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Case Name:

York Condominium Corp. No. 42 v. Hashmi

RE: York Condominium Corporation No. 42, and Abid Hashmi and All Unit Owners of York Condominium Corporation No. 42

[2007] O.J. No. 2085

Court File No. 06-CL-6587

Ontario Superior Court of Justice

H.J. Wilton-Siegel J.

Heard: May 18, 2007.
Judgment: May 29, 2007.

(28 paras.)

Counsel:

George F. Vella and Matthew R. Vella, for the Administrator on behalf of York Condominium Corporation No. 42, the applicant in the motion for declaratory relief.

A. Edward Tonello, for Nicolo Fortunato, the applicant in the motion for injunctive relief.

ENDORSEMENT

1 H.J. WILTON-SIEGEL J.:-- York Condominium Corporation No. 42 ("YCC42") is a condominium corporation of three high-rise buildings having 897 units located at the municipal addresses of 320, 330 and 340 Dixon Road, in the City of Toronto. The buildings are 36 years old and are in a bad state of repair. The balconies have deteriorated and are unsafe, and many bricks from the building face are either missing or damaged.

2 Andrew Atrens was appointed the administrator (the "Administrator") for YCC42 under section 131 of the *Condominium Act* 1998, S.O. 1998, c. 19, as amended, (the "Act") pursuant to an order of Lederman J. dated August 28, 2006 (the "Order"). Paragraph 3 of the Order sets out the mandate of the Administrator, of which sub-paragraph provides that he is to manage the affairs of the Applicant as if he were the board of directors of YCC42, whose powers were thereby suspended.

3 Two motions relating to the affairs of YCC42 were considered at this hearing. I will address each in turn.

Motion for Injunctive Relief

Background

4 The City of Toronto has issued work orders to YCC42 covering repair of the balconies and brickwork of each building. This work constitutes repair of common elements of YCC42. The Administrator has negotiated a settlement with the City whereby the construction required by the work orders is to be completed over three years commencing this spring.

5 The Administrator engaged a firm of engineers, SPG Engineering Group Ltd. ("SPG"), to assess the work required to comply with the City work orders and to assist in a tender process for completion of that work. From six bids submitted in that process, the Administrator selected the bid of Universal Structural Restorations Ltd. ("USRL"). The Administrator has proceeded to sign three contracts with USRL, each dated April 5, 2007, for the completion of the work in three stages. The contract prices under these contracts are approximately $2.76 million in 2007 for 330 Dixon Road, $3.87 million in 2008 for 320 Dixon Road, and $2.89 million in 2009 for 340 Dixon Road.

6 The applicant in the injunction proceeding, Nicolo Fortunato ("Fortunato"), is an owner of a unit in YCC42. He and a number of other unit owners object to the contracts with USRL as well as the Administrator's proposal to borrow $12 million to fund the costs of such work and certain other expenditures.

7 With respect to the USRL contracts, Fortunato relies on a report of another engineering firm, Trillium Inspection Testing and Consulting Services Limited, (the "Trillium Report") prepared in late 2005 or early 2006 with respect to the work required to comply with the City work orders at two of the three buildings of YCC42 (at that time there were no work orders outstanding with respect to the third building). The Trillium Report estimated the restoration costs to be approximately $1.52 million for 320 Dixon Road and $1.42 million for 330 Dixon Road. However, the work contemplated by the Trillium Report was never put out for tender so there is no confirmation of the accuracy of these estimates in 2006. The Board of Directors of YCC42 at the time approved the Trillium Report. However, a borrowing by-law for the purposes of financing this work was rejected by the unit owners at a meeting held on June 29, 2006, leading to the events giving rise to the appointment of the Administrator.

8 Fortunato seeks the appointment of a forensic engineering firm to advise as to the minimum cost required to comply with the City work orders and an interim injunction suspending all work under the USRL contracts pending receipt of the report of the forensic engineering firm.

Analysis and Conclusions

9 The three-part test for an interim injunction is set out in *RJR-MacDonald Inc.* v. *Canada (Attorney-General)*, [1994] 1 S.C.R. (S.C.C.) at para. 48.

10 The first part of the test requires demonstration of a serious issue to be tried. The applicant has failed to satisfy this test for the basic reason that he has not commenced any action or other proceeding.

11 The applicant's purpose in bringing the motion is to have the USRL contracts declared invalid. At the hearing of this motion, the applicant sought leave to assert an oppression action against the Administrator. This was denied on the basis that the Administrator had no notice of this claim. Even if successful, however, an oppression claim against the Administrator would not be sufficient to invalidate the USRL contracts. When apprised of this difficulty, counsel for the applicant suggested that the USRL contracts would be challenged on the grounds that they were related party contracts. There is, however, no evidence whatsoever to support this claim.

12 The application for an injunction is therefore adjourned to a date to be scheduled at a 9:30 a.m. appointment to be agreed upon by the parties after the applicant has commenced a proceeding asserting a claim in respect of which an injunction may properly be sought. If the applicant fails to commence such an action within thirty days, the Administrator is at liberty to bring a motion to dismiss the applicant's motion for an injunction. Costs of this morning's attendance are reserved to the trial judge in such action, failing which YCC42 shall be at liberty to bring a motion for determination of costs, if any, payable by Fortunato in respect of such attendance.

Motion for Declaratory Relief

Background

13 In the estimation of the Administrator, YCC42 needs approximately $12 million to fund (1) the work under USRL contracts and additional restoration work in the garage, (2) payment of outstanding obligations of approximately $600,000 and (3) replenishment of the reserve fund required under the Act. The Order provides in sub-paragraph (c) that the Administrator has the power to levy and collect special assessments against the units for the proper operation of YCC42. He exercised this power immediately after his appointment.

14 The Administrator convened a meeting of unit holders on April 23, 2007 to consider options for financing payment of the work contemplated by the USRL contracts, which had been executed prior to the meeting. The options were a loan in the amount of $12 million negotiated by the Administrator with a third party or a further special assessment to be levied monthly for thirty months. In connection with the first option, the unit owners were also asked to consider passage of a borrowing by-law authorizing a $12 million loan by YCC42. It appears that neither option was acceptable to the majority of the unit owners in attendance, who believed the cost of the repair work is too high. In any event, the by-law was not approved.

15 The Administrator believes it is in the best interests of the unit holders that YCC42 obtain the $12 million by means of the loan negotiated with the third party, subject to the right of the unit owners at their option to pay monthly over the thirty months of the work contracted for with USRL or to prepay their obligations for each year in the spring. He has therefore brought this motion under section 131 of the Act seeking the Court's advice and directions with respect to the authority of YCC42 to borrow without passage of a borrowing by-law.

Analysis and Conclusions

16 The Administrator makes three arguments in support of his position that YCC42 has the authority to borrow without a borrowing by-law. I will address each in turn.

17 First, the Administrator argues that the scheme of the Act, specifically paragraph 56(1)(e) and section 56(3), provides that no borrowing by-law is required if the expenditures for which a particular loan is being obtained are included in the current year's budget for YCC42. For the following reasons, I do not accept this argument.

18 Condominium corporations are creatures of statute and, because they have not been given the capacity of a natural person, are subject to the doctrine of *ultra vires*: see *Peel Condominium Corporation No. 668* v. *Dayspring Phase I Ltd.* 2006 Carswell Ont. 767 (Ont. S.C.J.).

19 For this purpose, sections 56(1)(e) and 56(3) are relevant. They provide as follows:

> 56(1) The board may, by resolution, make, amend or repeal by-laws, not contrary to this Act or to the declaration, ... (e) subject to subsection (3), to authorize the borrowing of money to carry out the objects and duties of the corporation; ...
>
> (3) A corporation shall not borrow money for expenditures not listed in the budget for the current fiscal year unless it has passed a by-law under clause (1)(e) specifically to authorize the borrowing.

The implication of the introductory clause in section 56(1) is that a by-law is required to carry out the purposes contemplated in the individual paragraphs of that provision including paragraph (e).

20 This conclusion is reinforced by the Declaration of YCC42, which provides in paragraph (b) of Article XIV that the duties of the corporation include "*subject to the prior authorization by By-Law*, to borrow such amounts from time to time as in its discretion is necessary to protect, maintain, preserve, or insure the due and continued operation of the property ...". [emphasis added]

21 Based on the foregoing, the following principles emerge regarding borrowing by YCC42:

1. any borrowing requires authorization in the form of a borrowing by-law;
2. it may borrow the amount necessary to fund expenditures included in its current years' budget pursuant to a general borrowing by-law; and
3. it requires a by-law specific to a proposed loan if the purpose of the loan is to fund expenditures not included in the current year's budget.

22 The Administrator's second argument is that section 27(a) of the *Interpretation Act*, R.S.O. 1990, Chapter I.11 grants a general borrowing power to YCC42 that rectifies any deficiency in its borrowing authority flowing from the absence of a general borrowing by-law.

23 Section 27(a) provides as follows:

> 27. In every Act, unless the contrary intention appears, words making any association or number of persons a corporation or body politic and corporate, ... (a) vest in the corporation power to sue and be sued, to contract and be contracted with by its corporate name, to have a common seal, to alter or change the seal at its pleasure, to have perpetual succession, to acquire and hold personal property or movables for the purpose for which the corporation is constituted, and to alienate the same at pleasure;

24 I do not think this provision is sufficient to address the absence of a borrowing by-law that satisfies the requirements of section 56 of the Act set out above. Section 27 of the *Interpretation Act* is introduced by the clause "unless the contrary intention appears". In the case of the Act, section 56 directly addresses the issue of the borrowing authority of a condominium corporation by establishing the scheme described above. This is a clear contrary intention that displaces the operation of section 27 of the *Interpretation Act*. I would also note that, more generally, counsel for YCC42 was unable to find any case law in which this provision has been interpreted to provide a borrowing authority to a corporate entity that lacked such power under its corporate legislation and constating documents.

25 The third submission of the Administrator is that the Court has the authority under sub-section 131(4) of the Act to order that the Administrator shall borrow the money that he has determined is required by YCC42. Sub-section 131(4) provides that an administrator may apply to the Court for the "opinion, advice or direction of the court on any question regarding the management or administration of the corporation".

26 The Administrator did not provide the Court with any case law or other authorities supporting the conclusion that the Court has the power under sub-section 131(4) to rectify any deficiency in the borrowing authority of a condominium corporation by directing that it borrow funds. I am sceptical that this provision provides the Court with such authority. It is not self-evident that the concepts of "opinion, advice and direction" extend to directing a condominium corporation to take an act that it does not otherwise have the power to take. However, given the determination of this matter below, I do not have to reach a conclusion on this issue and I decline to do so.

27 The authority of the Court in sub-section 131(4) is clearly discretionary. In the present circumstances, it is not appropriate to exercise the Court's discretion. The Administrator has put the precise proposal for which it now seeks Court approval before the unit owners as recently as April 23, 2007 and they rejected it. He very candidly urges the Court to approve it on the basis that he believes the unit owners are acting against their best interests. That may be. Nevertheless, they are free to do so. The unit owners are property owners who are bound by the Declaration and By-laws of YCC42. In respect of the common elements, they are subject to the requirement of collective approval of any proposed action. The Act expresses a very clear policy that any action of the condominium corporation shall be taken after, and in accordance with, a vote of the unit owners. There is no basis for the Administrator's position that the scheme of the Act contemplates that the financial health of a condominium corporation is "paramount" and, "where necessary, therefore, democracy shall succumb to professional administration."

28 Accordingly, the Court finds that YCC42 does not have the power to borrow any monies in the absence of a borrowing by-law approved by the unit owners in accordance with the provisions of the Act.

H.J. WILTON-SIEGEL J.

cp/e/qljxg/qllkb

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Case Name:

Essex Condominium Corp. No. 5 v. Rose-Ville Community Center Assn.

Between

Essex Condominium Corporation No. 5, Applicant, and Rose-Ville Community Center Association, Essex Condominium Corporation No. 3, Essex Condominium Corporation No. 4, and Essex Condominium Corporation No. 6, Respondents

[2007] O.J. No. 2067

Court File No. #06-CV-007180

Ontario Superior Court of Justice

R.M. Pomerance J.

Heard: January 10, 2007.
Judgment: May 23, 2007.

(25 paras.)

Counsel:

Robert R. Istle counsel for the Applicant/Respondent on the Motion.

William F. Wright, counsel for the Respondent/Applicant on the Motion.

R.M. POMERANCE J.:--

INTRODUCTION

1 Essex Condominium Corporation No. 5 (ECC No. 5) has launched an application to wind up a corporation known as the Rose-Ville Community Centre Association under the provisions of the *Corporations Act*, R.S.O. 1990, c. C.38. On this motion, the Rose-Ville Community Centre Association seeks summary judgment under Rule 20 of the *Rules of Civil Procedure*, arguing that there is no genuine issue to be tried. ECC No. 5 takes the position that summary judgment is not available because the underlying proceeding is an application, not an action. In the alternative, ECC No. 5 argues that summary judgment should not be granted as there is a genuine issue to be tried on the merits.

2 Two issues must be determined:

1. Does Rule 20 of the *Rules of Civil Procedure* apply to Applications as distinct from Actions?; and
2. If Summary Judgment or its equivalent is available in connection with Applications, should such relief be granted in this case?

BACKGROUND FACTS

3 ECC No. 5 is one of four standard freehold corporations, incorporated under the *Condominium Act*, 1998, S.O. 1998, c. 19. These corporations collectively comprise the condominium property known as Rose-Ville Gardens.

4 The moving party, Rose-Ville Community Centre Association is a corporation without share capital, incorporated under the provisions of the *Corporations Act*, R.S.O. 1970, c. 89. The sole object of the corporation is the management of the Rose-Ville Gardens Community Centre. This community centre contains a swimming pool and a rental hall with a kitchen that can be used by the unit owners in the four Essex Condominium Corporations.

5 The Community Centre is owned by the Condominium Corporations in the following proportions:

ECC No. 3: 29.0%

ECC No. 4: 13.25%

ECC No. 5: 24.25%

ECC No. 6: 33.50%

6 In the main application, ECC No. 5 seeks an Order directing the wind-up of the Community Centre Association Corporation on various bases. ECC No. 5 argues that the continued operation of the Community Centre is not economically viable, given projected contributions to the Reserve Fund and increasing operating costs. It is further alleged that the Board of Directors of the corporation have failed to comply with the provisions of the management agreement. EEC No. 5 asserts that it has lost confidence in the Board's ability to properly manage its affairs. ECC No. 5 relies upon Rules 14.05 and 38 of the *Rules of Civil Procedure* and sections 243 to 271 of the *Corporations Act*, R.S.O. 1990, c. C.38.

7 On the motion before me, the Rose-Ville Community Centre moves for summary judgment under Rule 20 of the *Rules of Civil Procedure*. Rose-Ville argues that there is no genuine issue for trial because the matter falls within the exclusive jurisdiction of the *Condominium Act*. It argues that there is no proper recourse to the wind-up procedure prescribed in the *Corporations Act*.

8 ECC No. 5's response is two-fold. First, it argues that summary judgment relief is only available in connection with actions. Because the main proceeding is an application, as distinct from an action, Rose-Ville cannot obtain the relief set out in Rule 20. Second, ECC No. 5 argues that, even if summary judgment is available in this context, it should not be granted because there is a genuine issue to be tried.

What is the Scope of Rule 20?

9 Rule 20 of the *Rules of Civil Procedure* provides that:

> 20.01(1) *To plaintiff* - A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim.
>
> (2) The plaintiff may move, without notice, for leave to serve a notice of motion for summary judgment together with the statement of claim, and leave may be given where special urgency is shown, subject to such directions as are just.
>
> *(3)* *To defendant* - A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.

10 On its face, the plain language of the Rule is restricted to actions. The Rule speaks of a motion for summary judgment being made by a "plaintiff" or "defendant". These terms are defined in Rule 1.03. A plaintiff "means a person who commences an action". A defendant "means a person against whom an action is commenced". While "proceeding" means "an action *or* application", an action is defined as a proceeding that *is not* an application". A literal interpretation of Rule 20, in context, would restrict its scope to proceedings commenced as actions.

11 The authorities support this restrictive view of Rule 20: see *Holmes v. London Life Insurance Co.* [2000] O.J. No. 3621 (Ont. S.C.). While *Holmes* was distinguished in the subsequent cases of *Martin v. Ontario*, [2004] O.J. No. 2247 (S.C.) and *Fraser v. Canada*, [2005] O.J. No. 5580 (S.C.), these cases were concerned with Rule 21, as distinct from Rule 20. Rule 21 is concerned with striking a proceeding. This is very different than the relief envisaged by Rule 20, which is a summary disposition of the merits.

12 It would appear that an application may be *struck* in the same manner as a pleading. Rule 14.09 provides that:

14.09 An originating process that is not a pleading may be struck out or amended in the same manner as a pleading.

13 I am also mindful of the overarching principle set out in Rule 1.04 of the *Rules of Civil Procedure* which requires that:

1.04 These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

14 A Notice of Application is an originating process, and Rule 21.01(b) refers to the Court's power to strike out a pleading "on the ground that it discloses no reasonable cause of action or defence". Similarly, Rule 25.11 provides that "the court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading *or other document* ... is frivolous ... or is an abuse of the process of the court".

15 The cumulative effect of these Rules is that a Notice of Application may be struck out on the same basis as a pleading. It may be done through the combined authority of Rules 14.09 and 21.01(b). Alternatively, a similar result may be achieved by invoking Rule 25.11, which refers to a pleading or *other document*, which would, by necessity, including a Notice of Application: see *Martin v. Ontario* [2004] O.J. No. 2247 (S.C.J.) and *Fraser v. Canada (Attorney General*), [2005] O.J. No. 5580 (S.C.J.).

16 As was held by T. Ducharme J. in *Fraser* at para. 47: "It would indeed be incongruous if an action could be struck on the basis that the plaintiff lacked capacity or that it disclosed no reasonable cause of action but the same result could be avoided merely because the plaintiff chose to commence an application instead". I agree with this proposition. However, the proper mechanism by which to achieve this end must be Rule 21.01.

17 This logic does not and cannot apply to Rule 20. First, Rule 20 does not refer to other documents or other proceedings. It is, on a logical interpretation, restricted to actions. Nor can it be said that Rule 14.09 applies to Rule 20, as Rule 20 does not allow the court to strike out or amend a pleading. Rather, it allows a party to apply for summary judgment, a final disposition of the claim on the merits. This is a very different form of relief and is not analogous to striking out or amending a claim.

18 Finally, I have considered s. 106 of the *Courts of Justice Act*, which provides that: "A Court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just". The Association did not move under s. 106 and are not seeking a stay. In any event, I am not satisfied that a stay is appropriate in the circumstances of this case.

19 In conclusion, I find that summary judgment relief under Rule 20 of the *Rules of Civil Procedure* is not available to the Association, because the main proceeding is an application, as distinct from an action. It might well have been open to the Association to bring a motion to strike the application under rule 21.01, but it did not opt to do so.

20 Some might think it highly technical to deny the moving party relief simply because the wrong rule was invoked. This could be seen as violating the letter and spirit of Rule 2.01(1), which provides that:

> A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity and the court,
>
> (a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute.

21 On the hearing of the motion, the moving party did not seek to amend his motion under one of the applicable rules. More importantly, I find that the procedural issue in this case is largely academic. ECC No. 5 has satisfied me

that, on the merits, there is a genuine issue to be tried. Accordingly, the Association has failed to demonstrate that there is any basis for an Order granting summary judgment, striking the application or otherwise terminating the proceeding.

Is there a Genuine Issue to Be Tried?

22 In seeking summary judgment, Rose-Ville Community Centre Association argued that ECC No. 5 is not entitled to invoke the wind-up procedure set out in the *Corporations Act* because the *Corporations Act* does not apply. The Association takes the position that this matter falls within the exclusive ambit of the *Condominium Act*, 1998 S.O. c. 19. Section 5(3) of the *Condominium Act* states that the *Corporations Act* does not apply to a corporation created or continued under the *Condominium Act*.

23 ECC No. 5 and its counterparts - ECC No. 3, No. 4 and No. 6 - are all incorporated under the terms of the *Condominium Act*. The *Corporations Act* would have no application to these corporate entities. However, the Rose-Ville Community Centre Association was incorporated under the terms of the *Corporations Act*, not the *Condominium Act*. Therefore, the *Corporations Act* - including the wind-up provisions - clearly applies to the Rose-Ville Association.

24 During the course of argument, counsel for the Rose-Ville Association argued that ECC No. 5 could have taken any number of alternate steps to address its concern over the continued viability of the Rose-Ville Community centre. It is true that alternatives were available. However this is not the test for determining whether there is a genuine issue to be tried. ECC No. 5 chose to launch an application to wind up the corporation under s. 243 of the *Corporations Act*, R.S.O. 1990, c. C.38, and it is open to ECC No. 5 to do so. At the very least, this is a triable issue to be determined on the application. It cannot be said to be frivolous, vexatious, or lacking a jurisdictional foundation: see *Kay v. Nipissing Twin Lakes Rod and Gun Club* (1993), 7 B.L.R. (2d) 225 (Ont. Gen. Div.).

CONCLUSION

25 In all of the circumstances, I dismiss the motion for summary judgment. I find that there is no jurisdiction to apply Rule 20 to applications but that, in any event, the moving party has failed to establish that the absence of a genuine issue to be tried.

R.M. POMERANCE J.

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