

Court File Nos. SC-8796/15, SC-8790/15,
SC-8792/15, SC-8794/15, SC-8788/15

SUPERIOR COURT OF JUSTICE
SMALL CLAIMS COURT

B E T W E E N :

KRASS, Melvin, KRASS, Carla, SHULMAN, Ralph,
SHULMAN, Sandra, BARBIERI, Bina, BURSTEIN, Connie,
MAITLAND, Marcia, DANG, Anh Vu, OPHEK, Jenny,
PETERS, David, PETERS, Barbara, GOLDSTEIN, Marcia,
AREIAS, Jose, AREIAS, Iva, RANTISI, David,
GOLTSMAN, Felix, PAPTAEODOROU, Jim, STOPNICKI,
Roberto, RADZINSKI, Rebeca, SFYRIDIS, Dimitrios,
NESPOLO, David, RETI, Andrew, RETI, Judith,
SPYROPOULOS, John, ANASTASIOU, John, ANASTASIOU,
Elleni, NESPOLO, Stephanie, YAKHNIN, Eugenia,
BRAUN, Hanita, BOWER, Douglas, LUNARDO, Domenicangelo,
FRIEDMAN, Audrey, FRIEDMAN, Jerry, MICHAS, Evangelos

Plaintiffs

- and -

NORSTAR PORTRAIT INC.

Defendant

R E A S O N S F O R J U D G M E N T

BEFORE THE HONOURABLE DEPUTY JUDGE T. CLEMENHAGEN
on May 13, 2016, at TORONTO, Ontario

APPEARANCES:

M. Mackey Counsel for the Plaintiffs
B. Waseil Student-at-Law for the Plaintiffs
R. MacDonald Counsel for the Defendant

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REASONS FOR JUDGMENT

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1.
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Reasons for Judgment - Clemenhagen, D.J.

FRIDAY, MAY 13, 2016

R E A S O N S F O R J U D G M E N T

5 CLEMENHAGEN, D.J. (Orally):

10 The action brought before me this afternoon
arises out of 17 agreements of purchase and sale
in about the year 2014. It relates to condo
purchases by these defendants--by these
plaintiffs. Before me is a fair bit of evidence
with regard to the various contracts and what
these parties were entitled to believe that they
were getting when they bought these units.

15 The action starts innocently enough when the
purchasers see their statement of adjustments
and on it find an adjustment charge for a water
meter and an adjustment charge for a hydro
meter. The hydro meter, by the way, is an
20 electrical meter. It becomes noticeable to them
that there are no water meters for the
individual units and they wonder why they are
being charged an adjustment for a water meter
when there are no individual water meters in the
25 building. They also don't get any individual
water bills. They get a proportional bill from
the condo corporation, which leads them to
believe that there is something amiss here.

30 They then look at the hydro meter and see that
they were charged a substantially less amount
for the hydro meter and they don't actually see

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an actual meter for their own unit. There are hydro meters. There are hydro meters on three of the floors. These hydro meters contain internally other meters which are set up to measure the use of hydro in each of the individual units and they all get individual hydro bills. Therefore, they come to court wanting to set aside both of those charges on their respective bills.

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The real issue in my mind comes from the agreement of purchase and sale and what does it say with regard to what they were to get by way of metering systems. The agreement of purchase and sale, which is by example at tab 22, which is the Krass agreement of purchase and sale, says that the hydro and water meters are both pursuant to paragraph 12(vii) of the agreement and there has been quite a bit of discussion as to what 12(vii) actually means. In my opinion, in reviewing that section, I note that this is a preprinted drafted agreement by the developer or by his predecessors in title depending on the case. If there are any construction problems or anything that causes me any misapprehension with regard to what is meant, that I would interpret it narrowly. It says that the cost on the statement of adjustments should be supplying and installing an electric or water meter pertinent to the unit that measures the unit's separate or individual consumption or assists in calculating a proportionate consumption. The operative

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5 words there, in my opinion, are the words that are not in the modifying bracket, but the actual words which state that they are entitled to a unit that measures the unit's separate or individual consumption. It says appurtenant, but I am not sure what appurtenant means in the sense of--as long as it is in the building, I suppose that is close enough.

10 Having said that, I think it is quite clear that the hydro meter does what it is anticipated to do. It does measure the flow to the individual units. I was given in evidence by the defendant his charges with regard to the electric and water, a 50 percent back-out and then an amount that was allocated on a proportional basis for the adjustments. I didn't see any great problem with that. On the Krass statement of
15 adjustments it's \$1,171.15. It varies on each of them depending on the size of the unit. I am satisfied that that is fair, and in accord with the agreement and that they did get what they bargained for.

25 With regard to the water meter, unfortunately I don't think they got what they bargained for. There is no unit, I guess an individual flow of water reading. It goes to the head office. It's allocated, in some manner determined by the board of directors, I presume. Having said
30 that, it really doesn't matter to me. It is not an individual use flow meter. It's not what's

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required in the statement--in part in the agreement and that the sum, which in the Krass' case is \$2,466.58, is improper in that it does not reflect what's required in the agreement of purchase and sale. It was required to be an individual meter, an individual flow meter. It is not, and therefore I would take that out.

10
I should also comment, there's something been made about the hydro meter that it was supplied by Enercare, which is true. They supplied the actual box, including the interior of the box, the idea being that no one's to open the box and the readings are simply to go by hardwire to Enercare. That has, in my opinion, nothing really much to do with this action. The
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defendant's claim, the plaintiff in the defendant's claim, clearly installed and created the appropriate required connections and various other things to have that all installed. I
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don't think that the sum of \$1100, as it turns out in the Krass, is unreasonable for that kind of installation. And despite the fact they did not actually pay for the box, they are entitled to the reimbursements for installation. They
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would be entitled to reimbursement for installations in the water meters as well; however, they didn't install it, so there's nothing along that line.

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Another aspect of this case which caused me some difficulty was the development charges which are

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5 listed on the statement of adjustments. Once again, just for the sake of example, it totals \$16,658.33 in the Krass case, and all of the amounts as paid by all of the plaintiffs to this action are contained in Exhibit 4, and I have no problem and it's agreed that those amounts are correct. I am told on behalf of the defendant to that action that these are development charges that are paid directly to the City of Toronto. They are paid when the building permit is taken out and they relate to various items that are in the *City of Toronto Developments Act*. The Act wasn't produced in front of me. The bylaw wasn't proven in front of me. I have no bill from the City of Toronto in any amount, let alone those amounts. I have no breakdown of those amounts. I really honestly don't know whether those amounts are for what they say they are or for some combination. It may well be they are partially for some development charges. It may be they are for something else. I really have no evidence as to what they're for. The plaintiffs' position is these amounts are paid. It's the onus is on defendant to establish what they are. These are prepaid towards outstanding charges that were understood by these various people to be development charges in the broad sense, and they are--they have paid the development charges that are required of them to be paid.

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30 There is a list of further charges which was

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given in evidence in this action and is contained in Exhibit 3 at various points. Also, the list is at, I believe Exhibit 5, and a loose Exhibit 5, tab 5 that we had outlining a list of the amounts of new charges to be allocated to each of these people. Then there are following that documents which prove the amounts. There are in total nine of them. I listed all nine, totalling from some \$355,000, which was a March 2008 expenditure, a \$127,267 expenditure, which is an actual which appears in the site plan, page eight, paragraph three. It was estimated there by the City at \$182,455, but in reality it was somewhat less. This was done in March 2012. Number three is \$11,729.40, which also appears in the site plan as an incurred cost back in 2012. Number four is in the amount of \$80,792.07, which is at tab 11 by way of proof and appears from March 2012. Number five is in the total amount of \$76,569.73. It is for a number of charges between March 2010 and September 2014. The bulk of the charges are prior to 2013 and that appears at tab 10. Number six is a charge of \$18,960 from the site plan, which is also prior to any of these closings. Number seven is a large one, \$399,498. There was an estimate of \$373,000 by the City but actual payments were somewhat more. This is more than two years before the actual statements of adjustments. Number eight is \$49,500 from January 8, 2013 and before, appearing at tab 13 by way of being proven.

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Finally, number nine is for a fence in the amount of \$17,967 which was incurred on September 20, 2013. It's at tab 14.

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It is the position of the plaintiffs in this action that these amounts when added form the amount of the development charges that they'd already paid when they closed in 2014. They were all incurred prior to 2014 closings. They were known prior to the 2014 closings. And they--if they were not included in that statement of adjustments, they should have been. The defendant comes to court and says, when looking at this lawsuit he went through his records and these were just simply missed. He had his accountants and lawyers prepare the statements of adjustment for each of these closings and they were just simply missed.

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I accept the evidence of the plaintiff--I'm sorry, of the defendant who says that it's his belief, but I have a significant problem believing that all nine of these in excess of a million dollars were actually just simply left out prior to 2014. They are amounts that were obviously incurred in all kinds of these situations. They're typical, usual amounts. The people they employed undoubtedly knew what they were doing and were used to doing this kind of calculation. I suspect they would have specifically looked for this. It would have been part of their employment if they were

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employed, or part of their contract to specifically look for these expenses and put them in to adjust. Therefore, I am not satisfied with that explanation. I think it is more likely that they were known, and part of the original adjustments and that they have been paid. On a balance of probabilities that is a better explanation to me, as given by the plaintiffs, than it is by the defendants, that he simply overlooked them or staff overlooked them. I would think that a man of his experience, and obvious talent and ability would not miss more than a million dollars in these kinds of expenses when they're so obvious and it's so large.

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Something in excess of probably two million dollars was collected at the time of all of these closings, and I am of the opinion that it isn't proven before me that the development charges as charged do not include these. In fact, I will go so far as to say I am satisfied they probably do include both this and some development charges from the City, but they include both. Therefore, I am of the opinion they have already been paid.

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Therefore, the defendant's claims in their entirety are dismissed. I give judgment to the plaintiffs for the amounts as contained in their various statements of adjustment for the amounts of the water meters. I don't have handy before

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me every single statement of adjustment, and we didn't have each of them marked separately. They're all in the material before me, there's no question, I just simply don't know the exact amount for each plaintiff.

MS. MACKEY: They're in Exhibit 1, Your Honour, if I may interject.

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THE COURT: Just the water heater? Oh, Exhibit 1, I was looking at 4. Let me look at 1. Oh, absolutely. I take back everything I just said. Exhibit 1 does contain the water heater amounts and the hydro. As I've said, I think the hydro is fair, but the water meter for reasons I've given, each of the plaintiffs shall have judgment for the amounts as contained in Exhibit Number 1. It appears to be \$2,466.58 for everyone, except the Areias who have \$1,233. Yes, I think that's probably fair. How should I endorse the judgment then in this respect for each plaintiff?

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MS. MACKEY: Perhaps you could attach this as a schedule?

THE COURT: Will that work for you?

MS. MACKEY: That would certainly.

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MR. MACDONALD; Yeah, and if Your Honour, much as you've done already, if the first endorsement just says this applies to the other actions. As long as it's clear, I don't think you need to fill out five judgments and do finite....

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THE COURT: Well, no, what I--yeah, that was my plan, and that's what we had done to date. I had used the Stornicki judgment--Stopnicki, no

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R--you can take him back your R, as the appropriate one. Well, actually I, I only have three. Are there three actions?

MS. MACKEY: There should be five, Your Honour.

5 THE COURT: Yeah, they only gave me three, yeah, which even gives me a better idea of what I'm going to do with that because I only have three of them. So I am endorsing them all on the Stopnicki. So....

10 Okay, judgment for the plaintiffs in this action and actions--I'll need some help here. You haven't done anything today, why don't you do it? Okay? The first one is this action which is 8792, okay? The second one is the Ophek number, 8796. The next one is the Krass action, 8790. I need two more. What are the numbers on the last two? I may even have them here.

15 MR. WASEIL: Eight, seven, seven....

20 THE COURT: Morrison. The Morrison, 8788?

MR. WASEIL: Yes. And 894--8794. Eight-seven-nine-four is the John Anastasiou suit matter. Sorry for the mispronunciation.

25 THE COURT: Ma'am, could you do me a favour? Could you photocopy Exhibit 1, but just the sheet, just that and that?

COURT REPORTER: Okay.

30 THE COURT: Okay? What I've done, judgment for the plaintiff, this action and actions (and I've listed the actions), as listed on the schedule attached, and I will attach a schedule, as attached for--what does it say? I don't have

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the schedule any more. Does it say water heater?

MR. MACDONALD: It just says water at the top of it.

THE COURT: It just says water?

MR. MACDONALD: Yes.

MS. MACKEY: On the statement of adjustments?

MR. MACDONALD: No, this.

THE COURT: No, on the sheet, Exhibit 1.

MS. MACKEY: On--it says water, yes.

THE COURT: Okay. For the water column only. Costs?

MS. MACKEY: The plaintiffs are looking for their costs, Your Honour. I had prepared two separate bills of costs.

MR. WASEIL: Can I bring it to you, Your Honour?

THE COURT: Can you what?

MR. WASEIL: Can I bring you the costs owing?

THE COURT: Yeah. But only you, not, not, not that guy who won't put his hand up any more. Okay, I'm going to, okay, I'm going to file that. Your position, I filed. Perfect. Is that what I wanted? Bingo, it's exactly what I wanted. Oh, I see. I'm going to write water, on page four I'm writing water, just so there's no misunderstanding. Okay.

MS. MACKEY: Your Honour, the plaintiffs are seeking costs for their filing fees. There are a few disbursements and 15 percent of the amount claimed in both actions. The defendant--or the plaintiffs were entirely successful in the defendant's claim, for which \$17,456.24 in costs

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are claimed. In the plaintiffs' claim, I appreciate the plaintiffs were only about two-thirds successful. We had, assuming we had been a hundred percent successful, been claiming 15 percent of that, which totalled \$15,397. Do you have my bills of costs?

THE COURT: I do.

MS. MACKEY: Okay. But if, if we were only success....

10
THE COURT: I propose to enter--no, wait a sec. Yeah. Okay, I know what I'm going to do. Okay. I, I don't the proper endorsements really. Bear with me. Give me 30 seconds here. What's the number? I don't have it handy.

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MS. MACKEY: I'm just....

THE COURT: ...of--hang on, I haven't asked yet, of the D1 actions. Here they are here. Here they are here. Are they the same numbers?

MS. MACKEY: They are.

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THE COURT: Okay. Okay. What I've done is I've added the numbers for the defendant's claim on the same endorsement. You're going to get one endorsement covering everything and I've marked it all defendant's claims dismissed. Now, we can get back to where we were.

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MS. MACKEY: So the...

THE COURT: There will be one costs order for everything.

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MS. MACKEY: ...the costs for the defendant's claims, the \$17,000 figure is here. And for the plaintiffs' claim, Your Honour, the plaintiffs concede we were only two-thirds successful, and

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I have reduced the amount claimed here to
\$10,636.85.

THE COURT: How many actions are there?

MS. MACKEY: Ten, five defendant's, five
plaintiffs'.

THE COURT: Okay. What are you asking for in
costs? What do you think would be a fair
figure, given, given it's a Small Claims Court?
And they're all combined together. They're not
separate actions.

MS. MACKEY: They were all combined together.

THE COURT: What do you think would be fair?
Give me your, your, your number.

MS. MACKEY: We're asking for \$28,000.

THE COURT: What do you, what do you think would
be fair?

MS. MACKEY: I....

THE COURT: 'Cause if he comes in with a much
more fair number, I might go with his.

MS. MACKEY: I think that would be fair, Your
Honour, and...

THE COURT: Remember...

MS. MACKEY: ...I would....

THE COURT: ...be careful here. You're not
going to get 28,000 in a Small Claims Court. It
just doesn't happen.

MS. MACKEY: I--Your Honour, the, the standard
amount of costs claim is typically 15 percent of
the amount claimed.

THE COURT: Right, and I don't do that. I would
never give any--let anybody claim 25,000 and get
a judgment for one, and give them 3750 in costs

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on a \$1,000 judgment. It would never happen. I would give 15 percent of the amount recovered.

I'm not sure what it is in the main actions.

MS. MACKEY: The amount recovered in the main-- in, in the five plaintiffs' claims the amount recovered for the water is \$62,897...

THE COURT: Okay.

MS. MACKEY: ...and 50 cents.

THE COURT: So it's about \$10,000 there approximately, right, at 15 percent?

Approximately?

MS. MACKEY: Yes. And then the, the defendant's claim at which....

THE COURT: Yeah, that adds a bit, but....

MS. MACKEY: That's a hundred thousand dollars.

THE COURT: No, I understand it adds a bit, but they were heard at the same time, you see.

MS. MACKEY: They were.

THE COURT: So...

MS. MACKEYT: And Your Honour, this....

THE COURT: ...so give me your best number.

What do you think is fair? You're not going to get--I'm not doubling it by--because you have-- there's a defendant's claim you're successful at. They were all heard at the same time. The same evidence applied to everything.

MS. MACKEY: My friend and I will--yeah, my friend and I will agree on \$15,000 all in.

THE COURT: Seems about right. Somewhere around there is about right. That's sort of where I was heading, I think. Somewhere around 10 to 15,000 is fine. That's all in?

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MS. MACKEY: Yes.

MR. MACDONALD: Yes.

THE COURT: Okay.

MR. MACDONALD: That's, yes, the plaintiffs'
claims and defendant's claims.

THE COURT: Yeah.

MR. MACDONALD: Yeah.

THE COURT: I've put costs on consent for all
actions \$15,000. Okay? Anything else I can do?

MS. MACKEY: No. Thank you very much, Your
Honour.

THE COURT: Okay.

MR. MACDONALD: Yeah, thank you, Your Honour.

...PROCEEDINGS CONCLUDED

16.
Krass et al. v. Norstar Portrait Inc.
Certification

FORM 2
Certificate of Transcript
Evidence Act, Subsection 5(2)

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I, G. Armstrong, certify that this document is a true and accurate transcription of the recording of Krass et al. v. Norstar Portrait Inc., in the Superior Court of Justice held at 47 Sheppard Avenue East, Toronto, Ontario, taken from Recording No. 4816-110-20160513-092503, which has been certified in Form 1 by B. Bhagat.

15

(Date)

(Signature of authorized person)