, not water infiltration or damage. In any event, the Association has committed to a renovation project that includes replacement of Ms. Tang's balcony doors.

For these reasons, Ms. Tang's request to present further testimony will be denied.

#### **C. Are There Current Water Infiltration Problems at Complainant's Unit?**

Notwithstanding the absence of any evidence of current water infiltration, it remains likely that the condensation drain will back up from time to time. Therefore, the Panel will order that the Association put in place a regular preventive maintenance program to address that issue. With respect to the likelihood of future water infiltration from the balcony, the Panel concludes that the Association is addressing that issue in a reasonable manner at this time. Should the Association's renovation project falter or be abandoned, any resident who suffers significant personal injury or property damage as a result is free to complain to the Commission.

#### **D. Has Complainant Suffered Any Damage Due to Post-Settlement Water Infiltration?**

Mont. Cnty. Code Section 10B-8(4)(B) requires that a common ownership community's failure to maintain or repair a common element is actionable only if the failure results in "significant personal injury or property damage." In this case there was *no* evidence showing Ms. Tang's unit suffered significant damage as a result of water infiltration occurring *after* execution of the Settlement Agreement. The Panel notes that the Association paid Ms. Tang \$3,000 to cover any pre-settlement damages; it repaired the drywall that Ms. Tang herself removed in June 2013; and it replaced a number of loose parquet tiles despite the Association's conclusion that those tiles were not damaged by water infiltration.

#### E. Should Ms. Tang Be Awarded Her Filing Fee?

Mont. Cnty. Code Section 10B-13(d) authorizes the Panel to require the losing party to pay all or part of the \$50 complaint filing fee. In considering whether Ms. Tang lost, the Panel may consider remedial actions taken by the Association after she filed her complaint. *Frazier v. Castle Ford, Ltd.*, 430 Md. 144, 165-66 (2013) (an award of attorneys' fees under a fee-shifting statute was proper based on settlement of the plaintiff's claims before trial). The Association's actions include sandbagging and later re-grading the roof, sandbagging Ms. Tang's balcony, replacing her bedroom window, and clearing a slow drain. For purposes of awarding costs, the Panel considers Ms. Tang the prevailing party.

#### IV. Order

Accordingly, it is, this 1st day of November, 2013, ORDERED as follows:

1. The Association's motion to dismiss Ms. Tang's complaint as barred by the Settlement Agreement is DENIED.

2. Ms. Tang's request to take further testimony from Messrs. Weber or Swank is DENIED.

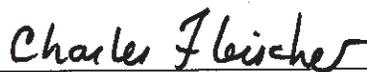
3. Within 30 days after the date of this Order, the Association must establish and comply with a reasonable, written preventive maintenance program to maintain the HVAC condensation drains that serve Ms. Tang's unit and must provide Ms. Tang with a copy of the program.

5. Ms. Tang's request for an award of her \$50 filing fee is GRANTED and the Association must reimburse her for the filing fee within 30 days after the date of this Order.

6. All other relief is DENIED and the complaint is DISMISSED WITH PREJUDICE.

Panel members Terry Cromwell and David Weinstein concur in this Decision and Final Order.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court for Montgomery County, Maryland within 30 days after this Order, pursuant to the Maryland Rules of Procedure governing administrative appeals.



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Charles H. Fleischer, Panel Chair