CITATION: Nolevaux v. King and John Festival Corporation, 2023 ONSC 5028
COURT FILE NO.: CV-12-448294-00CP
DATE: 20230906

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Nolevaux et al.

AND:

King and John Festival Corporation et al.

BEFORE: J.T. Akbarali J.

COUNSEL: *Ted Charney and Caleb Edwards*, for the plaintiffs

Aleksander Jovanovic, for the defendants King and John Festival Corporation and The Daniels Corporation

Vedran Simkic, for the defendants KPMB Design Inc., and Kuwabara, Payne, McKenna and Blumberg Architects

Timothy Alexander, for the defendants Toro Aluminum Railings Inc., and Toro Glasswall Inc.

HEARD: September 5, 2023

Proceeding under the *Class Proceedings Act, 1992*

ENDORSEMENT

Overview

[1] The plaintiffs in this certified class action bring a motion seeking an order (i) approving the settlement agreement, under s. 29 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*"); (ii) appointing RicePoint Administration Inc. as claims administrator; (iii) approving the distribution program; (iv) approving counsel fees and disbursements; and (v) for releases as set out in the settlement agreement. The plaintiffs also seek ancillary orders. In the notice of motion, the plaintiffs sought an honorarium for each representative plaintiff; however the request for honoraria has been withdrawn.

[2] For the reasons below, I grant the orders sought.

Brief Factual Background

[3] This action relates to incidents of glass falling from the balconies at Festival Tower, a condominium in Toronto. The representative plaintiffs, Yvette and Rene Nolevaux, owned a condominium unit in Festival Tower which they rented out to the third representative plaintiff, Debra Williams.

[4] The balconies of the condominium units in Festival Tower were protected by a balcony guardrail system comprised of aluminum framing into which a pane of tempered glass was inserted. Unfortunately, in 2011, Festival Tower experienced six incidents of spontaneous breakage of the balcony guardrail glass, leading to glass fragments falling onto the streets below, putting pedestrians and vehicles at risk. The shattered balcony glass, and the potential for it, also rendered the balconies unsafe to those in the building.

[5] On August 18, 2011, the City of Toronto declared that Festival Tower's balconies were unsafe and issued Orders to Remedy Unsafe Building, which required the defendants to seize occupancy of the balconies and exterior common areas and to remedy the unsafe conditions by (i) undertaking an expert review to determine the cause of the failure of the tempered glass panels; (2) submitting a report from professional engineers describing the remedial measures necessary to render the buildings safe; and (3) providing a report from the expert engineers detailing the results of the analysis and testing, and the causes of the glass failure.

[6] The City of Toronto also commissioned a study into the cause of the failing glass panels. On July 1, 2012, the provincial government made changes to the Ontario Building Code which required developers to use heat-strengthened laminated glass when the glass is close to the edge of a balcony, and to use heat-strengthened laminated glass or heat-soaked tempered glass where glass balcony guards are inset from the edge of the balcony.

[7] The defendant King and John Festival Corporation, which is the owner, developer, construction manager, and declarant for Festival Tower, decided to replace the glass panels in all 381 condominium units. The remedial work was done between August 2011 and November 2012.

[8] At the outset, all residents lost all use of their balconies for a period of about two weeks. In that period, green mesh was installed around the glass balcony panels to catch any glass that broke and prevent it from falling to the street. Once the green mesh was installed, residents had the use of their balcony, but their views were marred by the green mesh. Subsequently, each resident lost the use of their balcony for another four weeks between August 2012 and November 2012 while the glass panels were replaced. Panels were replaced on one side of the building at a time, such that some people gained access to their repaired balconies earlier than others.

Brief Background to the Litigation

[9] This class action was commenced in 2012, alleging breach of contract, breach of warranty and negligence. Following a contested motion, the proceeding was certified on October 3, 2013. In the certification order, the class was defined as "those persons, excluding the defendants and their senior officers and directors, who owned, rented and/or ordinarily resided in a residential condominium unit at the premises municipally known as 80 John Street, in the City of Toronto,

during the period commencing on May 1, 2011, to and including November 30, 2012". The time frame reflects the period in which the balconies were under repair or covered by mesh.

[10] After certification of the action, the parties exchanged affidavits of documents and discoveries took place. A mediation was held in October 2017, but was unsuccessful.

[11] Thereafter, the plaintiffs delivered three expert reports on liability, addressing the cause of the glass breakage. The plaintiffs' experts gave evidence to the effect that the defendants' architectural and engineering design of the balconies and guard rails did not meet the functional objectives set out in the Ontario Building code, and that there were deficiencies with the design, supply and installation of the balcony guards and glass panels.

[12] The defendants delivered eight reports from six experts refuting the plaintiffs' allegations that the work done on the balcony guards was faulty. The defendants' experts gave evidence to the effect that the investigation, mitigation and remedial work design for the balcony guard system was appropriate, proactive and timely. The experts also disagreed on the probable cause for the glass breakage, and whether defects in the glass would have been known to the design community at the time the balcony guard system was designed and installed.

[13] In addition, one of the defendants' experts used video monitoring to monitor actual balcony usage at Festival Tower. The report concluded that the total balcony usage over a period of one week in the fall was 38 hours, 22 minutes and 57 seconds, which amounts to approximately 0.00408% of balcony usage.

[14] Following exchange of the expert reports, the plaintiffs brought a motion for summary judgment. Motion records were exchanged, and the parties were about to proceed to cross-examinations on affidavits when another attempt to resolve the issues was made.

The Settlement

[15] The parties' renewed discussions were prompted by the settlement of two similar class actions, with respect to which at least some counsel who act in this proceeding also acted.

[16] Festival Tower was not the only condominium building experiencing a problem with falling glass. At least two other towers, Murano Towers and One Bedford, experienced falling glass. Those incidents also led to certified class proceedings which settled and, in June 2023, obtained court approval: *Emam v. Bay Grenville Properties Inc.*, CV-12-448301-00CP and *Krishna v. Bedford and Bloor Realty Inc.*, CV-12-455627-00CP (June 14, 2023, unreported).

[17] With the benefit of the settlements in *Emam* and *Krishna*, the parties were able to reach a settlement of this action. It provides for a gross settlement fund of $800,000. From that amount, counsel seeks a contingency fee of 30% plus HST, consistent with the retainer agreement, and disbursements (which total $159,236.96). Counsel estimate claims administration will cost $52,237, leaving a net settlement fund of $317,318.04. The parties expect interest to accrue on the settlement fund before it is distributed, estimated to be about $14,720. Thus, the estimated net settlement amount for distribution is $332,038.04 if the settlement and fees are approved.

[18] There are 381 units in Festival Tower. Of these, 79 units accepted $500 in exchange for a release and thus cannot participate in the settlement. Another five units opted out of the class action. Thus, 297 units are eligible to claim under the settlement.

[19] If there is 100% take-up, the award per unit will be $1,120. At an 80% take-up rate, the recovery per unit is $1,400. If there is a 60% take-up rate, a rate which Glustein J. considered reasonable to assume when approving the settlements in *Emam* and *Krishna*, each unit will recover $1,865.

[20] The distribution plan provides for the same amount per unit regardless of when the unit residents regained full access to their repaired balcony, and regardless of the number of people living in the unit.

[21] Notice of the settlement, including the proposed counsel fee, was distributed according to my order of June 26, 2023. No one has objected to the settlement.

Legal Principles Applicable to Motions to Approve a Settlement in a Class Proceeding

[22] Under s. 27.1(1) of the *CPA*, a proceeding brought under the *CPA* may only be settled with court approval. The court shall not approve a settlement unless it determines that the settlement is fair, reasonable, and in the best interests of the class: s. 27.1(5) *CPA*, at para. 7. The burden lies on the party seeking approval: *Robinson v. Medtronic, Inc.*, 2020 ONSC 1688, at para. 63; *Nunes v. Air Transat A.T. Inc.*, 2005 CarswellOnt 2503 (S.C.J.), at para. 7.

[23] Public policy favours the resolution of complex litigation: *Nunes*, at para. 7.

[24] Settlements need not be perfect; they are compromises: *Lozanski v. The Home Depot, Inc.*, 2016 ONSC 5447, at para. 71. To find that a settlement is not fair and reasonable, it must fall outside a range of reasonable outcomes: *Nunes*, at para. 7. An objective and rational assessment of the pros and cons of a settlement is required: *Mancinelli v. Royal Bank of Canada*, 2017 ONSC 2324, at para. 38. There is a strong presumption of fairness when a proposed class settlement, which was negotiated at arms-length by counsel for the class, is presented for court approval: *Nunes*, at para. 7.

[25] A court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of its litigation rights against the defendants: *Nunes*, at para. 7. However, it is not the court's function to substitute its judgment for that of the parties or attempt to renegotiate a proposed settlement. Nor is it the court's function to litigate the merits of the action, or, on the other hand, to rubber-stamp a settlement: *Nunes*, at para. 7.

[26] When considering whether to approve a negotiated settlement, the court may consider, among other things: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of litigation and risk; (f) the recommendation of neutral parties, if any; (g) the number of objectors and nature of objections, if any; (h) the presence of good faith, arm's length bargaining and the absence of collusion; (i) the degree and nature of communications by counsel and the representative parties with class members during the litigation; and (j) information conveying to

the court the dynamics of and the positions taken by the parties during the negotiation: *Lozanski*, at para. 73; *Nunes*, at para. 7; *Robinson*, at para. 65.

Should the settlement agreement be approved?

[27] I approve the settlement agreement in this case for the following reasons:

a. The settlement was reached as a result of good faith, arms-length bargaining, after a failed mediation with an experienced mediator. There was no collusion.

b. The settlement was concluded after significant documentary discovery and oral discoveries took place, with the benefit of extensive third-party production from the City of Toronto, and after the exchange of expert reports.

c. Although the expected award associated with each unit is about half of that approved by Glustein J. in *Emam* and *Krishna*, in this case, the loss of use of the balcony was comparatively minor. In *Emam* and *Krishna*, residents were excluded from their balconies entirely for periods of time ranging from 8 to 20 months, with an average of 13 months in One Bedford, an average of 16 months in Murano North Tower, and an average of 10 months in Murano South Tower. In this case, residents were excluded from their balconies for a total of six weeks, and had reduced enjoyment from their balconies during the remaining class period due to the green mesh that was installed.

d. There was a risk that the defendants could establish compliance with the standard of care in effect at the time the glass fell from the Tower, and compliance with prior versions of the Ontario Building Code.

e. There was a risk related to the novelty of the claim for loss of use and enjoyment of a balcony. The risk was exacerbated by the defendants' expert report indicating minimal use of the balcony by residents, raising the question of whether any loss the residents suffered was *de minimis*.

f. There was a risk that the defendants' experts' theory of causation would be accepted, such that the falling glass could have been caused by excessive nickel sulfide inclusion in the glass, a technical matter the awareness of which would be realistically only known by companies in the glass supply chain, but not in the design community.

g. There was a risk that the plaintiffs' contention that general damages for loss of use of the balconies during the repair period constitutes compensable damages and falls under an exception to pure economic loss exclusion would not be accepted. The theory is novel.

h. There were thus real and meaningful risks to the plaintiffs in establishing both liability, and damages. In addition to those mentioned above, the defendants also argued that the claims were precluded by a disclaimer in the agreements of purchase and sale, that the defendants owed the plaintiffs no duty of care, that the glass had

been replaced without cost to the plaintiffs, who thus had no damages, and that none of the damages could be determined in the aggregate, such that individual assessments would be required. I note that Belobaba J. did not certify aggregate damages as a common issue. Thus, each class member would have had to establish their own damages were the litigation to succeed at trial, a process that would have been lengthy.

i. No one has objected to the settlement.

j. Experienced class counsel supports the settlement.

k. Although significant work had been done in the litigation, significant work remained with respect to the summary judgment motion, and possible appeals, were it to succeed, and trial, were it not to succeed. The settlement avoids the risk, cost, and time associated with further litigation.

l. The settlement provides a result that is within a zone of reasonableness, and reflects a compromise that takes into account the risks of the litigation to all parties.

Should the distribution program be approved?

[28] I am satisfied that the distribution program is reasonable. Given the amount at issue, any attempt to customize the amount for each unit based on the amount of time that passed until the balconies were fully repaired, or the number of residents in each unit, would not be proportionate.

[29] The proposed manner of distribution is straightforward and easy to comprehend.

[30] I approve the distribution program.

Should counsel fees and disbursements be approved?

[31] As Morgan J. recetly noted in *Austin v. Bell Canada*, 2021 ONSC 5068, at para. 10, citing *Commonwealth Investors Syndicate Ltd. v. Laxton,* [1994] O.J. No. 2922, at para. 63 (S.C.J.), generally speaking, when considering whether to approve class counsel fees, “the amount payable under the contract is the starting point for the application of the court’s judgment.”

[32] The general principles to apply to the assessment of class counsel’s fees were set out by Juriansz J.A., in *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233, at para. 80:

a. the factual and legal complexities of the matters dealt with;

b. the risk undertaken;

c. the degree of responsibility assumed by class counsel;

d. the monetary value of the matters in issue;

e. the importance of the matter to the class;

f. the degree of skill and competence demonstrated by class counsel;

g. the results achieved;

h. the ability of the class to pay;

i. the expectations of the class as to the amount of the fees;

j. the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

[33] In this case, I approve the counsel fees and disbursements for the following reasons:

a. The fees sought are significantly less than the fees actually incurred by counsel.

b. The result achieved for the class is reasonable. This is not a situation where it is proposed that the class receive an award that appears to be low while counsel seeks a healthy fee.

c. Class counsel dedicated significant time to this litigation, resulting in an opportunity cost to it.

d. The settlement provides the class with the ability to pay the fees while still obtaining a reasonable award for its losses.

e. No one has objected to the counsel fees sought.

f. The fees sought are consistent with the retainer agreement, signed by all representative plaintiffs.

g. The expert reports required were significant and make up a material portion of the disbursements.

[34] In summary, I approve class counsel's contingency fee request of 30% of the gross settlement, or $240,000, plus HST of $31,200, and disbursements of $67,61.77 to Charney Lawyers PC, and $91,621.19 to Strosberg Sasso Sutts LLP, both of which firms acted as class counsel. The interest that accrues shall accrue to the benefit of the settlement fund.

Conclusion

[35] In conclusion, I approve the settlement agreement and distribution program, as well as the fees and disbursements sought by class counsel.

[36] Counsel have provided me with a draft form of order acceptable to all counsel. I have made some amendments of which the only substantive one reflects the allocation of interest on the settlement funds, to clarify that interest accrues to the benefit of the class. Order to go in accordance with the draft I have amended and signed.

J.T. Akbarali J.

Date: September 6, 2023