CITATION: Nipissing Condominium Corporation No. 4 v. Simard, 2009 ONCA 743
DATE: 20091028
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COURT OF APPEAL FOR ONTARIO

Doherty, Gillese and Epstein JJ.A.

BETWEEN

Nipissing Condominium Corporation No. 4

Applicant (Respondent in Appeal)

and

Martin Eugene Simard, Kyle Gibson, Denise Crane, Wendel Simpson, Amanda Moore, Jake Sweeney, Emily Brown, Lauren Finnie, Sara Pickles, Meagan Lance, Natalie Stacy, Jennifer Neilson, Megan Miles, Maenda Fortier, Gareth Preston, and David Lacosse

Respondents (Appellant in Appeal)

Mark H. Arnold, for the appellant Martin Simard

Sonja Hodis, for the respondent

Heard: October 19, 2009

On appeal from the judgment of Justice P. H. Howden of the Superior Court of Justice dated April 8, 2009.

ENDORSEMENT

[1] The appellant brought a motion under rule 21.01(3)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, for an order dismissing or staying the respondent's application on the ground that sections 132 and 134 of the *Condominium Act 1998*, S.O. 1998, c.19, mandates that the dispute be resolved through mediation and arbitration and therefore the Superior Court has no jurisdiction over the matter. The appellant appeals from the dismissal of its motion.

[2] What connects these parties is a condominium development in which the appellant, Martin Simard, is the owner of three units: the other respondents in this proceeding (not participating in this appeal) are tenants who live in Simard's units. The respondent is the board of directors of the condominium corporation.

[3] The dispute centres on Simard's having rented his units to students. The respondent contends that as a result, Simard is in violation of Part III, s. 5 of the declaration of the condominium corporation which provides that "each unit shall be occupied only as a one family residence."

[4] The respondent brought this application against Simard for a compliance order under s. 134 of the *Act* requiring him to comply with ss. 83 and 119. As against the tenants, the respondent seeks an order terminating their tenancies claiming that the tenants are in breach of the occupancy restriction in the declaration.

[5] Rule 21.01(3)(a), under which the respondents brought the motion, provides that "[a] defendant may move to have an action stayed or dismissed on the ground that . . . the court has no jurisdiction over the subject matter of the action".

[6] The essence of the appellant's argument on the motion was that s. 132 of the *Act* requires mediation and arbitration when, as here, there is a disagreement with respect to the declaration. The appellant contends that the motion judge erred in not applying the clear wording of the legislation and consistent jurisprudence that s. 132(4) applies to the dispute between the parties and that the respondent is therefore precluded from making an application to the Superior Court.

[7] The motion judge's reasons for dismissing the motion are brief:

> This motion under rule 21 is dismissed on the following grounds:
>
> (i) this case involves intertwined issues under the Condominium Act and the Condominium Declaration that go beyond the owners of the units and the Corporation, who are the only parties referred to in the requirement of mediation-arbitration in s.132(4) and (1); and
>
> (ii) there is no appellant authority accepting Justice Juriansz's "generous interpretation" of "disagreement between the parties" as including the validity and interpretation as a matter of law. In my view, this application is proceeding to a hearing at this stage without significant factual disputes and the sole issue comes down – not to factual and behavioural issues, perception of those issues by the parties and the meaning of rules of a Declaration provision (such as

> pet rules or unreasonable noise) as in the cases cited involving only the unit owner and the corporation – but to the validity in law of the family provision in the Declaration as well as whether reasonable steps have been taken by the Respondent unit owner. Even the latter must give way to the prime issue of validity in law. Unlike *Peng*, this is not, as far as I can see, a case involving issues of conduct and use and gradations thereof, but to whether a unit owner is bound by what he alleges to be a provision in violation of the Ontario Human Rights Code and is discriminatory.
>
> Finally, all the issues in this case should be determined on the whole record in the Application proceeding and not on a summary motion like this involving sectioning off the unit owner and proceeding only against the respondent tenants. [Emphasis added.]

[8] The parties agree that section 132(2) of the *Act* makes it clear that the mandatory mediation and arbitration provision do not apply to disagreements between the corporation and tenants or occupiers. Consequently, if the appellant's motion succeeded, the proceedings would have to be split. The respondent's claims against the appellant would proceed by way of mediation and arbitration. The respondent's claims against the tenants would continue on by way of this application.

[9] Section 7(5) of the *Arbitration Act, 1991*, S.O. 1991, c.17, states as follows:

> (5) The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that,

> (a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and
>
> (b) it is reasonable to separate the matters dealt with in the agreement from the other matters.

Charron J.A. described this subsection in *Brown v. Murphy* (2002), 59 O.R. (3d) 404 at para. 12, as granting a discretion to a trial judge to refuse a stay of proceedings where it is unreasonable to separate the matters subject to arbitration from the other matters that were part of the claim and were not subject to arbitration.

[10] Section 138 of the *Courts of Justice Act*, R.S.O. 1990, c. C.34 provides that multiplicity of proceedings should be avoided. Rule 1.04 sets out the objective of securing the just, most expeditious and least expensive determination of the matter on its merits. Proceeding against the appellant in one forum and the tenants in another would arguably run contrary to both provisions.

[11] The arbitration provisions do not apply to all of the matters raised in the application. All of the matters can, however, be addressed by way of an application. The motion judge had to decide whether it was appropriate to proceed in one or two different forums. His decision to avoid "sectioning off" the two main aspects of the claim and to proceed in one forum was within his discretion. We see no reason to interfere.

[12] It is unnecessary to express any view concerning the other divide between the parties, namely whether this dispute falls under ss. 132 and 134 and is therefore subject to the statutory obligation of mediation and arbitration.

[13] For these reasons, we would dismiss this appeal with costs fixed in the amount of $5,000 including disbursements and Goods and Services Tax.

"Doherty J.A."
"E.E. Gillese J.A."
"G.J. Epstein J.A."