Before the
Commission on Common Ownership Communities
Montgomery County, Maryland

In the Matter of:	
Dina Soliman	
Complainant,	
v.	Case No. 12-09 February 25, 2010
Madison Park Condominium	
Respondent	

DECISION AND ORDER

The above-entitled case came before the Commission on Common Ownership Communities for Montgomery County, Maryland, for hearing and arguments on October 28, 2009, pursuant to Sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12, and 10B-13 of the Montgomery County Code. The hearing panel has considered the testimony and evidence presented, and finds, determines, and orders as follows:

Background

Dina Soliman (Complainant), the owner of the residential unit located at 4800 Battery Lane, Unit PH-201, Bethesda, Maryland, filed a complaint with the Commission on Common Ownership Communities on March 25, 2009. Complainant alleged:

1. Her residential unit is within the Madison Park Condominium (Respondent) community.

2. Respondent needed to appropriate funds sufficient "to properly replace the condominium roof in an expeditious fashion" and "to properly and thoroughly repair and replace damage done to Complainant's unit as a result of the [Respondent] Board's failure to replace the roof in a timely manner, thereby causing on-going [sic] and substantial damage to Complainant's unit."

Discussion

1. Complainant claimed damages of approximately $14,300, consisting of $4,000 in damage to her unit, $6,000 for loss of use, $1,300 for two mold inspections, and $3,000 in attorney fees, stemming from recurring leaks in the roof from early 2007 to May 2009. Complainant testified that the $6,000 loss of use total was based on the market rental value of her unit. During cross

examination, Complainant stated that she was working in Richmond, Virginia, during the week and mainly residing in her unit during the weekends for the two years spanning the roof leaking. Complainant was not represented in this action by an attorney.

2. Complainant stated that she hired a contractor to perform repairs and other remodeling work on her unit in 2008.

3. Respondent's property manager, Mr. Cafritz, testified that a new roof was installed in 2004, and Respondent entered into a service agreement with the roofing contractor in 2005. He stated that leaks in the roof damaged Complainant's unit in April 2007. He stated that leaks in the roof allowed water to get into Complainant's unit again in February 2008, and that the roofing contractor responded to and repaired the roof leaks in both instances.

4. Respondent's property manager also stated that in May, 2008, after further leaks were detected, the roofing contractor asserted that the roof needed permanent repair. He stated that, in September, 2008, the roofing contractor refused to do any further work on the roof under the terms of the 2005 service agreement. He stated that a second roofing contractor was hired in September, 2008 and attempted to repair the leaks under the terms of the roofing manufacturer's warranty. However, the roofing manufacturer announced that it would stop honoring the warranty in October, 2008.

5. Respondent's property manager testified that a third roofing contractor attempted to repair the roof some time between October, 2008 and February, 2009. He stated that this roofing contractor could not fix the roof and also discovered improper repair attempts by a previous contractor. He stated that this roofing contractor was hired in February, 2009 to completely replace the roof at a cost of approximately $128,000, and that the work was completed in May, 2009.

6. Respondent's property manager stated that he obtained an estimate of $2,000 to repair Complainant's floors that were damaged in 2008 and an additional estimate of $1,300 to repair Complainant's unit for damage caused by the leaking roof in 2009. He stated that under the terms of Respondent's governing documents, Respondent is responsible for damage to drywall (or plaster), paint, and flooring in Complainant's unit caused by the leaking roof.

7. Ms. Timberlake, Respondent's President of the Board of Directors, testified that the Board sent Complainant a letter in 2008 advising Complainant not to commence any repairs or remodeling in her unit until the roof had been verified to be leak free.

8. Mr. Johnston, an engineer hired by Respondent to design, inspect, and oversee the roof replacement in 2009, testified that:

- He determined that the roof needed to be replaced in January 2009;

- Respondent's Board of Directors accepted the proposal for roof replacement in February 2009; and

- In 2006, it was known that the manufacturer of the roof installed in 2004 was in financial trouble, but condominium associations were trying to save money and trying to get the manufacturer to pay for repairs under the terms of the warranty.

Findings of Fact

1. The case centers on the extent to which the Respondent is liable for damage caused to Complainant's unit.

2. Respondent is a condominium association established pursuant to the Maryland Condominium Act (Title 11 of the Real Property Article of the Code of Maryland), whose governing documents are recorded in the land records of Montgomery County, Maryland, and which establish a condominium regime governing all units in the building.

3. Complainant is the owner of a residential unit governed by Respondent's governing documents.

4. Complainant and Respondent agree that beginning in early 2007 a series of leaks in the roof of Complainant's building caused damage to Complainant's unit and that Respondent is liable for the damage caused by the leaks from the roof, which is a common element.

5. After this case was filed, the Commission's staff offered to arrange an informal mediation between the parties pursuant to Commission policy, but the Complainant rejected this option and insisted on a formal hearing.

6. Shortly before the hearing in this dispute, the Respondent contacted the Complainant directly and also through the Commission staff to offer her $13,180 to settle her claims. The Complainant refused this offer because it was contingent upon her waiving all her claims for damages to her unit arising from the leaks occurring *prior to* May 2009, whether known to her or not. The proposed agreement would not have affected any claims she might have as a result of future leaks.

7. At the hearing, the Respondent moved for an award of attorneys fees in the amount of $7,228, on the grounds that Complainant had unreasonably rejected mediation and had unreasonably prolonged the case by rejecting a settlement offer that was well in excess of what she could reasonably hope to prove as damages in a hearing.

Conclusions of Law

Damage Repair

The Panel does not agree with Complainant that she is entitled to the full claim for damages of more than $14,300 for repairs to her unit and loss of use. Complainant claimed some damage to her unit that was not Respondent's responsibility, including electrical receptacles and parts of the unit that were not determined to have been affected by the leaking roof. She also did not provide sufficient evidence that her unit was rendered uninhabitable by the damage from the leaking roof, including testifying that she continued to occupy the unit during the time period when the leaking roof affected her unit. Thus, Complainant's actual potential claim against Respondent could be no more than $3,300 plus any loss of use – which Complainant did not adequately demonstrate by her testimony and evidence – plus potential attorney fees. This total appears to be approximately $8,000.

However, the Panel agrees with Complainant that she is entitled to some compensation for damage caused to her unit by the leaking roof. Respondent properly admitted liability for some of the repair costs incurred by Complainant. This amount is $3,300.00 in accordance with estimates obtained from Respondent's contractors.

Complainant did not follow proper procedures for repairing her unit. Complainant should have allowed Respondent to assess the damage and obtain separate estimates before commencing any repair work. If Complainant did not agree with Respondent's assessment and repair estimates, she should have followed Madison Park Condominium Association procedures for challenging those decisions.

Instead, Complainant chose to proceed with completing the repairs to her unit as well as performing some additional remodeling. In fact, Respondent warned Complainant not to perform any remodeling work on her unit because the roof leak had not been completely resolved.

The Panel also sees mediation as a missed opportunity. The Panel believes that Complainant did not necessarily understand her rights associated with participating in mediation. Mediation allows parties to discuss possible ways to resolve a dispute that in no way impacts their rights to pursue claims. Parties' rights are only affected if they reach a written agreement during mediation.

Finally, the Panel also believes Complainant did not understand the effect on her rights of signing a release agreement. It was clear to the Panel that the release

proposed by Respondent would not have affected Complainant's rights to pursue claims for damage in the future. Complainant did not appear to understand that such a release would have been standard and proper under these circumstances and was necessary for Respondent to reimburse Complainant for the damage that had been caused. Respondent cannot simply pay money for damage without a written assurance from Complainant that Complainant will not attempt to pursue further actions against Respondent for the same damage.

Attorney Fees

At the conclusion of the hearing, the Respondent claimed attorney's fees in this matter. Respondent's motion requested an award of $7,228.50. Of this sum, Respondent claimed 11.5 hours of work to prepare for the hearing, at the reduced rate of $305.00 per hour, for a total of $3,507.50. Complainant also claimed attorney's fees.

We will deal first with the Complainant's request for attorney's fees. Complainant was not represented by an attorney in this matter. Under Section 10B-13(d), we can only award attorney's fees incurred as part of and in connection with a CCOC proceeding, and only for one of the reasons specified in that law. We also find that Respondent did not engage in any of the misconduct prohibited by the law in the course of the proceedings before us, nor do the rules of the Respondent require it to pay attorneys fees to the Complainant in this type of dispute. Therefore we deny Complainant's request for attorney's fees.

We now turn to the Respondent's claim for attorney's fees. Under Section 10B-13(d) of the Montgomery County Code, attorney's fees may be awarded if the Panel finds that a party has maintained a frivolous dispute, unreasonably refused to accept mediation of a dispute, or substantially delayed or hindered the dispute resolution process without good cause. Clearly, Complainant had a valid claim against Respondent for damages, and Respondent admitted as such.

However, as stated above, Respondent offered to settle Complainant's claim for the sum of $13,180, which is significantly more than the amount of actual damages that the Complainant submitted in this case. Her original claim to the Respondent was for $7,885.00, which included repainting, duct cleaning, new floors or refinished floors, window cleaning, storage, and carpet cleaning. The Respondent offered to pay $3,300, and the Panel also has concluded that $3,300.00 is the proper measure of damage. Even if the Panel accepted Complainant's damage claims and documentation of damage at their full face value of $7,885, that is far below the amount of the Respondent's offer. By rejecting the offer, the Complainant forced the Respondent and this Panel to incur the expense and time of a fact-finding hearing when she could not reasonably expect to prove a claim that was the equivalent of the settlement offer. In effect, she pursued a claim that was considerably greater than even her own evidence supported.

The Commission has not previously dealt with this situation. However, there is support for the proposition that the rejection of a settlement offer can, under certain conditions, give rise to a penalty. Under Rule 68, "Offer of Judgment", of the Federal Rules of Civil Procedure, a party who rejects an offer of judgment, forces a trial on the claim, and then receives a judgment which is less than the offer, *must* pay the other party's costs incurred after the making of the offer. Such costs can include reasonable attorney's fees if allowed by statute or contract. *See,* 13 Moore's Federal Practice, 3d Section 68.02 (2006). "In addition, a plaintiff will have to pay defendant's attorney's fees if plaintiff's action was 'frivolous, unreasonable, or without foundation.'" *Id.,* Section 68.08[4][b] n. 16 at p.68-60.

Common law also includes the tort of "wrongful civil litigation", which is defined as the
'institution *or continuation* of a suit in a civil *or quasi-judicial forum* without probable cause and for improper purpose," D.Dobbs, 2 The Law of Torts, Section 436 (West, 2001) (emphasis added). *See also,* Restatement (Second) of Torts, Sections 674 *et seq.,* and Comment (e): "One who *continues* a civil proceeding that has properly been begun . . . after he has learned that there is no probable cause for the proceedings becomes liable as if he had initiated the proceeding." (Emphasis added.)

The Panel is *not* taking the position that the mere rejection of an offer of settlement amounts to misconduct under Section 10B-13(d). Rather, the Panel finds that the Complainant pursued this matter to a hearing when her own evidence, taken at face value, was significantly below the amount she was offered to settle without a hearing. It was not reasonable for her to pursue her claims after receiving that offer. In addition, the Panel finds that Complainant unreasonably refused to accept mediation of a dispute and substantially delayed or hindered the dispute resolution process without good cause. Complainant delayed resolution by rejecting a settlement offer that was communicated through Commission staff and was greater than Complainant's actual damages.

At the same time, Respondent bears some responsibility for allowing this matter to continue unresolved for so long. The Panel believes Respondent consistently selected the cheapest option for addressing the leaking roof instead of the option that was in the best interest of the owners and residents. The roof leaks began causing noticeable damage to Complainant's unit around April 2007. Proper repairs to the roof did not occur until early 2009. Respondent attempted to demonstrate that it had been diligent in addressing the leaking roof. However, when a critical element of a building exhibits obvious and recurring problems so soon after installation (the roof was installed in 2004), Respondent has a duty to the owners and residents to address the problem in a thorough and complete manner. The engineer who proposed a new roof system in 2009 testified that it was known that there were problems with the roofing manufacturer that had supplied Respondent's roof in 2004. Respondent's failure to fully assess and properly repair the leaking roof in a timely manner led to repeated damage to Complainant's unit. Further, it is incumbent upon Respondent to clearly explain the

process residents need to go through to get damage repaired, especially under circumstances of recurring problems.

Therefore, the Panel agrees that Respondent should be awarded attorney's fees, but the awarded fees should be reduced to reflect the sum caused by the need to go forward with the hearing after rejection of the settlement offer. Based on other cases (*Livingstone v. Parkside Community Association,* CCOC #28-08 (October 28, 2008) (attorneys fees of $245 per hour found reasonable); *Seneca Crossing I HOA v. Mejia,* CCOC #24-08 (January 6, 2010) (fees of $200 per hour found reasonable); *Akhigbe v. Doral HOA,* Circuit Court of Montgomery County #306449-V (fees of $285 per hour in a CCOC proceeding were reasonable and should have been awarded by Panel), the Panel believes a reasonable rate for this type of proceeding is $250.00 per hour. The Panel further concludes that the hours reasonably required in this case should only be those required to prepare for the hearing that would have been averted if Complainant had accepted Respondent's final settlement offer, which Respondent's attorney claimed was 11.5 hours. Therefore, the total attorney's fee awarded to Respondent shall be $2,875.00. This amount shall be deducted from the award due to Complainant

Order

1. Based on the evidence of record and the reasons stated above, it is ordered this 25th day of February, 2010, that Respondent pay Complainant $425 in compensation for damage to her unit caused by a failure in the roof within 30 days after the date of this decision. This amount is for damage incurred through completion of the new roof installation in May 2009, which the Panel found to be $3,300, less $2,875.00 of attorney's fees for Respondent to prepare for and participate in the hearing. This Order does not in any way limit Complainant's right to compensation for damage properly attributable to Respondent occurring after completion of the roof repair in May 2009.

2. Not later than sixty (60) days after the date of this decision, the Board must hold a properly announced meeting to: (a) review and discuss their current procedures for addressing maintenance issues; (b) include a summary of those procedures in the minutes of the meeting; and (c) distribute a written copy of the minutes to all unit residents and owners. The Respondent must provide a copy of the agenda and of the minutes of that meeting to the Complainant.

If Respondent fails to meet the requirements of this order, Complainant may pursue any remedies available to her. The County may also enforce this order pursuant to Section 10B-13(j) of the Montgomery County Code.

Commissioners Steven Greenspan and Andrew Oxendine concurred in this decision.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland, within thirty (30) days from

the date of this Order, under the Maryland Rules of Procedure for appeals from administrative decisions.

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Douglas Shontz, Panel Chair
Commission on Common Ownership Communities