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SUPERIOR COURT OF JUSTICE - ONTARIO

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

BEFORE: Mr. Justice H.J.W. Siegel

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

HEARD: May 18, 2007

ENDORSEMENT

[1] 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.W. Siegel J.

DATE: May 29, 2007

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