Case Name:

Sauve v. Paglione

Between
Eugene Allen Sauve, Moving Party (Plaintiff), and
Franco Paglione, Donelda Haycock, Peter Boer, Steven Topley, Craig Woodford & Middlesex Condominium Corporation, Responding Parties (Defendants)

[2006] O.J. No. 3523
Court File No. 1242/06

Ontario Superior Court of Justice
Small Claims Court - London, Ontario
J.D. Searle Deputy J.

Heard: September 1, 2006.
Judgment: September 7, 2006.
(25 paras.)

Counsel:

Counsel for the moving party: self represented

Counsel for the responding party: Michael Biderman, agent

REASONS FOR ORDER

¶ 1 **J.D. SEARLE DEPUTY J.**:— The plaintiff is the owner of a unit in the corporate defendant's condominium located in the city of London in the county of Middlesex. The individual defendants are directors of the corporation. Some of those directors are also officers.

¶ 2 The threshold issue on this motion is whether the Small Claims Court has jurisdiction to grant the relief sought in this motion brought by the plaintiff.

¶ 3 In the "Type of Claim" portion of his Claim form commencing this action the plaintiff seeks:

> Damages under the Condominium Act 1998, Ontario, known as the Act s. 55(8), (9) and (10)

¶ 4 The opening paragraph reads:

This Plaintiff's Claim is submitted to obtain from the Defendants the right of access of an owner to the records of the owners who have notified the corporation in writing of the owner's name and address for service on file with Middlesex Condominium Corporation No. 161 and used to send notices to owners.

In this motion the plaintiff seeks orders:

1. To prohibit the responding parties from expending Corporation funds to finance their defense in these actions until the tribunal has determined if anyone, or all, the responding parties are disqualified from doing so under the Condominium Act 1998, Ontario, known as the Act, s. 38(2), EXHIBIT 4. To further order that any corporate funds expended by any board member prior to this ruling be returned to the corporation until the Court has ruled on the question.
2. To direct the responding parties to deliver to the plaintiff the names of owners and addresses of service held in Corporation records that the Act specifies the plaintiff may use in subsections 34(5), 43(2) and 46(5).

¶ 5 A perusal of the forty-six paragraph Claim suggests the plaintiff's case can be summarized as follows: on December 7, 2005, the board notified the unit owners it had passed a set of Rules. The plaintiff was so notified but does not like the Rules or some of them. Those Rules are in force beginning thirty days after the notice unless the board receives a requisition for a meeting of owners to discuss the proposed Rules. Such a requisition must be in writing and signed by owners who own at least "15 per cent of the units ...". The plaintiff wished to organize such a requisition but was having difficulty doing so without access to the list of owners on record with the corporation. The corporation refused, citing privacy laws, to give the plaintiff access to the list of owners on record. The corporation is required to keep such a record. With certain exceptions set out in s. 55(4) of the Act a unit owner such as the plaintiff is entitled to examine the records of the corporation. The record the plaintiff seeks to examine does not fall within the exceptions.

¶ 6 Further, s. 55(8) provides that unless the corporation has a "reasonable excuse" for not permitting an owner such as the plaintiff to examine or copy the corporation's records the corporation shall pay that owner $500.00 upon receiving a written request for same. By s. 55(9) "[t]he owner may recover the $500.00 from the corporation by an action in the Small Claims Court." Unless the corporation has a "reasonable excuse" for denying the right to examine or copy records under s. 55 ss. (10) thereof "the Small Claims Court may order the corporation to produce the records for examination."

¶ 7 That ends the court's summary of the plaintiff's Claim.

¶ 8 The materials filed on the motion, especially by the plaintiff, are extensive and total an estimated 150 to 200 sheets. Those materials contain, among other things, an affidavit with fifty exhibits and his written argument consisting of eight pages single-

spaced. The materials have been meticulously prepared by an apparent layperson. The court reserved and has examined all the materials. Some of them are relevant to this motion, some might be relevant at the trial and some, particularly the vast tracts dealing with the recently-passed condominium rules, would be relevant only if and when a meeting of unit owners occurs.

¶ 9 It must be said that the statute law proffered by both sides is not in satisfactory form: the plaintiff's version is reproduced from a text which is now somewhat dated. The defendants' version is reproduced from an unidentified handbook and references to the "Ontario Court (General Division)" suggest the material dates from 1996 or earlier. The court deemed it necessary, in order to create these reasons and make the orders below, to locate and rely upon a version of the Condominium Act current to August 26, 2006.

¶ 10 The plaintiff's written argument begins with a request that "all parties stipulate" that the corporate defendant "be stricken from the list of defendants." On the hearing of the motion the court did not hear any consent from the defendants' representative. The plaintiff's materials, including the first item of relief sought on this motion, make it abundantly clear that he is trying to separate the directors from the corporation and make them personally liable for the expense of defending this action. The relief sought in this action is clearly statutory and found in ss. 55(8) and (10) of the Condominium Act. That relief is clearly available only against the condominium corporation. If the corporation ceases to be a defendant the plaintiff's Claim is highly vulnerable to being struck.

¶ 11 In the course of written and oral argument and in the supporting materials the parties, particularly the plaintiff, refer to numerous sections of the Act. The court has examined those sections and finds the following sections to be inapplicable or irrelevant to the issues on this motion: 34, 37, 38, 43 and 52.

¶ 12 The defendants appeared on this motion and made oral argument but filed no material other than dated excerpts of the Act. In their Defence to the plaintiff's Claim they plead that the Small Claims Court "does not have jurisdiction to hear this application." At least to date there is no "application" and the court takes that to be a reference to the action. The reference to lack of jurisdiction in this court is understood to be a reference in particular to s. 96 of the Courts of Justice Act R.S.O 1990, c. C.43 and amendments thereto and to s. 130 of the Condominium Act.

¶ 13 In this motion the plaintiff seeks firstly an order prohibiting the defendants from expending the corporation's funds in defending this action and an order that such funds already expended be returned to the corporation.

¶ 14 In his text *The Law of Equitable Remedies*, Irwin Law, 2000 Professor Berryman defines an injunction in his introduction to Chapter 2 as "an order granted by a court of competent jurisdiction that instructs a (legal) person to do, or refrain from doing, a particular thing." An injunction is an equitable remedy. What the plaintiff seeks in the two branches of the first part of this motion are interlocutory injunctions. That raises the issue of the jurisdiction of the Small Claims Court.

¶ 15 Section 96(3) of the Courts of Justice Act reads:

> Only the Court of Appeal and the Superior Court of Ontario, exclusive of the Small Claims Court, may grant equitable relief, unless otherwise provided.

¶ 16 When the Small Claims Court was re-created several years ago it was re-created as "a branch of the Superior Court of Justice." As a result there was an apprehension the legislature intended to confer generally on the Small Claims Court power to grant equitable remedies. The legislature responded by inserting in ss. 3 the phrase "exclusive of the Small Claims Court".

¶ 17 No conference of the power on this court to grant the relief sought in the first part of this motion was brought to the court's attention and so the first part of the motion is dismissed.

¶ 18 The second part of the motion seeks an order directing the responding parties to deliver from the corporation's records the names and service addresses of the unit owners in the condominium. This too amounts to a request for injunctive relief but it is different.

¶ 19 In Professor Berryman's text, *supra,* he makes the blanket statement "there is no power in Ontario's Small Claims Court to issue an interlocutory injunction." However, in the subsequent case of 936464 Ontario Limited c.o.b as Plumbhouse Plumbing & Heating v. Mungo Bear Limited [2003] O.J. No. 3795 the Divisional Court in the person of Heeney J. heard an appeal from the Small Claims Court. In extensive and heavily-researched *obiter dicta* Justice Heeney discussed the words "unless otherwise provided" found at the end of s. 96(3) and described them at paragraph 24 as being "of critical importance." Those words indicate to him there "is not a blanket prohibition against the Small Claims Court granting equitable relief, but instead a qualified one that will permit the exercise of that power if it is otherwise provided." As an example of how the legislature has "otherwise provided" Justice Heeney cited s. 23(1)(b) of the Courts of Justice Act which gives the Small Claims Court the jurisdiction to make an order for the delivery up of possession of personal property, an equitable remedy.

¶ 20 Section 55 of the Condominium Act reads in part:

> If a corporation without reasonable excuse does not permit an owner or an agent of an owner to examine records or to copy them under this section, the Small Claims Court may order the corporation to produce the records for examination.

¶ 21 It is obvious the concluding words "order the corporation to produce the records for examination" are amenable to at least two interpretations: they could mean production to the trial judge for examination to enable the trial judge to properly adjudicate the issues or they could mean production to enable the owner to examine them.

¶ 22 In the order which is about to be made that question will be left to the trial judge but in the tentative view of this court on this motion, if the words mean examination by the owner they are an example of how the legislature has "otherwise provided."

¶ 23 The defendants contend Part IX of the condominium Act, particularly s. 130, mitigates against the power said to be granted to the Small Claims Court by s. 55. Section 130 permits the Superior Court of Justice, upon the application of certain persons, to appoint an inspector to, *inter alia*, "investigate the corporation's records mentioned in subsection 55(1)." In the view of this court the fact the legislature has granted the apparently full Superior Court jurisdiction for certain purposes does not derogate from the power granted to the Small Claims Court for the limited purpose set out in s. 55.

¶ 24 Even though this court is inclined to the view it has the power to order production of the records sought by the plaintiff it should not do so because the exercise of that power requires a finding that the refusal to permit the plaintiff to examine or copy the requested records was "without lawful excuse." That can only be done after evidence is given and tested and full argument is made. That requires a trial.

¶ 25 The motion is dismissed. Costs of the motion are reserved to the judge or deputy judge finally disposing of this proceeding.

J.D. SEARLE DEPUTY J.

QL UPDATE: 20060908
cp/e/qw/qlhjk/qlbxs

Case Name:

York Condominium Corp. No. 136 v. Roth

Between
York Condominium Corporation No. 136, Applicant, and
Marshall Roth, Respondent

[2006] O.J. No. 3417
Court File No. 06-CV-310801PD3

Ontario Superior Court of Justice
P.M. Perell J.

Heard: August 15, 2006.
Judgment: August 25, 2006.
(23 paras.)

Counsel:

Jonathan Fine, for the Applicant

Marshall Roth, in person

REASONS FOR DECISION

¶ 1 **P.M. PERELL J.**:— This is an application pursuant to s. 134 of the *Condominium* Act, 1998, S.O. 1998, c. 19 by York Condominium Corporation No. 136 for, amongst other things, an order requiring the Respondent, Marshall Roth, who is the owner of a unit in the condominium, to sell his unit and an order restraining him from interfering with the operation of the condominium corporation and its board of directors.

¶ 2 The Condominium Corporation also seeks an order that Mr. Roth be restrained from communicating with or having any contact with any of the affiants in these proceedings and/or an order that he be restrained from doing anything which in the opinion of the board of directors is disturbing to or otherwise interferes with any other person lawfully entitled to be on the condominium's property. The prayer for relief contains 15 paragraphs of similar requests.

¶ 3 The Condominium Corporation says that it requires and is entitled to this extraordinary relief because Mr. Roth has shown himself to be antisocial and, more particularly, he has made alarming threats and committed a few acts of actual violence that make him a danger to the community that is comprised by the unit holders of the condominium.

¶ 4 This application was originally made returnable on May 23, 2006, and Mr. Roth attended, and he was granted an adjournment to retain counsel and to file material.

¶ 5 On May 23, 2006, the application was adjourned to June 15, 2006, at which time another adjournment was sought and granted to Mr. Roth, who appeared without council. The order made on June 15, 2006 established a timetable, and the application was adjourned to be heard on August 15, 2006.

¶ 6 On August 15, 2006, Mr. Roth attended again in person, and again he requested an adjournment to file material. He explained that because of stress associated with having relatives living in Israel during the recent warfare, he had not been able to prepare material.

¶ 7 I denied Mr. Roth's request for an adjournment, and, in any event, he was content to argue the application, when I told him, and Mr. Fine, counsel for the Condominium Corporation, that based on my initial review of the record that it was unlikely that I would be making an order requiring Mr. Roth to sell his unit in the condominium.

¶ 8 After hearing argument from Mr. Roth and from Mr. Fine, I reserved judgment, and I am now satisfied that my initial assessment was correct and that this is not an appropriate case to make the draconian orders sought by the Condominium Corporation. However, based on the uncontradicted evidence before the Court, the Condominium Corporation is entitled to some relief, which I will describe and explain below.

¶ 9 I will begin with the easiest matter. The Condominium Corporation requests an order that Mr. Roth provide it with a series of post-dated cheques dated the first day of each month on account of common expenses in respect of his unit from the date of the order, the next following 31st day of December, being the end of the Condominium Corporation's fiscal year and also an order that thereafter, for as long as Mr. Roth remains an owner of the unit, if at all, he shall provide annually to the Condominium Corporation, in advance, a series of post-dated cheques dated the first day of each month on account of the common expenses for each subsequent year which commences on January 1.

¶ 10 The evidence establishes a long and very sorry history of late payments by Mr. Roth of his common expenses. This has been a source of friction and animosity between the parties, and based upon the uncontradicted evidence properly put before the Court, Mr. Roth's conduct in response to the demands for prompt payment has been inappropriate. Condominium unit owners are obliged to comply with the *Condominium Act, 1998* and the condominium corporation's declarations, by-laws, and rules: see s. 119 of the Act. In the case at bar, the Condominium Corporation is entirely justified in making the request for post-dated cheques.

¶ 11 Under s. 134 of the Act a condominium corporation may apply to the Court for a compliance order. See *Re Peel Condominium Corporation No. 78 and* Harthen (1978), 20 O.R. (2d) 225 (Co. Ct.); *Metropolitan Toronto Condominium Corp. No. 776 v.* Gifford (1989), 6 R.P.R. (2d) 217 (Ont. Dist. Ct.); *Re Carleton Condominium Corporation No.*

279 and Rochon (1987), 59 O.R. (2d) 545 (C.A.); *Peel Condominium Corporation No. 499 v. Hogg*, [1997] O.J. 623 (Gen. Div.); *Metropolitan Toronto Condominium Corp. No. 776 v. Gifford* (1989), 6 R.P.R. (2d) 217 (Ont. Dist. Ct.); *Marafioti v. Metropolitan Toronto Condominium Corp*. No. 775, [1997] O.J. No. 1899 (C.A.). The Court may make an order enforcing compliance with any provision of the Act, the declaration, the by-laws, or the rules of the Condominium Corporation. Pursuant to this authority, I grant the orders set out in paragraph [9] above.

¶ 12 The next matters, and these raise much more difficult questions, concern what relief should be granted to the Condominium Corporation in light of the evidence submitted to the Court that Mr. Roth has violated the rules of the condominium corporation and has engaged in unmanageable and antisocial behaviour.

¶ 13 The Court's authority to make a compliance order is discretionary, and the Court may consider the quality of the evidence in exercising its discretion: *Re Peel Condominium Corp. No. 73 and Rogers* (1978), 21 O.R. (2d) 521 (C.A.)

¶ 14 Under s. 117 of the *Condominium Act, 1998* no person shall permit a condition to exist or carry on an activity in a unit or in the common elements if the condition or the activity is likely to damage the property or cause injury to an individual.

¶ 15 Having reviewed the evidence about the conduct of Mr. Roth, I find the evidence to be problematic as to whether and to what extent Mr. Roth is a serious threat or likely to cause damage to property or injury to a person. It is unfortunate that Mr. Roth did not retain counsel or exercise his rights to cross-examine the witnesses and to file his own affidavit material. I find the evidence to be troublesome and of doubtful quality because some of it is hearsay and much of it relates to incidents that happened many years ago and some (but not all) of the incidents appear trivial.

¶ 16 Moreover, in weighing the evidence, there obviously is personal animosity between the chief complainant, Mr. Abela, who is the manager of the condominium, and Mr. Roth. Based on the evidence, Mr. Abela may be quite justified in how he feels about Mr. Roth, but given the emotive tone of Mr. Abela's affidavit, I was concerned that Mr. Abela could not be expected to provide and did not provide objective evidence about Mr. Roth's conduct.

¶ 17 That said, there is uncontradicted evidence that Mr. Roth disrupted an owner's meeting on June 13, 2006 and physically assaulted the Condominium Corporation's president. There is also uncontradicted evidence of rude, aggressive, abusive, and dismissive behaviour by Mr. Roth in his relations with his neighbours, contractors that provide services to the condominium, and with the staff that manages the Condominium Corporation.

¶ 18 Accepting this evidence, and there is no basis for me not to do so, the Condominium Corporation is justified in seeking an order that Mr. Roth cease and desist

from his uncivil, improper and illegal conduct that violates the *Condominium Act, 1998* or the by-laws and rules of the Condominium Corporation.

¶ 19 The issue then is how should the court exercise its discretion under s. 134 of the Act to require Mr. Roth to conduct himself only in accord with his rights and obligations under the *Condominium Act, 1998* and the declarations, by-laws, and rules of the Condominium Corporation.

¶ 20 The Condominium Corporation sought the extreme order of requiring Mr. Roth to sell his unit. I have not been able to find any reported cases where such an order has been made, but Mr. Fine provided me with two orders that include this type of relief. The orders were made in *York Condominium Corporation No. 202 and Redican*, June 3, 1994, court file no. RE3905/94 (Gen. Div., O'Brien, J.) and *Peel Condominium Corporation No. 148 and Patrick*, July 18, 1997, court file no. A5053/97 (Gen. Div., Webber, J.)

¶ 21 In all the circumstances and, in part, because it would, in my opinion, not be just to require Mr. Roth to sell his home without providing him with an opportunity to show that he can abide by the rules that govern in his community, I believe the appropriate order is to direct him to control his behaviour, especially his manner of communicating with the officers and employees of the Condominium Corporation, so as to comply with the Act, declarations, by-laws and rules of the Condominium Corporation in default of which the Condominium Corporation may apply to the court: (a) pursuant to rule 60.11 for a contempt order; (b) pursuant to s. 134 of the *Condominium Act, 1998* for such a further order to enforce compliance as the Court deems just; or (c) pursuant to both rule 60.11 and s. 134 of the *Condominium Act, 1998*.

¶ 22 I further order Mr. Roth to pay the costs of this application on a substantial indemnity basis, which I fix at the sum of $9,600 all inclusive of counsel fee disbursements and GST, this sum to be paid in 24 monthly installments of $400 per month to be added to the amount of the postdated cheques referred to in paragraph [9] of these Reasons for Decision. (I note here parenthetically that the Condominium Corporation had claimed costs in the amount of $12,018.99).

¶ 23 I appreciate from what Mr. Roth submitted during his argument (but not from the evidentiary record) that he has concerns about the management of the Condominium Corporation and that he did not want to be disenfranchised or exiled from participation in the condominium community. The above orders allow him to exercise his rights as a owner of a condominium unit provided that he complies with his obligations.

P.M. PERELL J.

QL UPDATE: 20060831
cp/e/qlbxm/qlpwb/qltxp

Case Name:

Baliwalla v. York Condominium Corporation No. 438

Between
Viraf and Mary Baliwalla, Plaintiffs, and
York Condominium Corporation No. 438, Defendant

[2006] O.J. No. 3067
Claim No. T96795/04

Ontario Superior Court of Justice
Small Claims Court - Toronto, Ontario
V. Genova J.

May 31, 2006.
(3 paras.)

Counsel:

Plaintiff: Viraf Baliwalla

Defendant: Joseph W. Ryan, Fine and Deo

REASONS

¶ 1 **V. GENOVA J.**:— This action arises as a result of a dispute between the Plaintiff, Mary Baliwalla and the Defendant, York Condominium Corporation No. 438. While I do not intend to restate the facts as set out in the submissions of both parties, suffice it to say that the dispute arose due to a special assessment rendered by the Defendant in the amount of $7,500.00 per unit holder for certain construction repair to the Condominium in question. This assessment was based on an appraisal by an independent third party as to the costs of the restoration and construction of the work required. The appraisal, as it turns out, was inaccurate and considerably lower than what it would have cost to perform the work. As a result, a new appraisal was done that was to consider a more affordable restoration program. Based on the new appraisal and the actual work that was performed thereafter, and as alleged by the Plaintiff herein, the special assessment rendered against unit holders should have been considerably less than the $7,500.00. As such, the Plaintiff has pursued this claim for the difference between the initial and incorrect assessment and what the assessment should have been. I understand from the Plaintiff's evidence that her claim was commenced due to the fact that she no longer owns her unit and as such would not benefit from the remainder of the special assessment funds that were placed in the reserve fund by the Defendant.

¶ 2 I have considered the evidence presented at the two-day trial which proceeded on May 3 and August 5, 2005, together with all of the written submissions by both parties and have come to the following conclusion.

1. The Defendant, in both its submissions at trial together with its written submissions, stressed that the standard of reasonableness, not one of correctness, was to be applied to decisions made by a Board of Directors on behalf of a condominium corporation, and that this standard is enshrined in Section 37 of the Condominium Act, 1998, S.O. 1998, c. 19 (the "Act"). I have two comments in that regard. First, I agree with the submissions made by the Defendant that the Plaintiff conceded stipulations of fact with respect to the actions of the Board as being indisputably reasonable up to and including the issuance of the special assessment in question. However, what I have found to be unreasonable was the transfer of the money collected in the special assessment in the amount of $7,500.00 per unit holder into the designated reserve fund. This transfer of the special assessment money was done regardless of the fact that a conclusion had been reached by the Board and unit holders that the appraisal for the work contemplated to be funded by both the special assessment and money from the existing reserve fund was significantly inaccurate. The sum of $7,500.00 should not have been considered immaterial to unit holders. The money collected in the special assessment should have been, by the Board of Directors on behalf of the Defendant, held in abeyance during the period of indecisiveness with regard to the cost of the repair work required.
2. The Defendant argued at trial and in its submissions that the transfer of the special assessment funds into a reserve fund triggers Section 95 of the Act that specifically sets out that no distribution of any amount of the reserve fund can be made, with the exception of the termination of the corporation, to the owners of the units. In other words, the Defendant is arguing that the collection of an inappropriate or incorrect amount of money in special assessment from unit holders could not be refunded despite any mistake that may have occurred. I take issue with this position since this argument allows the Defendant and others similarly situated to act inappropriately with a purpose to avoid the return of funds to unit holders. While the Plaintiff in this case has alleged in submissions that the transfer of the funds prematurely was done with some kind of malice or premeditation, I do not accept that to be the case by this Defendant. However, I do find that the Defendant's transfer of the funds, as mentioned above, into the reserve fund was unreasonable given the state of flux as to the costs of the construction that would ultimately be incurred. As the written submissions and evidence has indicated in this case, the costs of the repair ultimately was considerably less than what was originally appraised and would have cost the unit holders approximately $2,100.00 in special assessment rather that the collected $7,500.00 per individual owner.
3. The Defendant has also argued that reserve funds as set out in Section 93

of the Act are a form of common expenses collected by a condo corporation from unit owners in the same manner as common expenses are collected. I do not agree with this submission. In fact, the evidence at trial was that common expenses are collected regularly whereas money placed in reserve funds by way of special assessments was collected only under special circumstances and, specifically, used for the purpose of major repair and replacement of the common elements and assets of the corporation (Section 93(2)). As well, the Defendant has argued that a designation that funds collected for the sole purpose of a major repair and replacement of the common elements and assets of the corporation need not be designated as a reserve fund but shall be deemed to be such as set out in Section 93(3) of the Act. While I agree in principle with this particular submission, I refer back to the unreasonable actions of the Defendant in dealing with the collected special assessment funds. In any event, the Defendant relies upon Section 37 of the Act and emphasizes that decisions made by the Board of Directors, regardless of whether they appear to have been incorrect must still be considered as to whether they are reasonable or not. I do not find that the Board exercised care, diligence and skill in the manner in which the special assessment funds were allocated immediately after the determination that the amount of the special assessment was incorrect.

4. Additionally the Defendant has submitted that a director shall not be found liable for a breach of duty if the breach arises as a result of their reliance, in good faith, upon a report or opinion of a lawyer or engineer. It is the opinion of the court that this section of the Act (Section 37(3)) deals specifically with the liability of directors and not the condo corporation which is a separate legal entity.
5. The court 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 his property.
6. I wish to emphasize that while the actions of the Board were reasonable up to and including the issuance of the special assessment (as stipulated by the Plaintiff at trial), its actions thereafter were not. In fact, knowing that the appraisal had been incorrect with regard to the cost of the repair and restoration, it acted unreasonably. While its actions up to and including the issuance of the special assessment were reasonable, they were nonetheless incorrect. As such, the special assessment of $7,500.00 would not have been collected had matters been performed correctly regardless of their reasonableness. In light of the incorrectness, which I find, was known to the Defendant, the Defendant cannot now say that they are protected by Section 93(3) of the Act that the money would be deemed as a reserve fund and therefore could not be returned in whole or in part to the unit owners. I find that this could not be the intent of the legislation and, as such, find in favour of the Plaintiff.

¶ 3 I find in favour of the Plaintiff and award damages in the amount of $5,350.29, together with pre-judgment interest from April 14, 2004 to date, and costs of $242.67.

V. GENOVA J.

QL UPDATE: 20060831
qp/s/qw/qlrpv

Case Name:

Metropolitan Toronto Condominium Corp. No. 562 v. Froom

Between
Metropolitan Toronto Condominium Corporation
No. 562, (Applicant/Respondent), and
Arthur Froom, (Respondent/Appellant)

[2006] O.J. No. 3314
Docket: C44467

Ontario Court of Appeal
Toronto, Ontario
S. Borins, R.G. Juriansz and H.S. LaForme JJ.A.

Heard: August 15, 2006.
Oral judgment: August 15, 2006.
Released: August 18, 2006.
(2 paras.)

Appeal From:

On appeal from the order of Justice Arthur Belobaba of the Superior Court of Justice dated October 14, 2005.

Counsel:

Arthur Froom In person

Christopher J. Jaglowitz For the applicant/respondent

ENDORSEMENT

The following judgment was delivered by

¶ 1 **THE COURT** (oral endorsement):— We are satisfied that the dispute between the parties relates to the application of the respondent condominium's pet rules. Central to the resolution of Mr. Froom's alleged failure to comply with the pet rules was whether the 2003 release applies to the new rules and the present circumstances. In our view, the interpretation of the 2003 release and the compliance issue could not be separated, and

together should have been submitted to the mediation and arbitration of the *Condominium Act* before the respondent resorted to the court.

¶ 2 Accordingly, the appeal is allowed and the order of Belobaba J. is set aside. The application is dismissed with costs of both the application and the appeal in the amount of $8,500 inclusive of disbursements and GST.

S. BORINS J.A.
R.G. JURIANSZ J.A.
H.S. LaFORME J.A.

QL UPDATE: 20060822
cp/e/qw/qlbxm

Case Name:

Little v. Metropolitan Toronto Condominium Corp. No. 50

Between
R. Marcus H. Little, Applicant, and
Metropolitan Toronto Condominium Corp. No. 50,
Respondent

[2006] O.J. No. 3294
Court File No. 06-CV-310928PD2

Ontario Court of Justice
F.N. Marrocco J.

Heard: August 14, 2006.
Judgment: August 15, 2006.
(18 paras.)

Counsel:

Mark H. Arnold, for the Applicant

Patricia M. Conway, for the Respondent

ENDORSEMENT

¶ 1 **F.N. MARROCCO J.**:— This application is dismissed with costs.

¶ 2 The applicant, a unit owner at Metropolitan Toronto Condominium Corp. No. 590, in essence seeks an order requiring the respondent to reimburse its (the Respondent's) Reserve Fund for $230,000 that the applicant claims were wrongfully expended from that fund. The applicant argues that inappropriate Reserve Fund expenditures were made on the following items:

(1) Security system upgrades,
(2) the purchase of exercise equipment
(3) replacement of the entrance canopy,
(4) lobby renovations, and
(5) design fees.

SECURITY SYSTEM UPGRADES

¶ 3 The security system had a 15-year life cycle. It was scheduled for replacement in 2002. Security systems evolve over time. When systems are replaced, sometimes enhancements are affected. In this case new security cameras were installed in the front foyer. New lenses were installed in all cameras. The system was updated to record images using digital technology.

¶ 4 Section 97(1) of the *Condominium Act*, 1998, S.O. 1998, c. 19 (the "Act") provides that the corporation has an obligation to maintain the common elements. It is a notorious fact that technology becomes outdated and in order to be maintained must be replaced. Replacing a 15-year-old security system with a modern one clearly involves maintaining the security system and therefore the common elements. That is all that happened here.

¶ 5 Section 97(2)(b) of the Act provides that the Board may make improvements or changes to the common elements to ensure the safety or security of persons using the property. Changing the security system by replacing it with a more modern version ensures the safety or security of persons using the property.

THE PURCHASE OF EXERCISE EQUIPMENT

¶ 6 The expenditure on exercise equipment involved replacing a 1974 rowing machine with a newer used model. The weight machine was replaced because no parts were available to put it back into safe operating condition. The word "maintain" as it appears in s. 97(1) of the Act is not defined. Furthermore the English language is not an instrument of mathematical precision. Determining that the exercise equipment was maintained by replacing old equipment with new equipment does no more than recognize the obvious, namely, that it is impossible for the Legislature to foresee the manifold sets of facts which can arise in any area which is the subject of legislation. Finally, I note that, according to the President's Report, the repairs were well received. The following appears in the Minutes of the Annual General Meeting (April 25, 2002) "the renovation of the exercise facility had been completed. The area is larger and usage had increased." (Respondent's Record at p. 60)

REPLACEMENT OF THE ENTRANCE CANOPY

¶ 7 The canvas canopy, at the entrance of the building, was scheduled for replacement in 2003. The Board determined to address the absence of eaves-troughs at the location of the canopy. The absence of eaves troughs led to water pouring onto the concrete at the front of the building thereby creating a hazard. The Board also determined to address the absence of handicapped access.

¶ 8 A new glass and granite canopy, which updated the look of the front of the building, was installed to replace the old canvas canopy. Eaves-troughs were installed and handicapped access provided. During the course of the canopy replacement it was discovered that water had been entering the outer foyer of the lobby and that the concrete

in that area was badly deteriorated. The front doors, threshold and outer foyer floor had to be taken up and replaced.

¶ 9 The change from a canvas canopy to a glass and granite canopy was simply the substitution of a modern canopy for what had once been a modern canopy. The canvas canopy was at one time stylish. Today, one modern equivalent is a canopy made of glass and granite. There is nothing in s. 97(1) of the Act that suggests that it was intended to be a cultural straitjacket. The canopy that was at the entrance was simply replaced by a more contemporary version.

¶ 10 The decision to provide handicapped access reflects no more than a desire to ensure that persons under a physical disability will be able to safely use the property and is in accordance therefore with s. 97(2) of the Act.

¶ 11 There's no suggestion that the repairs to the outer foyer were anything but an attempt to reverse the effects of years of water damage. The Corporation had an obligation to make such repairs and I find based on the evidence that the repairs were made using materials that were reasonably close in quality to the original and thus are deemed by s. 97(1) of the Act not to be an addition, alteration or improvement to the common elements or a change in the assets of the corporation.

LOBBY RENOVATIONS

¶ 12 The Board determined that the owners wanted a lobby redesign, which would project the same high-end image for the building as, had existed when the building was first marketed and built. The owners were able to agree on a new design. The Board determined that of the total projected cost of $70,000 constituted an improvement to be funded by an existing operating surplus of $35,000 and a special assessment of $35,000.

¶ 13 The Corporation decided that a vote of the owners was required. Approval was sought at the Annual General Meeting to be held on April 25, 2002. At the meeting there were not enough unit owners present to obtain the consent of the necessary two-thirds of the unit owners (i.e. 80 unit owners). There were 45 unit owners present 44 of whom voted in favour of the renovation. The meeting resolved to leave the vote open for a period of 120 days to allow the Board to solicit proxies and thereby get the approval of the required 80 unit owners. The Board obtained proxies from 36 unit owners who were not present at the Annual General Meeting. These 36 proxies plus the votes from the 44 unit owners who were present at the Annual General Meeting, in the Board's opinion, gave it the required approval from 80 unit owners.

¶ 14 The Board conducted itself in a manner that contravened s. 97(5) of the Act. Specifically, the votes of 80 unit owners were not taken at a meeting duly called for the purpose of approving a substantial addition to the assets of the corporation.

¶ 15 Section 134(1) of the Act provides that a unit owner may make an application for an order enforcing compliance with the Act. Section 134(3) provides me with the discretionary authority to make a compliance or other remedial order.

¶ 16 I decline to make such an order. I based my decision upon the following factors:

(1) the changes were fully disclosed to the unit owners prior to any construction taking place,
(2) the required number of unit owners did approve the Lobby Renovations (i.e. "addition, alteration or improvement to the common elements or a change in assets of the corporation" to use the language of section 97(3)) albeit not at a meeting called for that purpose,
(3) I find and the respondent agreed that the decision of the Annual General Meeting to delay the vote and solicit proxies was taken in good faith,
(4) the Lobby Renovations were carried out in a fiscally responsible way creating no deficiency in the Corporation's Reserve Fund or finances generally.

DESIGN FEES

¶ 17 None of the evidence tendered on this application was directed to the appropriateness of Design Fees, in the amount of $8,000, being paid out of the Reserve Fund. The issue was raised for the first time in argument. I am not persuaded that the payment of Design Fees out of the Reserve Fund was inappropriate.

¶ 18 Accordingly this application is dismissed with costs.

F.N. MARROCCO J.

QL UPDATE: 20060821
cp/e/qlhjk/qlpwb

Case Name:

York Condominium Corp. No. 25 v. Persaud

Between
York Condominium Corporation No. 25, and
Deon Persaud et al.

[2006] O.J. No. 2922
Court File No. 06-CV-311985PDI

Ontario Superior Court of Justice
T.P. Herman J.

Heard: June 20, 2006.
Judgment: June 22, 2006.
(38 paras.)

Civil procedure — Injunctions — Considerations affecting grant — Serious issue to be tried or strong prima facie case — Irreparable injury — Balance of convenience — Motion by York Condominium Corporation for injunction preventing respondents from holding meeting pending hearing of application to appoint administrator allowed — Condominium's recent history was sufficiently troubling to put owners' interests at risk, which favoured appointment of administrator — Holding of a meeting to elect new board of directors had potential to add further instability and uncertainty to difficult situation — Injunction was for only a few weeks and did not completely do away with respondents' right to hold meeting — Costs arising from postponing meeting were compensable in damages.

Motion by York Condominium Corporation for injunction preventing respondents from holding meeting pending hearing of application to appoint administrator — York Condominium Corporation owned condominium building — Building fell into state of disrepair, accumulated significant financial arrears and accounting records were unable to be audited — York replaced board of directors — Respondents called meeting to replace board of directors — York sought injunction to delay meeting pending hearing of application to appoint administrator — HELD: Motion allowed — There was serious issue to be tried — The recent history of the condominium was sufficiently troubling to put owners' interests at risk, which favoured appointment of administrator — Holding of a meeting to elect new board of directors had potential to add further instability and uncertainty to difficult situation — Real harm from proceeding with meeting before appointment of administrator — Harm of denying application was greater than harm of granting it — Injunction was for only a few weeks and did not completely do away with respondents' right to hold meeting — Costs arising from postponing meeting were compensable in damages.

Statutes, Regulations and Rules Cited:

Condominium Act, s. 131

Counsel:

Benjamin Rutherford, Karen Kisiel, for the Applicant

Paul Mand, for Maria Ramos, V. Bravo, Rogelio Mayo, Hannah Brown, Vinanso Gray, Sheila Moolchan, Diane Hart, Ray Parker, Salvador

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ENDORSEMENT

¶ 1 **T.P. HERMAN J.** (endorsement):— York Condominium Corporation No. 25 (YCC 25) has brought a motion for an injunction restraining the holding of a meeting called by the respondents, pending the hearing of an application to appoint an administrator.

¶ 2 The application for the appointment of an administrator was scheduled for October 30, 2006. That was the first date available at the time that the application was set down. The applicant indicated that it would welcome an earlier date, if it could be obtained. I have been able to obtain an earlier date of July 11, 2006 for the hearing of the application.

¶ 3 The respondents have requisitioned a meeting, currently scheduled for July 7, 2006. The main purpose of the meeting is to remove the current Board of Directors and elect new members of the Board.

¶ 4 In addition to counsel for the applicant and counsel for nine respondents, I heard from several other individuals. Mr. Inderpal Deol represented himself and five other unit owners. Ms. Sabjda Chaitram represented six persons who are potential nominees to the board, as well as other unit owners. Mr. Parker, a unit owner, represented himself. Mr. Burt Berger is not a unit owner, but was asked by the requisitionists to chair the proposed meeting. I am mindful that much of what was heard from these individuals was unsworn evidence. Nonetheless, it was clear that these individuals have significant concerns about what has gone on in the past and the current situation at their building.

Injunction

¶ 5 In order to obtain an injunction, the applicant must satisfy the three criteria set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)* (1994), 1 S.C.R. 311. The three criteria are: (i) whether there is a serious question to be tried; (ii) whether irreparable harm will result if the relief is not granted; and (iii) the balance of convenience to the parties.

Serious Question

¶ 6 The threshold to establish a serious question is generally a low one. A motions court should only go beyond a preliminary investigation of the merits where the granting of the injunction would, in effect, amount to a final determination of the action.

¶ 7 YCC 25 is seeking the appointment of an administrator. Section 131 of the *Condominium Act* provides that the court may make an order appointing an administrator if it is of the opinion that it would be just or convenient, having regard to the scheme and intent of the Act and the best interests of the owners.

¶ 8 The grounds upon which YCC 25 makes its application are: the property is in a state of disrepair and neglect the finances are precarious; there has been a demonstrated inability to manage the corporation; there has been misconduct and mismanagement; the appointment of an administrator is necessary to bring order to the affairs of the corporation; and there is a struggle among competing groups that impedes or prevents proper governance.

¶ 9 The recent history of YCC 25 is a troubled one. The applicant alleges, and it is not challenged, that there were no elections or annual general meetings from 2001 until May 2005, when a court-ordered meeting and election were held. No financial statements were prepared for those intervening years until February 2005. The Audit Report of March 4, 2005 indicates "serious deficiencies in the accounting records and the system of internal controls". Because of these deficiencies, the auditor was unable to express an opinion as to whether the financial statements were presented fairly in accordance with accounting principles.

¶ 10 In addition to ordering that a meeting be held, the court appointed an inspector to investigate YCC 25's records and investigate the affairs of Bert Joyal, the previous president of the board. Due, in part, to difficulties in obtaining information, the inspector has not yet completed his report. However, he prepared a preliminary report in April 2005. In that report, he expressed his deep concern for the condominium. There was, in his opinion, a financial and managerial crisis such that the financial interests of the owners could be at risk. He expressed his opinion that the operations of the corporation were in direct contravention of the Condominium Act. A motion has been brought to extend the scope of the inspector's investigation to include other individuals.

¶ 11 The current board hired a management company. In his affidavit, Mr. Stephen Stern, the property manager, expresses serious concerns about the well-being of the corporation. He has discovered that YCC has various debts, the most significant of which is to the City of Toronto for $250,000 for water and sewer services. As of January 2006, YCC had approximately $14,000 in its bank accounts.

¶ 12 There is a significant issue concerning repairs to the garage. The owners were previously assessed $125 per month per unit for five years for the purpose of these repairs. However, Mr. Stern reports that the account that was supposed to contain the

money for repairs had a virtually nil balance as of January 2006 and the garage is still, according to Mr. Stern, in need of repairs.

¶ 13 YCC 25 has commenced a civil action against Bert Joyal, claiming the sum of $2,000,000 in respect of reserve fund monies that it alleges Mr. Joyal misused or misdirected.

¶ 14 Mr. Stern indicates that he is attempting to turn the situation around by, for example, setting up a reserve fund. However, in his opinion, significant obstacles remain. These obstacles include: the general lack of knowledge and awareness of the unit owners; the Board's need for significant counsel and direction; and a threat to YCC 25's political stability in that certain owners appear intent on overthrowing the current Board.

¶ 15 Individual owners who spoke at the hearing of this motion disagreed that Mr. Stern was turning the situation around. Rather, they had complaints that he was not responding to their concerns and was not providing adequate property management.

¶ 16 YCC 25 contends that individuals from the previous board and individuals connected to Mr. Joyal are behind the requisition for a meeting and the attempt to replace the current board. Ms. Chaitram, the spokesperson for several individuals who wish to run for election to the board, denies that this is the case. Counsel for nine of the respondents submits that YCC 25 has not put forward anything more then innuendo to support its allegation.

¶ 17 I cannot, on the basis of the evidence before me, make a determination as to why the meeting has been requisitioned. However, Mr. Joyal could well have an interest in having the current board overturned since they are the ones who initiated the action against him.

¶ 18 The appointment of an administrator was addressed in the case of *Skyline Executive Properties Inc. v. Metropolitan Toronto Condominium Corp. No. 1385*,. Brennan J. granted an injunction postponing the meeting of members to a date following the hearing of that application (Endorsement, August 26, 2002). In his view, the matter was sufficiently serious, irreparable harm would arise from the replacement of the Board before the application could be dealt with, and the balance of inconvenience weighed in favour of granting the injunction.

¶ 19 When the application was heard, [2002] O.J. No. 5117, Hoilett J. decided to appoint an administrator. He cited various factors to be taken into consideration. These factors include: whether a demonstrated inability to manage the corporation has been established; whether substantial misconduct or mismanagement has been demonstrated; whether the appointment of an administrator is necessary to bring order to the affairs of the corporation; whether there is a struggle within the corporation among competing groups such as to impede or prevent proper governance; and where only the appointment of an administrator has any reasonable prospect of the corporation. Added to these

factors, is the principle that the democratic government of the corporation should not be overridden except where absolutely necessary.

¶ 20 Although the "serious question" part of the test for an injunction is generally subject to a low threshold, a court should not lightly restrict the right of owners to requisition and hold a meeting. While it is not my job to decide whether an administrator should be appointed, I am satisfied, given the evidence before me, that the situation at YCC 25 is extremely serious, potentially placing at risk the financial interests of all the owners. The evidence points to several of the factors referred to in the *Skyline Executive Properties* case, above. The application for an administrator presents a serious issue to be tried.

Irreparable Harm

¶ 21 The applicant contends that if the meeting were to be held and the existing board replaced, the progress made so far and the application for the appointment of an administrator could be derailed. In addition to the application to appoint an administrator, there are other matters that are pending; the report by the inspector, a motion to expand the scope of the inspector's investigation and a law suit against Mr. Joyal.

¶ 22 The respondents maintain that this motion is premature. The court cannot, at this point, predict whether the current board will be overturned end, if it is, whether the new board will withdraw the application for an administrator. The court also cannot predict whether, as suggested by the applicant, the new board would discontinue the claim against Mr. Joyal.

¶ 23 As noted by Nordheimer J. in *Jet Print v. Cohen*, [1999] O.J. No. 2864 at para 21, the onus is on the person seeking the injunction to present sufficient evidence upon which the court can find that irreparable harm will be sustained. Irreparable harm must go beyond speculation.

¶ 24 While I cannot predict what would happen at the meeting, I am satisfied that the holding of a meeting to elect a new board of directors has the potential to add further instability and uncertainty to an already difficult situation. Given the circumstances, the application should be heard as soon as possible. The maintenance of the status quo would facilitate the consideration of the application. In my opinion, the harm of proceeding with the meeting goes beyond mere speculation.

Balance of Convenience

¶ 25 The harm to YCC 25 is set out above.

¶ 26 An injunction would not do away with the respondents' right to hold a meeting, but it would delay it and it would deprive them of their ability to choose the time at which the meeting occurs.

¶ 27 At the time of the hearing of this motion, it was believed that the application would likely not proceed until the end of October. An earlier date has now been obtained, such that the delay is several weeks instead of several months. It was submitted that even if an earlier date could be obtained, it would still be problematic because an injunction would limit the respondents' rights under the Act to hold a meeting. I agree that the court should not lightly interfere with these rights.

¶ 28 The individual owners who spoke raised two significant and related issues. While many of their continents were, in effect, unsworn evidence, I am mindful of the fact that this motion affects their rights as unit owners. Their first concern is that, in their opinion, the current board and property manager are not managing the property properly and a further delay means a further deterioration of the situation. The second concern is that these unit owners want the opportunity to elect a new board of directors and show that a democratically elected board can, indeed, manage the property properly without the need for court involvement or the appointment of an administrator.

¶ 29 I am sympathetic to the concerns of these unit owners. While it may be that some individuals who are behind the requisition for a new meeting have ulterior motives (a position put forward by the applicant but denied by the respondents), there appear to be unit owners who genuinely want the opportunity to elect a new board. They have significant concerns about the condition of their property and the impact that the situation has on their fees and property value.

¶ 30 As a result of obtaining an earlier date for the hearing of the application, the opportunity for a new board, if elected, to address problems of alleged mismanagement of the property, will be delayed for weeks, not months. This greatly reduces the potential inconvenience to the respondents.

¶ 31 The second issue that the respondents raised, that is, that they should be allowed to elect a new board of directors to manage the property properly instead of having an administrator appointed, is relevant to the question of whether an administrator should be appointed and can be addressed at the hearing of the application.

¶ 32 One inconvenience that the respondents could incur if the meeting is postponed, even by a few weeks, are the costs of organizing the meeting for July 7. However, those expenses can be compensated by way of damages.

¶ 33 On balance, it is my opinion that the harm of denying the injunction is greater than the harm in granting it. There have and continue to be significant problems at YCC 25. It is desirable that a judge hear the application for the appointment of the administrator and that, in the interim, the status quo be maintained.

Conclusion

¶ 34 It is my opinion that there is a serious question to be tried, there will be irreparable harm if the injunction is not granted and the balance of convenience favours

the granting of an injunction. An order is therefore granted enjoining the meeting of owners requisitioned by the respondents, to a date after the hearing of the application. The hearing of the application is scheduled to take place on July 11, 2006 at 10:00 a.m. (3 hours). Any further materials should be served and filed no later than July 5, 2006.

Other Matters

¶ 35 Three other matters need to be addressed; substituted service; the addition of party applicants; and the costs of this motion.

¶ 36 In his endorsement of May 30, 2006, Justice Siegel indicated that the applicants need to seek an order for substituted service in respect of the Notice of Application and any subsequent materials in relation to that proceeding. The parties are in agreement that substituted service on all of the respondents should be on Paul Mand, solicitor of record for nine of the respondents, and it is so ordered. Mr. Mand shall provide a copy of the reasons for this decision to Mr. Deol, Ms. Chaitram and Mr. Parker.

¶ 37 The applicant seeks leave to add four individuals as applicants: George Sorial, Timothy M. Case, Ruby Daniels and Edward Vasques. These individuals are members of the current board. The respondents do not object to the addition of these individuals except that they seek an undertaking from them with respect to costs. The undertaking of YCC 25 is, in my opinion, sufficient to provide adequate compensation to the respondents in the event that the applicant is not successful in the application. An order is therefore granted adding the four individuals as applicants. YCC 25 is required to provide an undertaking as to costs; the four individuals are not required to do so.

¶ 38 With respect to the costs of this motion, it is generally the case that costs are not ordered payable forthwith in a motion for an interlocutory injunction except where the granting of the injunction puts an effective end to the proceedings. In the case at bar, the injunction does not put an effective end to the proceedings and I see no reason in the circumstances to depart from the general practice. If the parties disagree with this proposition, they may make written submissions to me within 7 days of the release of this decision. Otherwise, the costs of this motion will be reserved to the judge hearing the application.

T.P. HERMAN J.

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