Case Name:

York Region Condominium Corp. Number 889 v. York Region Condominium Corp. Number 878

RE: York Region Condominium Corporation Number 889, Appellant,
and
York Region Condominium Corporation Number 878, Respondent
AND RE: York Region Condominium Corporation Number 872,
Appellant, and
York Region Condominium Corporation Number 878, Respondent

[2009] O.J. No. 3197

Court File Nos. 09-CV-378450, 09-CV-379113

Ontario Superior Court of Justice

R.E. Mesbur J.

Heard: July 27, 2009.
Judgment: July 28, 2009.

(26 paras.)

Counsel:

Mark H. Arnold, for the Appellant YRCC No. 889.

Marko Djurdjevac, for the Appellant YRCC No. 872.

Carol Dirks, for the Respondent YRCC No. 878.

ENDORSEMENT

R.E. MESBUR J.:--

Introduction:

1 The parties are three condominium corporations that comprise a condominium development known as "Central Park on Yonge", and share certain facilities. One of the appellants, York Region Condominium Corporation Number 889, is a commercial condominium operating 211 commercial units on the main level of each of two mid-rise apartment buildings. These apartment buildings comprise York Region Condominium Corporation Number 878, or the apartment condominium. The third condominium is a townhouse development located just behind the other buildings. It is the other appellant York Region Condominium Corporation Number 872. The three condominiums operate pursuant to a Reciprocal Agreement that governs the operation, use and costs associated with certain shared facilities. Schedule "A" to the Reciprocal Agreement has a list of the shared cost items, and the proportionate share each condominium is to bear for each of these expenses. The Reciprocal Agreement provides that conflict among the parties is to be resolved by mediation. If mediation fails, matters are to be referred to arbitration.

2 Conflict has arisen among the parties in relation to the reciprocal Agreement, particularly in relation to Schedule "A". The apartment condominium takes the position it is being treated unfairly, and has sought to rewrite the parties' obligations under Schedule "A".

3 The parties' current difficulties were not resolved in mediation, and they are in the throes of arbitration. The arbitration is to proceed with pleadings. Although the arbitration process has been going on for well over two years, the statement of claim of the apartment condominium has not yet been finalized. After the first iteration of the claim was delivered, the other parties moved before the arbitrator to strike out portions of it. The arbitrator struck some, but not all the paragraphs the commercial condominium and townhouse condominium attacked. They then appealed the arbitrator's decision to this court, and Pollak J heard the appeal. She allowed the appeal in part. Principally, she overturned the arbitrator's ruling that would have permitted pleadings that allowed him the jurisdiction to amend or rewrite Schedule "A", and struck those portions of the claim that requested this type of relief.

4 Pollak J released her decision in May of 2008. Following the release of the decision, she entertained submissions on costs. Included in the submissions was the request of all parties, on consent, to remit to the arbitrator the question of the appropriate disposition on costs of his arbitration, given the outcome of the appeal. Pollak J declined to do so, simply indicating in her endorsement that since this issue had not been part of her original reasons, she would not consider the issue.

5 The parties then exchanged a great deal of correspondence to schedule a further appearance before the arbitrator to deal with this costs issue. By the time the matter came on before the arbitrator, the apartment condominium had changed its position, and insisted that it no longer consented to the arbitrator dealing with revisiting the question of costs on the original motion to strike. The arbitrator held that they could do so, and determined that as a result he was *functus officio* in relation to costs, absent either a direction from a higher court that permitted him to do so, or the agreement of the parties.

6 Following Pollak J's decisions, the apartment condominium sought to amend the claim again. The other parties did not consent to the amendments, and the apartment condominium therefore moved before the arbitrator for leave to amend. Relying principally on the provisions of rule 26 of the *Rules of Civil Procedure,* the arbitrator allowed the amendments. The other parties appeal his decision, taking the position that the amendments to the claim are essentially the same as the provisions that were earlier struck by either the arbitrator or Pollak J, and constitute an impermissible collateral attack on those earlier decisions.

7 They also appeal the arbitrator's decision in which he determined he was *functus officio* in terms of revisiting his original costs order in light of Pollak J's decision on the appeal from his order to strike portions of the claim.

The standard of review:

8 The parties agree that the provisions of the arbitration agreement coupled with section 45 of the *Arbitration Act, 1991* [1] limit appeals from the arbitrator to questions of law alone. No appeal lies from a decision of the arbitrator which is either a question of fact, or a question of mixed fact and law. The parties also agree that the standard of review on an appeal on a question of law is a standard of correctness[2].

The pleadings:

9 In the amended statement of claim, the apartment condominium now seeks damages for breach of contract, and breach of a duty of good faith on the part of the other parties. The others do not quarrel with that pleading *per se,* but rather take the position that the claim as now pleaded essentially claims the same relief as that which was struck before. In order to address this issue, it will be helpful to look at the major amendments to the statement of claim.

10 Paragraph 1b. of the claim now seeks:

> A declaration that YRCC 872 and/or YRCC 889 are in breach of the Reciprocal Agreement, and/or are in breach of their duty of good faith in the performance of their obligations under said Agreement.

11 There is nothing objectionable in this paragraph, particularly since Pollak J agreed with the arbitrator's original decision that he had jurisdiction to determine whether the other corporations had acted in bad faith or unfairly in the execution of their duties under the contract. No one quarrels with the proposition that the arbitrator may also determine whether there has been a breach of contract.

12 The amended claim now seeks damages in the amount of $400,000 for this alleged breach of contract and for breach of a duty of good faith. Again, on its face, there is nothing objectionable about this pleading, which is simply a prayer for relief. The commercial condominium and townhouse condominium take the position, however, that since an earlier claim for $700,000 had been struck relating to "reimbursement" for "all monies paid ... in excess of the adjusted or amended Proportionate Shares", this new pleading is simply a replacement for what was previously struck. I am not persuaded that the paragraph itself is objectionable on this ground. As I have said, it is simply a prayer for relief, based on a claim for breach of contract.

13 It is in the particularization of the claim and the facts supporting it that the other corporations say the apartment condominium has fallen into error. They suggest, in particular, that paragraphs 28, 33 and 34 essentially attempt a collateral attack on Pollak J's finding that there is no jurisdiction in the arbitrator to rewrite Schedule A to redress any "unfairness" in it.

14 These paragraphs read as follows:

> 28. No formal response was received from either YRCC 872 or YRCC 889 to YRCC 878's request. In fact, both YRCC 889 and YRCC 872 failed and/or refused to consider any amendments to either Schedule "A" or to the Shared Costs.
>
> 33. Further, YRCC 878 pleads that YRCC 872 and YRCC 889 have a contractual duty of good faith in the performance of their obligation sunder the Reciprocal Agreement. YRCC 878 states that YRCC 872 and YRCC 889 have breached their duty of good faith by failing *inter alia*, to adequately regard the legitimate interests of YRCC 878 in respect of the disproportionate nature of Schedule "A" and/or the Shared Costs, and by not dealing fairly and/or reasonably with its representatives in respect of any amendment or adjustment to Schedule "A" and in the allocation of Shared Costs in the Shared Budget.
>
> 34. As a result of the aforesaid breaches of contract and breaches of duty of good faith, YRCC 878 has suffered damages in the amount $400,000, or such further amount as may be proven at the arbitration hearing and claimed in paragraph 1(h) herein.

15 The arbitrator did not agree with the characterization of these paragraphs as being an attempt to rewrite Schedule A, and obtain a refund, or damages as a result of such an amendment. The arbitrator held that while the apartment condominium cannot be granted relief by having the arbitrator adjust or amend the schedule or to appoint an expert to report on the need for any amendment to the schedule, it could not be denied a remedy if the other corporations were in breach of their obligations under the Reciprocal Agreement. As the arbitrator put it:

> ... it is equally clear that I retain the ability to grant declaratory relief and to award damages, if I conclude that the reciprocal agreement has been breached. As in the case of any breach of contract, the measure of damages will be determined in accordance with well-known principles of law, and it may very well be that this determination will be impacted by conclusions that I may reach regarding the difference between the current allocation of expenses in Schedule A and what I determine they would have been in the absence of a breach.

16 The commercial condominium and townhouse condominium take the position that these comments show that what the new claim really seeks is an amendment of Schedule A, and since this was ruled impermissible, the amended pleading is really a collateral attack on Pollak J's ruling. I disagree with this interpretation. As I see it, the arbitrator is simply articulating, as a possible component of a measure of damages, the difference, if any, between what Schedule A says the proper allocation of expenses is, and what the parties have actually done. The parties all concede that it is within the arbitrator's jurisdiction, for example, to determine that the percentages in Schedule A have not been followed, or that expenses allocated under one heading of the schedule may have been improperly allocated to that particular item. If these kinds of mistakes have been made as a result of breaches on the part of the townhouse condominium or commercial condominium, the arbitrator has the power to correct them and use the corrected figures in the calculation of damages.

17 Paragraphs 33 and 34 of the amended claim are certainly not well drafted, and might be open to the interpretation that the apartment condominium is seeking to rewrite Schedule A. That is not permitted, and the arbitrator clearly recognizes that limitation. He does not interpret the paragraphs as seeking that relief. As I have said, the paragraphs are

poorly drafted, and would benefit from particularization; I cannot find, however, that the arbitrator was wrong in law when he permitted them to stand in the amended pleading. After all, pleadings must be looked at generously as a whole, and are not held to a standard of perfection. As the arbitrator noted, rule 26 of the *Rules of Civil Procedure* is mandatory, requiring that amendments shall be permitted at every stage of a proceeding. Only claims that are clearly impermissible should be disallowed. I cannot conclude that the amended pleading has clearly attempted to breach the provisions of Pollak J's order.

18 That said, there is a provision of the amended claim that cannot stand. The parties are in agreement that what is now paragraph 39g. of the amended claim was formerly struck out, and was inadvertently included in the amended claim. On consent, paragraph 39g. of the amended claim is struck.

Should the arbitrator have revisited the costs issue?

19 There is no question that before the parties provided their written costs submissions to Pollak J on the costs of the appeal they agreed that the question of the costs of the prior arbitration award on the first motion to strike pleadings should be sent back to the arbitrator to revisit in light of the outcome of the appeal. They requested that Pollak J include this provision in her order, on consent. She declined to do so, and declined to consider the issue at all.

20 The real question is whether the apartment condominium is now permitted to change its position and withdraw its consent. The arbitrator considered this issue. He referred to the apparent unanimous consent of the parties to refer this matter back to him, and then made the following observation:

> Counsel for the appellants suggest that the respondent is bound by the position that it took before Justice Pollak regarding this issue. I do not agree. It is entirely possible that YRCC 878 [the apartment condominium] would have preferred to have had the costs reassessed by me, if they were going to be reassessed at all, and instructed counsel accordingly. Once Justice Pollak refused to set aside that costs order, however, that party was entitled to change its position in light of the appellate court ruling.

21 The question is whether the arbitrator was correct in law in coming to this conclusion. In my view, he was not. The parties had agreed to refer the question of reassessing costs to the arbitrator. At no time until the hearing before the arbitrator himself did counsel for the apartment condominium raise a question of the arbitrator's jurisdiction to deal with the question. I was referred to no law that suggests the apartment condominium had the authority to do so. I was referred to nothing that suggested the agreement to refer the issue to the arbitrator was conditional upon Pollak J's making an order to that effect. When the arbitrator began to speculate as to parties' motives, he fell into error; there was nothing before him to suggest any reason why the apartment condominium might have wished to change its mind, and nothing to support any legal reason why it might be permitted to do so.

22 To the contrary, section 5 of the *Arbitrations Act, 1991* expressly contemplates that an arbitration agreement may be an independent agreement, or part of another agreement. If parties to an arbitration agreement make a further agreement relating to the arbitration, it is deemed to be part of the arbitration agreement. An arbitration agreement need not be in writing. Importantly, an arbitration agreement may be revoked only in accordance with the ordinary rules of contract law.

23 In my view, the unequivocal agreement of the parties to refer the issue of costs back to the arbitrator was just such an amendment to the original arbitration agreement. It binds all the parties unless the apartment condominium can show it is revocable in accordance with the ordinary rules of contract law. It has failed to do so. To the contrary, the other corporations have provided me with clear law concerning the limited and unusual circumstances when a party may withdraw from an agreement.[3] Simply put, courts may imply a term for the termination of an agreement on reasonable notice, but only when it is both reasonable and necessary. In this regard, the court will balance the factors against implying a term for termination by a party on reasonable notice against those factors in favour of implying such a term. There was no evidence of this nature before the arbitrator on which he could have concluded the contract was revocable pursuant to the ordinary principles of contract law.

24 I therefore conclude the arbitrator was wrong in law when he concluded the apartment condominium could change its mind and revoke its consent to the arbitrator revisiting the question of costs. Thus, the apartment condominium is still bound by its agreement to have the issue of costs revisited by the arbitrator. As the arbitrator himself said, he would not be *functus* if the parties agreed to refer a question to him. That is clearly contemplated by the *Arbitrations Act*, *1991* and is conceded by all the parties. Since I have found the parties are bound by their agreement to have the arbitrator

revisit the costs issue, he cannot be *functus.* Thus, the appeal must be allowed in relation to the arbitrator's determination that he was *functus* in relation to the costs issue.

Disposition:

25 The appeal is therefore allowed in part, as follows:

a) on consent, paragraph 39g. of the amended statement of claim is struck, having already been struck out;
b) the arbitrator's decision that he was *functus officio* in relation to the costs issue is set aside, and he is directed to arbitrate the appropriate level of costs of the arbitration, given the decision of Pollak J on the original appeal;
c) The balance of the appeal is dismissed.

26 Given the divided success on the appeal, there will be no order as to costs.

R.E. MESBUR J.

cp/e/qllxr/qlmxb

1 S.O. 1991, c. 17

2 *National Ballet of Canada v. Glasco* (2000) 49 O.R. (3d) 230

3 *Petro-Lon Canada Ltd. v. Petrolon Distribution Inc.* (1995) 1995 CarswellOnt 26 (Ont. Gen. Div.)

Alert Settings:

Name: CONDO
Saved As: Scheduled Search - CONDO > August 05, 2009
Sources: All Canadian Judgments
Results Format: First 10 Documents, Full View
Sort Order: System Default
Run: August 05, 2009
Client ID: Craig

Modify Alert Settings | Cancel Alert | Contact LexisNexis

********** Email Completed **********
Time of Delivery: Wednesday, August 05, 2009 06:22:29
Email Number: 1862:170674052
****