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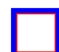

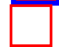

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Baliwalla v. York Condominium Corporation No. 438, 2007 CanLII 14915 (ON S.C.D.C.)

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Docket: 330/06

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Legislation cited (available on CanLII)

- Condominium Act, 1998, S.O., 1998, c. 19

COURT FILE NO.: 330/06
DATE: 20070404

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

B E T W E E N:	)	
VIRAF and MARY BALIWALLA	)	*Stephen R. Cameron*, for the Plaintiffs (Respondents)
Plaintiffs (Respondents)	)	
- and -	)	
YORK CONDOMINIUM CORPORATION NO. 438	)	*Joseph W. Ryan*, for the Defendant (Appellant)
Defendant (Appellant)	)	
	)	**HEARD at Toronto:** April 4, 2007

GREER J.: (Orally)

[1] The appellant, York Condominium Corporation No. 438, ("YCC 438") or "the appellant" appeals from the judgment of Deputy Small Claims Court Judge Genova ("Judge"), dated May 31, 2006, in a claim brought by the plaintiff, Mary Baliwalla ("Baliwalla") against YCC 438.

[2] The appellant asked the Court for an order setting aside the judgment given at the trial, wherein the Judge found in favour of Baliwalla and awarded damages to her in the amount of $5,350.29, together with prejudgment interest from April 14, 2004 to the date of the judgment and costs of $242.67. The appellant asks that the claim, once the judgment is set aside, be dismissed.

[3] In its Notice of Appeal, YCC 438 sets out seventeen grounds on which this appeal is based. These can be summarized as follows:

> (a) The Judge misconstrued the evidence and drew on erroneous conclusions of fact from such evidence and ignored other relevant evidence;
>
> (b) He erred at law in failing to properly apply the applicable provisions of the *Condominium Act, 1998,* S.O. 1998, c.19, as amended, and in failing to properly apply the provisions of YCC 438's Declaration, By Laws and Rules of the Corporation;
>
> (c) He erred in incorrectly applying the standard of review with respect to the YCC 438 Board's decisions and actions taken by them and in his findings in this regard;

(d) He erred in holding that YCC 438 was liable in damages to Baliwalla by not refunding part of the special assessment levied by the Board for major repairs to the common elements, which the Board had transferred into YCC 438's Reserve Fund.

SOME BACKGROUND FACTS

[4] Baliwalla was one of sixteen registered owners of YCC 438's condominium townhouses on LaRose Avenue, Toronto. Baliwalla's husband, Viraf, was a member of the Board of Directors of YCC 438 at the time the Board, in 2002, determined that it was necessary for the Corporation to make major repairs to the brick masonry cladding of the Corporations's exterior buttress walls and garden walls. The Board sent a notice dated August 15, 2002, to all unit owners of the Corporation that it was the Corporation's intention to begin such repairs "this fall". The notice said the Board intended to finance the project by paying "50% from the Reserve Fund" and "special assess unit owners for the remaining 50%" to commence September, 2002. The owners were asked for $7,500.00 per unit to be paid in three installments starting September 15 and ending November 15, 2002.

[5] The Board had already had engineers examine the site, give a report and estimate, and had put the bid out for tender. The engineering consultants provided a report dated August 26, 2002, setting out the amounts of private tender bids for the job. The estimates ranged from $186,196.00 to $384,372.00. Some of the bids were later revised by adding or subtracting from it but none of the bids were revised to a lower amount. The special assessment was to be $200,000 to cover the lowest bid.

[6] The Board held an information meeting on October 15, 2002, where owners were in attendance. The Baliwallas, however, were not present as they had sold their unit in September with the closing to take place in December, 2002. In the meantime, however, they had to pay the full $7,500 special assessment, in order to have a Status Certificate issued for the benefit of the new owners of their unit. That Certificate, dated October 28, 2002, sets out the status of the unit including the details of the special assessments payments.

[7] The Corporation also notes in paragraph 12 of the Status Certificate:

> "The Corporation has no knowledge of any circumstances that may result in an increase in the common expenses for the unit EXCEPT SPECIFICALLY FOR THE BRICKWORK REPLACEMENT ON BUTTRESS WALLS AND GARDEN WALLS."

[8] At the October meeting, the Board undertook to look again at the situation and set up an owner's committee to do this since the cost of such repairs was very high and the Corporation's Reserve Fund not sufficient to cover the expense without the special assessment already levied.

[9] The Board next met on December 17, 2002. On December 19, 2002, the owner's committee received a quotation for a modified type of repairs that was not as expensive as the earlier tenders. On

October 27, 2002, the Baliwallas wrote to the Board stating that they wished "…that the balance, if any, from our prepaid assessment will be forthcoming."

[10] The closing of their unit had recently taken place and it appears that the Baliwallas thought, given that the charge for the cost of the special assessed repairs would decrease, they would be entitled to a refund. In the meantime, given that no work had yet begun on the project, the Board transferred the special assessment fees paid by all unit owners, into YCC 438's Reserve Fund before its year-end.

[11] Sub-section 37(1) of the *Act* sets out the standard of care to which every Director and Officer of the Condominium Corporation is held to. It reads:

> "Every director and every officer of a corporation in exercising the powers and discharging the duties of office shall,
>
> (a) act honestly and in good faith; and
>
> (b) exercise care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."

[12] The Board, on January 20, 2003, obtained a legal opinion from its counsel that no money could be transferred out of the Reserve Fund unless the Corporation was wound up. In that letter, the counsel set out the provisions of subsection 93(2) of the *Act* which reads:

> "A reserve fund shall be used solely for the purpose of major repair and maintenance of the common elements and assets of the corporation."

[13] On January 22, 2003, the special committee formed by the Board then recommended that the Board approve the new contract at a lesser fee. This was followed by the corporation's Annual General Meeting held on March 18, 2003. There, it is noted in the financial statements of the corporation, that the monies collected were now in the Reserve Fund and had been transferred into the fund prior to the corporation's fiscal year-end of December 31.

[14] The Board repaid no monies to the Baliwallas and the Board was sued by them. The parties agree that only Mary Baliwalla, the registered owner, is properly a plaintiff in the proceeding and is the person to whom the Judge awarded damages. She is now the Respondent in this Appeal.

ANALYSIS

[15] The parties agree that the test be applied to the Board's decisions is that of reasonableness and is not one of correctness. As has been noted, the standard of care is what a reasonably prudent person would do in comparable circumstances. It is the position of the Appellant that the Board acted in a reasonable manner and that the Judge erred in coming to his conclusions otherwise.

[16] The trial before the Judge took two days and evidence was given and written submissions were made. The trial Judge's conclusion in paragraph 5 of his reasons is that he finds that the "… actions of the defendant were both unfair and unreasonable and, as such, they are liable for the damages incurred by the plaintiff who was not able to benefit from future repairs to his unit through the use of reserve funds given his sale of the property."

[17] The trial Judge, however, did find that the actions of the Board were reasonable in the issuance of the special assessment but that the actions thereafter were not. He appears to have determined in paragraph 1 of his reasons that he found it was unreasonable of the Board to transfer the money collected in the special assessment in the amount of $7,500 per unit holder into the designated Reserve Fund.

[18] He also seems in his reasons, in paragraph 3, to disagree with the corporation's submission that the Reserve Funds as set out in s.93 of the *Act* are in the form of common expenses collected by the condominium corporation, which are to be held in the same manner as common expenses are collected. The Judge did not agree with this submission, and in my view he erred, at law in applying the provisions of s.93 of the *Act* in the manner he did.

[19] I find that the Judge also erred in law, and in fact, in finding that the actions of the Appellant were both "unfair and unreasonable" and in finding that the corporation was liable for damages. The *Act* in subsection 84(1) sets out what are common expenses. The definition of common expenses is that these are expenses related to the performance of the objects and duties of a corporation. Therefore, all expenses including those relating to a special assessment, are common expenses, in this *Act* or in a corporation's Declaration. The *Act* also defines "common surplus" which means the excess of all receipts of the corporation over the expenses of the corporation.

[20] Subsection 84(1) of the *Act* states that:

> "Subject to the other provisions of the *Act*, the owners shall contribute to the common expenses in the proportions specified in the declaration."

[21] It then states in subsection (2) that:

> "A common surplus in a corporation shall be applied either against future common expenses or paid into the reserve fund, and except on termination, shall not be distributed to the owners or mortgagees of the units."

[22] The Baliwallas were asking for a refund of the amount not used in the assessment for the major repairs. They had no right to do so, as subsection 84(2) makes it clear that any surplus, which includes the receipts in question, shall be applied either against future common expenses or paid into the Reserve Fund. The Board's authorization to have the surplus funds paid into the Reserve Fund prior to its fiscal year-end was reasonable in the circumstances of the case before it.

[23] Section 93 of the *Act,* which governs a Reserve Fund, states that a corporation must establish and maintain one or more reserve funds and in subsection (2) it states:

> "A reserve fund shall be used solely for the purpose of major repair and replacement of the common elements and assets of the corporation."

[24] A special assessment is made for only major repairs and replacement of common elements as noted. Therefore, any surplus would be transferred by a reasonable Board of Directors into its Reserve Fund to be applied in the future against new major repairs and replacement.

[25] It is also to be noted that subsection 93(4) of the *Act* states that:

> "The corporation shall collect contributions to the reserve fund from the owners, as part of their contributions to the common expenses."

[26] The counsel have told me that there are no cases strictly on point in this matter. Counsel for the Appellant has suggested that by analogy, I apply the principles are set out in *York Condominium Corp. No. 382 v. Dvorchik*, [1997] O.J. No. 378, No. C12466 (O.C.A.), wherein our Court of Appeal, in examining the duty to obey the rules of the Condominium Corporation, noted in paragraph 5 that a Court should not substitute its own opinion about the propriety of a rule enacted by a condominium board, unless the rule is clearly unreasonable or contrary to the legislature scheme. It went on to say that in the absence of such unreasonableness, "deference should be paid to rules deemed appropriate by a board charged with responsibility for balancing the private and communal interests of the unit owners."

[27] This reasoning was applied by Molloy J. in *Metropolitan Toronto Condominium Corp. No. 1170 v. Zeidan* [2001] O.J. No. 2785, Court File No. 00-CV-198913 (O.C.C.J.). In paragraph 44 of her decision, Molloy J. notes that the Court of Appeal in the previous decision "mandates considerable deference to the condominium board in matters of this nature." I agree with these principles in the application of this Appeal. The Judge, in reaching the conclusion he did, erred in how he applied the provisions of the *Act* itself and erred in finding that the corporation's actions were both unfair and unreasonable.

[28] While it is true that the Judge did not say that the damages award (being approximately the value of the refund requested by the Baliwallas) was to be paid out of the corporation's Reserve Fund, the only place it could have been paid from then is the common expenses fund or what is called the general bank account of the corporation. The corporation only acts on the instructions of its Board and at no place in either the litigation or in the reasons of the Judge is it claimed that the Board acted in an negligent manner. I am therefore unclear how the Judge came to award damages against the corporation itself when the Board acted in a reasonable manner.

[29] The appeal is therefore allowed, and the decision of Deputy Small Claims Court Justice Genova is hereby set aside and, the Action in this matter by Baliwalla is therefore dismissed with costs payable by the Baliwallas to YCC 438, both in the Small Claims Court and in this appeal. If the parties cannot

agree on the quantum of such costs, I will receive brief written submissions by YCC 438 by May 16, 2007, with submissions by Baliwalla 7 days thereafter and any Reply by YCC 438, 7 days after that.

___

GREER J.

Date of Reasons for Judgment: April 4, 2007
Date of Release: April 19, 2007

COURT FILE NO.: 330/06
DATE: 20070404

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

B E T W E E N:

VIRAF and MARY BALIWALLA

Plaintiffs
(Respondents)

- and -

YORK CONDOMINIUM CORPORATION NO. 438

Defendant
(Appellant)

ORAL REASONS FOR JUDGMENT

GREER J.

Date of Reasons for Judgment: April 4, 2007

Date of Release: April 19, 2007

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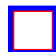
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