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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: DI NARDO et. al. v. SIMCOE CONDOMINIUM CORPORATION No. 92

BEFORE: The Honourable Mr. Justice C. Boswell

COUNSEL: Mr. John Whitehead for the Applicants

Mr. Thomas P. Merrifield for the Respondent

E N D O R S E M E N T

Introduction:

[1] The Respondent is a development of 32 condominium townhomes located in Collingwood, Ontario. The Applicants own two abutting units in the development. Their units are side by each in a block of four. In front of their block of units was a small grassy area which abutted a parking lot. Both the lawn and parking lot were common elements of the condominium.

[2] In 2007 the Respondent's Board of Directors (the "Board") caused a walkway to be constructed to service the parking lot. The walkway crosses in front of the Applicants' units. Now there is a smaller grassy area in front of their units, then a three foot wide stone walkway, then the paved parking lot.

[3] The Applicants want the walkway removed. They say it interferes with their privacy. More importantly, they say that its installation was not required and that its construction was a result of harsh, vindictive or oppressive motivations. The Applicants seek an Order pursuant to the oppression remedy provisions of the *Condominium Act,* R.S.O. 1990. c. C.19 requiring that the Respondent remove the walkway.

The Issues:

[4] The Application is brought pursuant to s. 135 of the *Condominium Act.* Section 135(2) specifically provides as follows:

> **135(2)** On an application, if the court determines that the conduct of…a corporation…is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant, it may make an order to rectify the matter.

[5] The fundamental issue in this application is whether the installation of the walkway in front of the Applicants' units constitutes conduct that was oppressive or unfairly prejudicial to the Applicants.

Factual Background:

[6] The Respondent was registered as a condominium corporation about twenty years ago. The development consists of 32 townhome units arranged in blocks of three or four units each. The blocks of units are loosely arranged in an L-shape. Paved parking lots servicing each block of units are located roughly in front of each block.

[7] The Applicants own units 583 and 584. The units abut one another in a block of four units, numbered 583-586. The Applicants' units are assigned designated parking spots numbered 583 and 584 in the parking lot located immediately in front of their units. Spots 583 and 584 are the closest two spots to their block of units. A sketch of the relevant units and the parking area is attached hereto as Appendix "A".

[8] This application focuses on decisions made by the Board relating to pedestrian access to the parking lot. The lot is a common parking area for the units in the Applicants' block as well as another adjacent block of units, numbered 579-582 ("Block 579"). The Applicants' block of units is quite close to the parking lot and each unit has a short front walkway that leads to the lot. Block 579 is a little farther away. The front walkways of the units in Block 579 all collect into a common walkway that leads to the parking lot. As a result of a poor initial layout, the walkway discharged directly into the top corner of parking spot 583. Whenever a car was parked in spot 583, the tenants and guests of Block 579 had to negotiate their way around the car, in rather tight circumstances, to get to and from the parking lot.

[9] The Respondent's Board of Directors considered the access route between Block 579 and the parking lot to be unsafe. They attempted to find ways to alter the configuration of the lot so as to ensure that the access route did not empty directly into spot 583.

[10] In 2004 or early 2005, the Board eliminated spot 583. They marked the spot as a no parking zone. They renumbered spot 584 (directly across the lot) to 583 and spot 584 was moved to another parking lot. The Applicants were unhappy and complained to the Board. The Board agreed that it had been unreasonable of them to unilaterally move spot 584 to another lot and they reinstated the original configuration of parking spots.

[11] The following year, the Board again attempted to reconfigure the subject parking lot. They again eliminated spot 583 and marked it as a no parking zone. They renumbered the balance of spots in the lot, so that spots 583 and 584 were now immediately beside one another instead of across the lot from one another. The renumbering ultimately resulted in spot 586 being relegated to another lot – something that was apparently done with the consent or acquiescence of the owner of unit 586. The Applicants continued to have two lots in the parking lot, side by side. The reconfiguration meant they would have to walk several more steps to reach their second parking spot.

[12] The Applicants were again upset by the Board's unilateral changes to the parking lot. They consulted counsel and threatened legal action. It was determined at this time that the Respondent's registered Declaration provided for exclusive use of the dedicated parking spots and it would be necessary to register a revised plan before any non-consensual changes could be made to the parking spots.

[13] In early 2007, the Respondent's Board advised the Applicants' counsel that they would reinstate the original parking configuration, but that doing so may require a re-alignment of the walkways servicing the parking lot. In fact, later that year, the Board installed the walkway referred to above. The new walkway is an extension of the access route from Block 579 to the parking area. Instead of discharging into parking spot 583, the walkway now extends across the common area in front of the Applicants' units and discharges into the central area of the parking lot.

Positions of the Parties:

[14] The Respondents say that they were required to address the parking lot issues for safety reasons. They take the position that they attempted to reasonably reconfigure the parking area, but were unable to satisfy the Applicants. They argue that the walkway they installed was really their only viable alternative.

[15] The Applicants say there really were no legitimate safety issues. They argue that the Respondent acted unilaterally and without lawful authority when it tried to move their parking spots. They say that when they complained, they set in motion a course of conduct on the part of the Respondents to essentially get back at them and that the installation of the walkway was for vindictive purposes and not for legitimate safety reasons.

[16] In support of their position, the Applicants point to a similar issue that arose in another parking area within the condominium project. In that case, the entire parking lot was shifted towards a grassy peninsula, allowing a walkway to be created without reducing the common areas in front of any units. They say that the same solution was available here – that the whole parking lot could have been shifted several feet away from the Applicants' block of units, allowing the installation of the walkway without

encroaching on the common area in front of their units. They say that the Board either didn't consider this possibility or otherwise rejected it out of hand. In the result, they claim they were discriminated against and were not treated fairly or equally by the Board.

Analysis:

[17] The Applicants rely on the oppression remedy provisions of the *Condominium Act*. Counsel for both parties indicated that they were unable to locate any reported decisions on the interpretation of those provisions. The Applicants' counsel referred me instead to decisions interpreting the oppression remedy provisions found in the *Canada Business Corporations Act*, R.S.C. 1985 c. C-44 ("*CBCA*"). Those provisions are found in s. 241(2) of the *CBCA*, which reads as follows:

> **241(2)** If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,
>
> (*a*) any act or omission of the corporation or any of its affiliates effects a result…
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

[18] The language of the *CBCA* is sufficiently similar to that found in the *Condominium Act* that the case law provided by the Applicants is instructive.

"Oppressive Conduct"

[19] In *Brant Investments Ltd. v. KeepRite Inc.*. (1991), 3 O.R. (3d) 289, McKinlay J.A., for the Ontario Court of Appeal, followed English authorities and held that "oppressive conduct" is that which is "burdensome, harsh and wrongful."

[20] In my view, the Applicants have not been the victims of oppressive conduct on the part of the Respondent. I make this finding for the following reasons:

(i) I find that the Respondent's actions in addressing the issue of access to the subject parking lot were legitimately premised on safety issues. The fact that other owners and their guests, particularly from units 579-582 had to carefully walk around the Applicants' vehicle (as admitted by Mr. Di Nardo) to get to the parking lot, created a hazardous situation, particularly in winter months. Moreover, whenever a vehicle was parked in spot 583, there was no reasonable access to units 579-582 for police, ambulance or fire personnel in the event of an emergency;

(ii) The initial actions of the Respondent in moving spot 584 to another lot were unreasonable and that is admitted by the Respondent. When concerns were raised by the Applicants, they reinstated the original configuration of the parking lot;

(iii) The subsequent reconfiguration – so that spots 583 and 584 were beside one another – could hardly be called oppressive or unreasonable. While the Respondent's actions may technically have been wrongful – in that they did not have lawful authority to unilaterally reconfigure the parking lot – they certainly were not harsh or burdensome. The effect would have been to resolve the issue of access to the lot through the former spot 583 with very minimal prejudice to the Applicants. They would only have had to walk a few more feet to reach the reconfigured spot 584. While the Applicants were lawfully entitled to stand on their rights, their decision to not co-operate with the reconfiguration left the Board with few options;

(iv) The Board considered the Applicants' proposal to move the whole parking lot and in doing so, to encroach on a nearby grassy peninsula. The Minutes of a Board meeting on August 18, 2006 reflect that the Board carefully considered the suggestion and even attended at the parking lot in question to view the area. The Board further retained an engineering firm to provide an opinion on ways in which the access issue could be resolved. In the end, the Board determined that construction of the walkway was the best option. Their decision was not in any way arbitrary, nor discriminatory. It took into account the interests of all affected unit owners;

[21] The ultimate determination to install a walkway across the common area in front of the Applicants' units may not have been the only solution to the problem, but it was, in my view, a reasonable solution, made *bona fide* by the Board in the discharge of its duty to manage the common elements of the corporation for the benefit of all owners and occupiers.

"Unfairly Prejudicial Conduct"

[22] In considering whether a party's conduct is "unfairly prejudicial", McKinlay J.A. in *Brant Investments Ltd. v. KeepRite Inc., supra,* held that it is sufficient if the conduct prejudices rights or disregards interests unfairly. The unfairness of the conduct is the central issue to be determined on the facts of each case. It is not necessary that there be an element of *male fides*.

[23] The alleged prejudice in this case relates to two issues. First, that the walkway impacts on the privacy of the Applicants' units and, second, that it causes the Applicants to have to negotiate a 10 inch step up at times to get across the walkway.

[24] In the case of the privacy issue there was almost no evidence presented as to how the Applicants' privacy has been affected. Apart from the fact that the walkway eats into the first three feet of what used to be grass at the front of their unit, there was no evidence

about increased traffic along that area of the common elements, nor any actual interference with the Applicants' privacy.

[25] With respect to the alleged step up, the evidence in the record does not satisfy me that there is any need for the Applicants to negotiate a 10 inch step up. The walkway from their unit is entirely flush with the new walkway.

[26] In my view, any prejudice to the Applicants created by the installation of the walkway is slight and does not rise to the level of unfair conduct on the part of the Respondent. The Applicants' interests were not disregarded. Rather, they were considered in the context of the interests of all affected unit owners.

[27] In the result, the Application is dismissed. If the parties are unable to agree on the issue of costs, they may address the matter in writing, with submissions not to exceed 2 pages in length. The Applicants' submissions should be served and filed by April 29, 2008 and the Respondent's submissions within 7 days thereafter. The Applicants shall have a further seven days to serve and file any reply submissions.

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Boswell J.

DATE: April 16, 2009.