

Before the
Commission on Common Ownership Communities
Montgomery County, Maryland

In the Matter of
Lida E. Demchyshyn
3852 Bel Pre Road, No. 13
Silver Spring, MD 20906

Complainant,

v.

Grand Bel Manor Condominium Association, Inc.
c/o Shea Management, Inc.
7220 Wisconsin Avenue, Suite 210
Bethesda, MD 20814

Respondent.

Case No. 286-0
~~December, 1995~~
January 11, 1996

DECISION AND ORDER

On October 18, 1995, this case was heard by a panel of the Commission on Common Ownership Communities ("the Commission"), pursuant to Sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12 and 10B-13 of the Montgomery County Code, 1994, as amended. Having considered the testimony and exhibits of record, the panel finds, determines and orders as follows:

Background

On November 4, 1994, Lida E. Demchyshyn ("Complainant") filed with the Commission a complaint relating to a shower assembly that served her unit and needed repair. The complaint alleged that the shower assembly was located outside the dimensions of her unit and that, therefore, the Grand Bel Manor Condominium Association ("Respondent") was responsible for making the repair.

In its December 22, 1994, reply to the complaint, Respondent stated that, because the shower drain was a part of Complainant's bathroom fixture and served only Complainant's unit, Complainant was responsible for the repair.

On March 1, 1995, the Commission voted to take jurisdiction over this matter. The hearing was originally scheduled for August 16, 1995. It was later rescheduled for October 18. At the hearing, Complainant represented herself. Complainant's only other witness was her fiancé, Ted Bartsch. Respondent was represented by Pat D'Avanza, the Association Manager. Respondent's only other witness was Ken Goldman, a licensed master plumber. By agreement of the parties, the record remained open until October 27, 1995.

Statement of Facts

1. Complainant owns and resides in a unit of the Grand Bel Manor Condominium (the "Condominium"), located in Silver Spring, Maryland.

2. The Condominium was established in December 1975. Section 2 of the Condominium's Declaration defines terms used in the Declaration and the Bylaws. Section 2(r) of the Declaration provides that: "'Unit' means a unit as defined by the [Maryland] Condominium Act, and consists of any one of those parts of the Buildings which is separately described on the Condominium Plat as a Unit, identified by a number."¹

Section 7 of the Condominium's Declaration is entitled "Dimensions of Units" and reads as follows:

Each Unit . . . consists of the space measured horizontally between the unfinished (unexposed) surface of the drywall enclosing such Unit and the space measured vertically from the unfinished (unexposed) surface of the parquet or tile floor of such unit to the unfinished (unexposed) surface of the ceiling of such unit. Each Unit includes (a) the door between the Unit and the adjoining balcony or patio; (b) all entrance doors to the Unit; (c) all windows in the Unit; (d) all interior partitions in the Unit . . . ; and (e) all kitchen appliances and plumbing and similar fixtures located in and serving solely a particular Unit.

Section 8 of the Condominium's Declaration, entitled "Common Elements," reads in part as follows:

(a) The General Common Elements consist of the entire Property . . . other than the Units and the Limited Common Elements, and include, without limitation, the following:

* * *

(6) All pumps, pipes, . . . , conduits and other apparatus relating to the . . . plumbing systems located outside of Units . . .²

¹ Section 11-101(o) of the Maryland Condominium Act, as amended, states that:

"Unit" means a three-dimensional space identified as such in the declaration and on the condominium plat and shall include all improvements contained within the space except those excluded in the declaration, the boundaries of which are established in accordance with Section 11-103(a)(3) of this title. A unit may include 2 or more noncontiguous spaces.

Section 11-103(a)(3) of the Condominium Act requires condominium declarations to set forth "A general description of each unit, including its perimeters, location, and any other data sufficient to identify it with reasonable certainty."

² Section 8(b) of the Declaration lists the Condominium's limited common elements (e.g., balconies and patios), none of which are pertinent to this case.

3. Responsibility for maintenance and repair of the Condominium is dealt with in the Bylaws.³ Section 5(a) of the Bylaws reads in part as follows:

By the Board of Directors. The Board of Directors shall be responsible for the maintenance, repair, and replacement of the following . . . :

(1) Except as otherwise provided in paragraph (b), all of the Common Elements, whether located inside or outside of the Units; and

* * *

(3) . . . all water, . . . , plumbing and telephone lines, facilities and systems that are deemed Common Elements, including all conduits, ducts, plumbing . . . and other facilities for the furnishing of all utility services into two or more Units, but excluding therefrom . . . all plumbing and electrical appliances, fixtures, systems and parts thereof which are enjoyed by only a single Unit and are located solely within the boundary of an individual Unit

. . . .

Section 5(b) of the Bylaws sets forth the responsibilities of unit owners and reads in part as follows:

(1) Except for the portions of his Unit required to be maintained, repaired and replaced by the Board of Directors, each Unit Owner shall be responsible for the maintenance, repair and replacement . . . of the following: . . . kitchen and bathroom fixtures and equipment; . . . and those parts of the plumbing and electrical system which are wholly contained within his Unit and serve his Unit and no other.

4. The issues relating to Complainant's shower began in July 1994. Complainant discussed the background in an October 9, 1994, letter to Shea Management. (The letter indicates that, around July 12, 1994, Shea had replaced Cameo Management as manager of the Condominium.)

According to Complainant's letter: In July 1994, her downstairs neighbors told her that water was leaking onto the ceiling of their master bathroom. In early July, Complainant tried, unsuccessfully, to raise the matter with Cameo and then with Shea. In early August, Complainant discussed the matter with Alec Lichtman, the president of the Condominium Association. A few weeks later, Complainant again "contacted Mr. Lichtman . . . and we arranged to have KENCO [a plumbing company] come out."

Complainant's letter stated that: "Apparently, the source of the problem was the pipe connection between the shower pan and the pipe disposing water. I was informed that the problem could be fixed temporarily by caulking, but to correct the problem permanently the pipe would need to be replaced." Complainant stated that the pipe is located outside her unit and is a common element, which should be replaced by the Condominium Association.

³ Section 11-108.1 of the Maryland Condominium Act provides that: "Except to the extent otherwise provided by the declaration or bylaws [of a condominium], the council of unit owners is responsible for maintenance, repair, and replacement of the common elements, and each unit owner is responsible for maintenance, repair, and replacement of his unit."

5. On October 12, 1994, Ms. D'Avanza, the Association Manager, wrote Complainant that the charge for the plumbing repair, \$176, had been backbilled to Complainant's account. Ms. D'Avanza's letter stated that: "Since the shower drain serves only your shower . . . , it is part of your unit and, therefore, your responsibility." The letter stated that Complainant could choose any licensed plumber to correct the problem, but added: "Do not try to have the Association billed."

6. As noted above, Complainant filed her complaint with the Commission in early November 1994.

7. At the hearing before the Commission panel, Complainant and Mr. Bartsch both testified as to the temporary repair made in September 1994. Complainant stated that the "shower assembly" that needed repair is located below the tile floor of her bathroom and is, therefore, outside the boundaries of her unit.

During his testimony, Mr. Bartsch referred to a drawing of a typical shower that Mr. Goldman had prepared (Respondent's Exhibit 2). According to Mr. Bartsch, the September 1994 repair involved caulking around the top of a "cup" that fits around the drain pipe, and the top of the cup is located about 1/2 inch below the floor of Complainant's unit.

8. Complainant and Mr. Bartsch stated that the September 1994 repair did not correct the problem and that, for some six months, they did not use that shower. In April 1995, they had the shower repaired. The work was done by another plumbing company, Vernon F. Gaegler, Inc., and cost a total of \$123.⁴

Mr. Bartsch testified that he was present at the time of the April 1995 repair and saw what was done. According to Mr. Bartsch, the plumber went to the apartment below, opened the ceiling, and found that the problem was a crack in the bottom of the cup of Complainant's shower assembly. Mr. Bartsch testified that the crack was located 3 to 3 1/2 inches below the subfloor of Complainant's unit. The repair, which consisted of repacking and pouring molten lead into the cup, corrected the problem.

9. In her testimony before the Commission panel, Ms. D'Avanza stated that, because the plumbing part in question serves only Complainant's unit, that part is not a "common element" and the repair is Complainant's responsibility.

10. Respondent's other witness, Mr. Goldman, is the president of Kenco Plumbing & Heating, Inc. He was not present during the September 1994 repair of Complainant's shower, but testified on the basis of the invoice and the notes of his employee who did the work. Mr. Goldman stated that his employee caulked around the top of the "cup."

Mr. Goldman based his drawing (Respondent's Exhibit 2) on his general knowledge and his familiarity with the configuration of bathrooms in the Grand Bel Manor Condominium. According to Mr. Goldman, shower stalls at the Condominium are made of fiber glass, with a metal drain in the floor of the shower. He stated that the shower stalls stand on the subfloor, which is usually plywood. According to Mr. Goldman, the "cup," which fits around the drain pipe, is an "integral part" of the shower, and the top of the cup is typically about one inch above the subfloor.

⁴ Complainant placed in the record two canceled checks, both dated April 5, 1995. One check, for \$48, was endorsed by Vernon F. Gaegler, Inc. The other, for \$75, was payable to Joseph Lewis. Mr. Bartsch testified that Mr. Lewis is the plumber who did the repair work.

Until the Commission hearing, Mr. Goldman did not know of the repair work that Complainant and Mr. Bartsch had done in April 1995.

11. In summarizing her position, Complainant stressed that, under the Bylaws, the responsibility of a unit owner for repair of parts of the plumbing system is limited to parts "which are wholly contained within his Unit and serve his Unit and no other." According to Complainant, the shower assembly that required repair is located outside the dimensions of her unit and is, therefore, a common element. Complainant maintains that the Condominium Association is responsible for such repairs, and she seeks (1) cancellation of the \$176 charge for the September 1994 repair and (2) reimbursement for the \$143 cost of the April 1995 repair.

12. In summarizing Respondent's position, Ms. D'Avanza contended that the Declaration's provision on the dimensions of a unit should be interpreted to include certain appendages, as well as the space within the specified boundaries. According to Ms. D'Avanza, the shower-drain assembly is such an appendage and is, therefore, part of Complainant's "unit."

Ms. D'Avanza acknowledged that, under the Declaration and Bylaws, there may be some "fuzziness" as to the repair responsibility of unit owners, but she contended that the provision on common elements makes clear that the Condominium Association's responsibility for plumbing is limited to plumbing that serves two or more units. According to Ms. D'Avanza, because the repairs here involved a shower serving only Complainant's unit, Complainant is responsible for the cost of those repairs.

Findings and Conclusions

1. One issue is what constitutes Complainant's "unit," and that depends on Section 7 of the Declaration. The first sentence of Section 7 specifies the vertical and horizontal boundaries of units. The vertical boundaries are the "unfinished (unexposed) surface of the parquet or tile floor" and the "unfinished (unexposed) surface of the ceiling." According to Complainant and Mr. Bartsch, the bottom of the shower-assembly cup is below the unfinished surface of the tile floor.

Consideration must also be given, however, to the second sentence of Section 7. That sentence states that: "Each Unit includes . . . all kitchen appliances and plumbing and similar fixtures located in and serving solely a particular Unit." It is clear that the shower stall is located in Complainant's unit. Also, according to Mr. Goldman's testimony, the metal piece referred to as the "cup" is an integral part of the shower assembly. Therefore, even though the bottom of the cup is located below the subfloor, we construe the second sentence of Section 7 to mean that the cup is in Complainant's unit.

2. Section 5(b) of the Bylaws states that a unit owner is responsible for bathroom fixtures and parts of the plumbing system "which are wholly contained within his Unit and serve [only] his Unit." The quoted language must be read in connection with Section 7 of the Declaration. In our view, that means that the shower-assembly is "wholly within" Complainant's unit and, therefore, Complainant is responsible for the costs of both the September 1994 and the April 1995 repair.

We wish to point out, however, that we do not accept Respondent's position that the Condominium Association's responsibility for maintenance and repair of plumbing is limited to plumbing that serves two or more units. Our conclusion as to the shower-assembly is based not only on the fact that the shower assembly serves solely

Complainant's unit, but also on the fact that, as we read the Declaration and Bylaws, the cup--an integral part of the shower assembly--is within Complainant's unit. This conclusion would not apply, for example, to a drain pipe serving only Complainant's unit, but located primarily outside that unit.

Order

1. Within 45 days of the date of this Order, Complainant shall pay Respondent \$176, the cost of the September 1994 repair.

2. Complainant's request for an order requiring reimbursement for the cost of the April 1995 repair is denied.

The foregoing was concurred in by panel members Carl E. Auvil and T. Peter Kristian. The other panel member, David B. Marblestone, dissents.

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 from the date of this Order, pursuant to the Maryland Rules of Procedure governing administrative appeals.

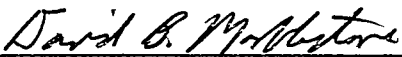
Dissent

I am unable to agree with the conclusions of the panel majority, because I differ with their reading of the Declaration and Bylaws.

The second sentence of Section 7 of the Declaration provides that a unit includes plumbing fixtures "located in and serving solely" that unit. In my opinion, the term, "located in," refers to the unit's boundaries, as specified in the first sentence of Section 7.

The testimony of Mr. Bartsch and that of Mr. Goldman seem to differ as to the location of the top of the shower-assembly cup. However, it seems clear that the bottom of the cup is located below the subfloor. For example, Mr. Bartsch, who was present when the repair work was done in April 1995, testified that the bottom of the cup is 3 to 3 1/2 inches below the subfloor. In my opinion, even though the cup is an integral part of the shower, the cup is not "located in" Complainant's "Unit" as those terms are used in the Declaration.

Furthermore, under Section 5(b) of the Bylaws, a unit owner is not responsible for repair of bathroom fixtures or parts of the plumbing system unless the fixture or part is "wholly contained within his Unit." In my opinion, to be "wholly contained" within a unit, an item must be located entirely within the boundaries specified in the first sentence of Section 7 of the Declaration. Because the part at issue here--the cup--is located at least partly outside those boundaries, the Condominium Association should be responsible for repairing it.¹ In my opinion, the Condominium Association should pay for the September 1994 repair and should reimburse Complainant for the cost of the April 1995 repair.



David B. Marblestone
Panel Chair

¹ My view does not mean that the Condominium Association would be responsible for repair of the shower stall. The stall and the cup are connected, but that does not alter the fact that the stall itself is "wholly" within the unit.