NEWMARKET COURT FILE NO.: CV-07-084642-00
DATE: 20090102

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 1240233 ONTARIO INC. v. YORK REGION CONDOMINIUM CORPORATION #852

BEFORE: THE HON. MR. JUSTICE G.M. MULLIGAN

COUNSEL: G. Marley, for the applicant

E. Lam, for the respondent

E N D O R S E M E N T

[1] This is an application by a commercial condominium unit owner (the applicant) for a declaration that the Condominium Corporation has acted in an oppressive or unfairly prejudicial manner pursuant to section 135 of the *Condominium Act*, 1998. In the event that an order is granted the applicant also seeks further relief flowing from such order.

HISTORY

[2] In order to understand the dispute between the parties, it is important to review the history of this particular commercial condominium corporation. The subject property is an indoor retail shopping mall known as "The Shoppes of the Parkway" (the mall) in Richmond Hill. The mall consists of 87 retail, food court and restaurant units. In 1994 the owner of the mall, Captain Developments Limited (the developer) converted the mall to a commercial condominium by registration of a declaration pursuant to the provisions of the *Condominium Act*. The mall became known as York Region Condominium Corporation 852 (Condo 852). The developer then proceeded to sell the individual units to existing tenants or through the real estate marketplace. The developer retained several units for itself including unit #1 either because it was unable to sell them or because it was commercially viable to retain them. One of the largest units in the project was unit #1. At the time of conversion it was leased to a national restaurant chain. This unit constituted almost 26 percent of the units in Condo 852. In comparison, all of the other units were much smaller, constituting just under two percent per unit for the remaining units.

[3] The developer, through a related company, also provided management services to the condominium corporation.

[4] By 1995 the developer still retained 33 of the 87 units of Condo 852. Only two of these retained units were leased including unit #1, the balance were vacant.

[5] The developer encountered financial difficulties and unit #1 was sold under Power of Sale by its mortgagee to the applicant in 1997. The applicant received an *estoppel* certificate and assumed the existing restaurant lease. The applicant, as the owner of unit #1, became a commercial landlord within a commercial condominium corporation. The applicant's unit has experienced some periods of vacancy over the years. When one restaurant tenant went out of business, the applicant re-rented the space to another restaurant tenant. Several years ago the applicant subdivided unit #1 creating unit #1A of about 1,000 square feet to a physiotherapist. This unit faced the rest of the indoor mall and reduced the size of the balance of unit #1 accordingly. This was done, in part, to meet the needs of its new restaurant tenant who sought a smaller space at a more affordable price.

[6] In 2002 the developer's related corporation was removed as manager of the affairs of Condo 852 and officers and directors of the developer ceased being board members. In 2002 an officer of the applicant corporation was also a board member of the condo corporation.

THE DISPUTE

[7] The dispute between the applicant and the condo corporation centres around the condominium's marketing and promotion fund and whether or not Condo 852 has acted oppressively or unfairly to the applicant with respect to this fund. In order to understand the roots of this dispute it is necessary to review the history of the mall before conversion and the steps taken after conversion by the developer with respect to units retained by it or sold to other various unit owners. It is also necessary to review how this fund was reflected in the audited financial statements of the condominium corporation over the years.

[8] Prior to conversion, while it was the mall owner, the developer leased out various units in the mall to commercial businesses. Unit #1 was leased to a restaurant chain. The developer entered into a lease with that tenant which provided for a promotional fund in section 8.01 which provided:

> (a) the tenant shall pay to the landlord, as additional rent in each rental year (or in any other annual period determined by a landlord, from time to time), for the purpose of the creation and maintenance of a common fund (the "promotion fund") for the purchase, maintenance or replacement of seasonal decorations in the commercial mall and/or for the promotion or benefit of the commercial mall…

[9] This is the lease which was assumed by the applicant when it purchased unit #1. It is quite conceivable that all of the other leased units in the mall had a similar clause relating to the promotional fund.

[10] An officer of the respondent corporation filed an affidavit containing many of the audited financial statements of the corporation over the years and a series of letters sent by the developer

to unit owners over the years. At Tab I, a letter dated September 9, 1997 to one of the unit owners 1074303 Ontario Inc., stated in part:

> Please find enclosed the common area expense and operating budget, for York Region Condominium Corporation #852 for the fiscal year October 1, 1997 to September 30, 1998… Commencing October 1, 1997, your monthly payments for the above noted unit are as follows:
>
> | | |
> |---|---|
> | Common area expense and operating budget | $138.29 |
> | Promotion fund contribution | 16.38 |
> | Contribution to common hydro – meter group 1 | 17.23 |
> | Total before GST | $171.90 |
> | GST | 12.03 |
> | Total monthly payment | $183.93 |
>
> Please note that your total monthly amount includes a promotional fund contribution which has been added. This amount was approved by the unit owners at last year's annual meeting and your contribution has been calculated as follows: square footage of your unit x $1.00 per annum.
>
> Kindly forward 12 post-dated cheques in the above amount payable to York Regional Condominium Corporation No. 852 for the twelve month period commencing October 1, 1997…

[11] The respondent filed similar letters for the years 1998, 1999 and 2001.

[12] There was no provision in these notices for the affected unit owners to opt out of this fund. The promotional account was identified separately and included in the total monthly payment required for the condo fee.

[13] It is common ground that the developer chose not to collect this promotional fund from the units it retained as unsold or leased out.

[14] The applicant purchased its unit in 1997 and as previously noted, assumed a lease which contained a provision enabling it to collect for the promotion fund. However, within two months of the applicant's purchase the restaurant tenant went out of business. Unit #1 was vacant for a number of months and eventually the applicant settled with that tenant for an undisclosed amount for arrears. At the time of purchase the applicant obtained an *estoppel* certificate signed by an officer of the Condominium Corporation. This officer was also a director of the developer

corporation. The *estoppel* certificate made no reference to the promotion fund nor was there any reference to this fund in the attached audited financial statements.

[15] In the years immediately following its purchase the applicant was not requested to contribute to the promotion fund although it appears that the other occupied units were contributing to this fund.

[16] In 2003, shortly after the Board had replaced the management company for Condo 852, the Board began attempts to have unit #1 contribute to the promotion fund. For the fiscal year 2004 a special arrangement was entered into whereby the Board required the applicant to contribute $97 per month toward the promotion fund. This was far less than the proportionate share that the applicant would otherwise have had to contribute based on the fact that it owned approximately 26 percent of the condo space.

[17] In 2005 the condominium board began to treat the promotion fund as a common element expense and therefore with uniform application to all unit owners in accordance with their proportionate shares. This meant that the applicant became responsible for approximately 26 percent of any such promotional expenses.

[18] In 2006 the condominium corporation obtained a reserve fund study as it was required to do under the provisions of the *Condominium Act*, 1998. The report indicated a need to supplement the reserves and the Board decided to use an accumulated amount in the promotion fund to meet the needs of the reserves rather than to issue a special levy to all unit owners.

AUDITED FINANCIAL STATEMENTS

[19] By way of background it is important to look at how the promotion fund was dealt with in various financial statements over the years. Not all financial statements for all relevant years were filed with this application. The audited financial statements filed with the applicant's *estoppel* certificate for the year ending September 30, 1996 made no reference to the promotion fund. After the change of management in 2002 new auditors were in place. The auditors report dated December 9, 2003 noted under liabilities an entry due to owners promotion fund (note 6) $25,105 for 2003. For 2002 on the comparable entry it showed $6,397. By way of note 6 the auditor stated:

> 6. Promotion fund. The Corporation administers a promotion fund on behalf of some of the store owners who have contributed their share of the assessment. Not all members of the corporation are participating in the promotion fund. As at September 30, 2003 there was a $22,738 fund balance in the name of the promotion fund. With a gross of $47,843 payable to the marketing fund, the corporation has a net payable amount of $25,105.

[20] In the auditor's report dated January 17, 2005 the marketing and promotion fund in the amount of $81,621 was noted as a current asset of the corporation. Under current liabilities the sum of zero was shown as due to owners promotion fund note 7. Note 7 stated:

> 7. Promotion fund. The Corporation had started a new marketing and promotion fund from proceeds budgeted for the promotional events on behalf of the retail unit owners. The fund is managed as a separate fund by the same management board of the corporation.

[21] The auditor's report dated January 27, 2006 showed current assets under the marketing and promotion fund of $114,373 as at September 30, 2005. Under a separate statement entitled Statement of Promotion Fund it noted a balance at the beginning of the year of $81,621, add transfer from general fund $32,752, balance at the end of the year $114,373.

[22] Under note 7 of those financial statements the auditor indicated:

> 7. Promotion Fund. The Corporation had maintained a separate marketing and promotion fund from proceeds budgeted from the promotional events.

[23] In 2006 the applicant retained counsel to raise an objection to the use of funds from the common elements budget for promotion of the mall.

[24] By notice dated May 30, 2007 the management of Condo 852 sent a notice to all unit owners of a special meeting regarding the promotion fund. The stated purpose of the meeting was:

> The purpose of the meeting is for the Board to present the plans for a promotion fund of $80,000 to the owners, for the unit owners to discuss the promotion fund and for the owners to vote to approve the promotion fund.

[25] The vote on this issue at the meeting did not achieve the 66 2/3% majority required for a substantial change under the provisions of the *Condominium Act* and therefore failed. It is the applicant's position that the calling of this meeting was an admission that previous allocations of common expenses to the marketing fund were improper. The respondent disagrees and states that the purpose of the meeting was to change the approach to the marketing fund by hiring a single professional advertising agency to market the mall and to deal with all of the funds in the reserve.

[26] The applicant brought this application on June 29, 2007 seeking the relief set out in the Notice of Motion including the oppression remedy set out in section 135 of the *Condominium Act*, 1998.

THE PROMOTION FUND

[27] In reply to the application the respondent filed an affidavit of Lawrence Chan president of Condo 852. At paragraph 12 Mr. Chan set out the rationale for the promotional fund as follows:

> 12. The commercial and practical reality is that YRCC852 is a retail mall. The unit owners purchased their respective units as investments and operate their own businesses from their units or leased them to tenants. As such, marketing has

> always been a concern of the great majority of the owners because customer traffic is necessary for the daily operations of the businesses and the value of the properties themselves. The Board takes these concerns seriously in their management of the affairs of YRCC852.

[28] The applicant in support of its application filed an affidavit of May Chiu one of the principal shareholders of the applicant corporation. In her affidavit at paragraph 13 Ms. Chiu stated:

> 13. Neither the applicant nor its tenants, have ever had any desire to participate in this promotion fund. In my opinion, marketing is a business decision for the individual business operating in a unit and is not a proper duty of the Condominium Corporation.
>
> 14. In addition our tenants perform their own marketing. One of our tenants runs an Indian Restaurant and the marketing campaigns that have historically been done are centred on the events such as the Chinese New Year. As such, the applicant gains nothing from marketing but is being asked to pay for over one-quarter of the total cost of the Corporation.

[29] On cross-examination of her affidavit, Ms. Chiu was asked if it was still her position that nothing was gained from marketing and promotion of the mall. She answered: "Well, not gained nothing. We did a little bit, but I doubt it, because mostly …". Elsewhere in her affidavit she answered:

> Well, I don't have difficulty with paying equally by all the units, okay – equally, but I have – but later on I found out that we have to pay according to the factor. That I don't agree with that, because my unit is just one unit, okay, and then I have to pay 25 or 26 percent of $80,000.

ANALYSIS

[30] It is the applicant's position that the use of a portion of the common expenses towards marketing and promotion is not a proper duty of the corporation and is therefore oppressive or unfair to the applicant.

[31] Section 1 of the *Condominium Act*, 1998 defines common expenses as follows:

> Common expenses means the expenses related to the performance of the objects and duties of a corporation and all expenses specified as common expenses in this *Act* or in a declaration.

Section 84(1) of the *Act* provides as follows:

> 84(1) Subject to the other provisions of this *Act*, the owner shall contribute to the common expenses in the proportion specified in the Declaration.

The Declaration of the condominium corporation defines common expenses as:

> 8. Common Expenses – means the expenses of the performance of the objects and duties of the corporation and includes without limiting the generality of the foregoing, any expense specified in the common expenses in the *Act*, this Declaration and Schedule E to this Declaration.

[32] Article 5.1(a) of the Declaration provides the duties of the corporation:

> The duties of the corporation shall include but not be limited to the following:
>
> > (a) controlling, managing and administration of the common elements and assets of the corporation.

[33] The applicant relies on section 135 of the *Condominium Act*, 1998, which provides as follows:

> Oppression Remedy
>
> 135(1) An owner, a corporation, a declarant or a mortgagee of any unit may make an application to the Superior Court of Justice for an order under this section.
>
> Grounds for Order
>
> (2) On an application, if the court determines that the conduct of an owner, a corporation, a declarant or a mortgagee of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interest of the applicant, it may make an order to rectify the matter.
>
> Contents of Order
>
> (3) On an application, the judge may make any order the judge deems proper including,
>
> (a) an order prohibiting the conduct referred to in the application; and
>
> (b) an order requiring the payment of compensation.

[34] Section 135 of the *Condominium Act*, 1998 has been dealt with in a number of recent cases. In *Niedermeier v. York Condominium Corp.*, D.C. Shaw, J. put the issue into context and stated at paragraph 4:

> Section 135 came into effect in 2001. While this is a new concept for Ontario condominium corporations, courts in Canada have dealt with oppression remedies for many years in the context of company law. Those cases have considered whether the conduct complained of falls under the three types of conduct enumerated under statute, namely (i) oppression (ii) unfair prejudice or (iii) unfair disregard. The courts have not drawn clear lines between any of the three statutory tests and have often found that conduct may fit into one or more of the categories. Unfair prejudice and unfair disregard are less rigorous tests than oppression.

[35] The Ontario Court of Appeal dealt with section 135 of the *Condominium Act*, 1998 in *McKinstry v. York Condominium Corp. #472* (2003) Carswell Ont. 4948. Juriansz J. quoted a definition for the oppression remedy and went on to state at paragraph 33:

> This new creature of statute should not be unduly restricted but given a broad and flexible interpretation that will give effect to the remedy it created. Stakeholders may apply to protect their legitimate expectations from conduct that is unlawful or without authority, and even from the conduct that may be technically authorized and ostensibly legal. The only prerequisite to the court's jurisdiction to fashion a remedy is that the conduct must be or threaten to be oppressive or unduly prejudicial to the applicant, or unfairly disregard the interests of the applicant. Once that prerequisite is established, the court may "make any order the judge deems proper" including prohibiting the conduct in requiring a payment of compensation. This broad powerful remedy and the potential protection it offers are appropriately described as "awesome". It must be remembered that the section protects legitimate expectations and not individual wish lists, and that the court must balance the objectively reasonable expectations of the owner with the condominium board's ability to exercise judgment and secure the safety, security and welfare of all owners and the condominium's property and assets.

[36] The Court of Appeal dealt with the oppression remedy in the context of minority shareholder rights in *Grant Investments Ltd. v. Keeprite Inc.* (1991) 3 O.R. (3d) page 289. McKinlay J. stated at page 301:

> Acting in the best interests of the corporation would, in some circumstances, require that a director or officer act other than in the best interests of one of the group's protected under section 234 [*Ontario Business Corporations Act*, 1982].

At page 320 McKinlay J. sent on to state:

> There can be no doubt that on an application under section 234 the trial judge is required to consider the nature of the impugned acts in a method in which they were carried out. That does not mean the trial judge should substitute his own business judgment for that of managers, directors, or committee such a the one involved in assessing this transaction. Indeed, it would generally be impossible

> for him to do so, regardless of the amount of evidence before him. He is dealing with the matter at a different time and place; it is unlikely that he will have the background knowledge and expertise of the individuals involved; he could have little or no knowledge of the background and skills of the persons who would be carrying out any proposed plan; and it is unlikely that he would have the knowledge of the specialized market in which the corporation operated. In short, he does not know enough to make the business decision required. That does not mean that he is not well equipped to make an objective assessment of the very factors which section 234 require him to assess.

[37] In *re Alldrew Holdings Ltd. v. Nibro Holdings Ltd.*(1993) 16 O.R. (3d) page 718 (Ont. Gen. Div.) MacKenzie J. provided a non-exhaustive list of some of the factors a court ought to consider when dealing with oppression. Those factors were:

(i) the history and nature of the corporation;

(ii) the type of interest affected;

(iii) general commercial practice;

(iv) nature of the relationship between the complainant and the alleged oppressor;

(v) the extent to which the impugned acts or conduct were foreseeable;

(vi) the expectations of the complainant;

(vii) the size, structure and nature of the corporation; and

(viii) the detriment to the interests of the complainant.

Those factors provide a helpful background for analyzing the facts in this application.

(i) The History and Nature of the Corporation

[38] The corporation is a commercial condominium corporation operated for the benefit of all the unit owners with a view to attracting customers and income for the various businesses while at the same time attempting to add value to the individual units.

(ii) The Type Of Interest Affected

[39] All of the unit owners operate or lease commercial businesses; however, the applicant has the largest unit occupying approximately 26 percent of the condominium corporation and therefore paying 26 percent of all the condominium corporation's expenses.

(iii) General Commercial Practice

[40] It would generally be expected that a prudent and diligent board of directors for a commercial condominium would spend money marketing and promoting the condominium for the benefit of the unit holders. There is nothing in the declaration or by-laws of this condominium corporation that would prevent such expenditures.

(iv) Nature of the Relationship Between the Complainant and the Alleged Oppressor

[41] The applicant is a commercial landlord owning the largest unit by far in the condominium corporation. The promotion fund is aimed at benefiting the entire mall by increasing customer traffic. The applicant by its own affidavit acknowledges that the applicant or its restaurant tenant may gain some advantage from these promotions.

(v) The Extent to Which the Impugned Acts or Conduct Were Foreseeable

[42] The applicant was aware of the promotion fund as established in the existing lease which it took over when it purchased the unit. The applicant found itself exempt from this promotion fund as years went by while all other unit owners were contributing their share. This exemption was not created by by-law or declaration but seems to have been created by the developer for itself, when it owned unit #1. The developer's related company, in providing management to the ongoing condominium corporation, neglected or refused to address this discrepancy. The issue became flagged when the management company for Condo 852 was replaced.

(vi) The Expectations Of The Complainant

[43] The applicant is a commercial landlord who purchased a unit in a mall operated by a commercial condominium corporation. As such, it could reasonably expect that some of the funds of the condominium corporation would be expended toward promotion and marketing even if such expenditures were not included in the financial statements when they first purchased their unit. The existence of the promotion fund did become apparent to the applicant over time through the various references in the subsequent audited financial statements. In addition, a shareholder of the applicant was on the Board of Directors of Condo 852 in 2002.

(vii) The Size, Structure And Nature Of The Corporation

[44] The corporation is a commercial condominium corporation owned by the various unit owners who operate or lease commercial businesses. The applicant is the largest unit owner.

(viii) The Detriment To The Interests Of The Complainant

[45] It is not clear from the affidavit material and the cross-examination of a representative of the applicant, that the applicant received no benefit from the expenditures from the promotion fund. Indeed, for many years the applicant may have benefited from the expenditures from the promotion fund to which it did not contribute. As such, there may have been an element of unjust enrichment for the prior years. The argument of the applicant as set out in the cross-examination of its shareholder would appear to be that the applicant does not object to an equal

contribution to the promotion fund but does object to its contribution of 26 percent of the overall fund.

CONCLUSION

[46] From the time that the mall was converted to a commercial condominium corporation, the occupied units, except for unit #1, contributed to the promotion fund. Because of the notices sent to the unit holders by the developer manager, I find that this payment was mandatory in nature being included in the monthly common elements fee. The owner of unit #1, originally the developer and now the applicant, was exempted from this payment without any legal basis for doing so. The applicant received the benefit of this non-payment from the time of its purchase until attempts were made to change this by the new condominium management. The applicant acknowledged that it or its tenants may have received some benefit from the promotions and indicated a willingness to pay a lower amount, perhaps equal to what the other unit owners paid. There is nothing in the declaration or by-laws that would prevent a commercial condominium corporation such as this from spending money from the common expenses fund on promotions and marketing. Such expenditures are consistent with its duties to manage and administer the corporation. Although the condo attempted to clarify this by way of the special meeting in 2007, I find that it was not necessary to do so to establish its right to spend some of the common expenses funds on marketing and promotion. Although categorized as such by the auditors, I find that the fund contributed to over the years by the other unit owners was not voluntary, it was mandatory. The applicant was aware of the promotion fund contained in the lease which it assumed upon purchase. It also became aware of the fund by way of notes to the audited financial statements over the years and by way of its participation on the Board in 2002. A commercial condominium unit owner could reasonably expect that it would have to participate in promotion and marketing in accordance with its ownership interest consistent with the contributions made by other unit owners over the years. Under the circumstances, I am not satisfied that the condominium corporation has conducted itself in a manner that would be considered oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant. In the result, the applicant's motion is dismissed.

[47] The applicant sought the assistance of the court under section 135 of the *Condominium Act* 1998. Section 135(3) indicates that a judge may make any order the judge deems proper. Although I decline to so order, it is open to the applicant to request the Board and the unit owners to give special consideration to the unique nature of its ownership and its proportionate share of contribution to the promotion and marketing fund. Such a motion could be brought at the annual general meeting or at a special meeting called for the purpose. The applicant, by way of its ownership, has approximately 26 percent of the votes and if 66 and two-thirds percent of the unit owners vote in favour of the special status for unit #1, then the Board may be authorized to charge the applicant for an amount lower than its proportionate share.

COSTS

[48] If the parties cannot agree on costs, I am prepared to fix costs. A costs outline and cost submissions should be submitted to me within 30 days of the date of this decision.

MULLIGAN, J.

DATE: January 2, 2009