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Case Name:

Walia Properties Ltd. v. York Condominium Corp. No. 478

**RE: Walia Properties Ltd. et al., and
York Condominium Corporation No. 478 and Rexdale Mews
et al.**

[2007] O.J. No. 1380

Court File No. 05-CU-295915PD1
Ontario Superior Court of Justice

A.L. Harvison Young J.

Heard: April 10, 2007.
Judgment: April 12, 2007.

(12 paras.)

Counsel:

Patricia M. Conway, for the Applicants.

Stephen M. Turk, for the Respondents, Rexdale Mews Inc. and Rexdale (Morki) Inc.

Samuel S. Marr, for the Respondents York Condominium Corporation No. 478.

ENDORSEMENT

1 A.L. HARVISON YOUNG J.:-- On August 26, 2005, the Applicants commenced this application. The Applicants are the owners of the commercial condominium units which are on the ground floor of York Condominium Corporation No. 478 ("the Condominium"). The Respondents include (i) the Condominium, and (ii) the owners of 59 of the 60 residential units which are townhouse units on the second and third floors of this 3 storey condominium. The residential units are owned by two related companies, Rexdale Mews Inc. and Rexdale (Morki) Inc. (collectively) "Rexdale" and rented out. Numerous affidavits have been filed by both parties and cross-examinations have been held.

2 The Applicant has brought a motion pursuant to Rule 38.10 of the *Rules of Civil Procedure* seeking that the application be converted to trial on the basis that there are facts in dispute and that there will be issues of credibility that could best be determined at a trial on the basis of viva voce evidence. Both the Condominium and Rexdale vigorously

oppose this, taking the position that there are no significant *material* facts in dispute and that, having begun the application over 2 years ago and had the opportunity to file all appropriate evidence and cross examination, there is no just reason for the conversion of this matter to trial of an action at this point.

3 At the heart of the application is the commercial owners' position that the common expenses are unfairly allocated such that they are responsible for 60% of the shared costs while the residential units pay 35%. Since acquiring the units, these expenses (particularly utility costs) have increased significantly. The application seeks a variety of relief under the Condominium Act including:

- (a) an order amending the Declaration to change the distribution of common expenses between residential and commercial to a distribution based on square footage pursuant to section 109 of the Act;
- (b) an order that the removal of the commercial directors and governance by a board nominated and paid by the residential owner is oppressive to the commercial owners, and an order amending Bylaw 1 to provide once again for equal representation by residential and commercial; pursuant to section 135 of the *Condominium Act*;
- (c) an order appointing an inspector to examine the books and records of the condominium, and report back to the court with respect to the propriety of the expenditures and tendering practices of the corporation pursuant to Section 130 of the Act;
- (d) an order terminating the condominium, pursuant to section 128, and distribution of assets in accordance with square footage, pursuant to section 129 of the Act.

4 The Applicants base their motion on their submission that there are material facts in dispute as well as their submission that the court would be assisted by oral evidence on some issues. For the reasons that follow, I disagree.

5 The Applicants submit that none of the residential owners was aware of the split in common expenses at the time of purchase. The biggest challenge for the applicant on this point is that there is no suggestion in the Applicant's material that the disclosure requirements of the Act were not met. Beyond this, the Applicants have filed affidavit material and the Respondents have cross-examined. In my view, there is sufficient evidence before the court to permit the adjudication of this issue fully and fairly. I am not satisfied that there are material facts that are contested to such an extent as to justify converting the matter to a trial at this stage.

6 The second issue raised in support of the application to convert is that the allocation of the common expenses between the commercial and residential owners is such that the commercial units are subsidizing the retail units. The Applicants have filed affidavit material on this point. The Respondents position on this point is that it does not justify allowing the motion because the determination rests not on the evidence as filed or upon what viva voce evidence might reveal but upon legal determinations depending upon the contents of the Declaration as well as the Act and any applicable by-laws. I agree with the Respondents on this point.

7 The Applicants also claim that the allocation of common expenses would be much more equitable if it were calculated on the basis of square footage as it would more closely track the benefits enjoyed by the commercial and residential tenants respectively. The Applicants seek the amendment of the Declaration accordingly. The Respondents take issue with this, but submit that this is not a matter of contested fact with respect to which viva voce evidence would be necessary or even helpful, but one of law. In addition, they argue that the evidence submitted does not support the Applicants' position on this point, and that if they had such evidence they should have filed it already. In essence, the Respondents submit that the Applicants are seeking to convert this to an action in the hopes of gathering evidence that they have not been able to procure to date.

8 As I read the affidavits filed, it seems that while the evidence of the parties is not entirely consistent in terms of the extent to which the Applicants may be "subsidizing" the Respondents, the primary issues before the court in the application relate to the Declaration itself and compliance with the terms of the applicable legislation: see *Re Peel Condominium Corporation No. 417 and Tedley Homes Ltd. et al.* (1997) 35 O.R. 257 (C.A.); *York Region Vacant Land Condominium Corporation No. 968 v. Schickedanz Bros. Ltd.*, 2006 CanLII 32596.

9 The Applicants also suggest that the court would be assisted by oral evidence on the issues of (i) the alternative for the owners in the event that the condominium corporation is terminated and in particular how a reciprocal arrangement could be negotiated; and (ii) the economic history of the condominium corporation since its registration. There is little evidence filed by the parties on these issues but there is no reason that these issues are not, or would not have been, amenable to affidavit evidence.

10 I am of the opinion that the nature of the application, the relief sought, the evidence filed and the relevant grounds render this a matter dealt with appropriately by application. At this point, the matter is well advanced and the issues are clearly defined. I am not satisfied that the application should be converted to an action, and accordingly, I dismiss the Applicants' motion.

11 I have advised counsel that they may arrange a time to appear before me to complete the argument relating to the application itself. They may do so by contacting my assistant, Ms. Irena Deveale at 416 3275095 or irena.deveale@jus.gov.on.ca to arrange a time. As I am sitting in motions during the weeks of April 23 or May 14, the hearing could be put on my list for any day on one of those weeks.

12 In the event that counsel are unable to agree as to the costs of this motion I may be spoken to.

A.L. HARVISON YOUNG J.

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