CITATION: 1420041 Ontario Inc. v. 1 King West Inc., 2010 ONSC 6671
DIVISIONAL COURT FILE NO.: 126/10
(Court File No. 05-CV-300372PD3)
DATE: 20101209

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

MOLLOY, SACHS and HERMAN JJ.

BETWEEN:	
1420041 ONTARIO INC. Plaintiff (Respondent in Appeal)	*Paul D. Guy and Scott McGrath*, for the Plaintiff/Respondent
– and –	
1 KING WEST INC. Defendant (Appellant in Appeal)	*Patricia M. Conway*, for the Defendant/Appellant
	HEARD at Toronto: November 9, 2010

H. SACHS J.

OVERVIEW

[1] This appeal raises the question of the right of an individual condominium unit owner to maintain an action for deficiencies in the construction of the common elements and of their individual units, particularly where the condominium corporation has also commenced an action for similar relief.

[2] The Plaintiff purchased a number of condominium units from the Defendant. On November 15, 2005, the Plaintiff commenced an action against the Defendant for alleged deficient workmanship and materials in the finishes of the units (the "Individual Action"). Many of the Plaintiff's complaints relate to alleged deficiencies in the HVAC and exterior doors and windows. Pursuant to the condominium corporation's Declaration, the exterior doors and windows in the building and the building's HVAC are not owned by the unit owners whose units

they service. They are part of the condominium corporation's common elements and are owned jointly by all unit owners as tenants in common.

[3] On March 19, 2007, the condominium corporation commenced an action claiming damages against the Defendant and other defendants for alleged construction deficiencies in individual units and of the common elements, based on an alleged breach of the warranty in the agreements of purchase and sale entered into by all purchasers (the "Condo Action"). The condominium corporation commenced the Condo Action on its own behalf and on behalf of all unit owners, including the Plaintiff. The condominium corporation advised the unit owners that they could opt out of the Condo Action as it related to the claims for alleged construction deficiencies in respect of their individual units. The Plaintiff did not opt of the Condo Action.

[4] The Defendant moved before Stewart J. for an order striking or staying the Individual Action on two grounds. First, as that action encompassed a claim for damages in relation to the common elements, the Plaintiff had no legal capacity to pursue the action. Only the condominium corporation could pursue such an action. Second, as the claim requested damages in relation to the Plaintiff's individual units, the action duplicated the Condo Action and should be stayed until such time as the Plaintiff opts out of the Condo Action.

[5] The motion judge dismissed the Defendant's motion and the Defendant appealed that decision. Leave to appeal was granted by Greer J. For the reasons that follow, I would allow the appeal and strike the Individual Action's claims in relation to the common elements on the ground that the Plaintiff has no legal capacity to assert such a claim. I would also allow the appeal by staying the Individual Action's claim for alleged construction deficiencies to the Plaintiff's own units, with leave to lift the stay if the Plaintiff elects to opt out of the Condo Action.

FACTUAL BACKGROUND

[6] In 2000 and 2001, the Plaintiff agreed to purchase from the Defendant eight condominium units in a high-rise condominium development located at 1 King Street West in downtown Toronto. Four units were to be finished and furnished in accordance with the requirements of the Rental Manager for participation in the short-term rental programme offered by the condominium. The Plaintiff intended to locate its head office in the building and alleges that the Defendant agreed to construct the other four suites with custom finishes to suit that purpose.

[7] The building became available for occupancy in the fall of 2005. A disagreement arose between the parties about the adequacy of the units that the Plaintiff had agreed to purchase. The Plaintiff commenced its action against the Defendant in November of 2005. In that action, the Plaintiff seeks damages and an order requiring the Defendant to specifically perform the agreement of purchase and sale, including the design and finishes that it says the Defendant promised.

[8] Shortly after the Individual Action was commenced, the parties agreed to close the transaction, except in relation to one unit, on terms that 15% of the purchase price would be held

to the credit of the Plaintiff's action. Thereafter, the Plaintiff claimed to hold back 30% of the purchase price for the one remaining unit. The Defendant took this as a breach of the agreement in relation to that unit, entitling it to terminate the agreement and forfeit the Plaintiff's deposit for that unit. The unit was subsequently resold. Amended pleadings were served and filed to address these additional issues.

[9] In March of 2007, Toronto Standard Condominium Corporation No. 1703 ("TSCC 1703") commenced the Condo Action on behalf of itself and the individual unit owners, including the Plaintiff. In that action, TSCC 1703 claims damages in relation to the whole project against various parties including the Defendant, the construction manager, the general contractor, the co-developers, the architects, the structural engineer, the mechanical engineer, the electrical engineer, and the City of Toronto.

[10] Prior to issuing the claim, and in compliance with the requirements of the *Condominium Act*, 1998, S.O. 1998, c. 19 ("the Act"), TSCC 1703 issued two separate notices to all unit owners advising them of its intention to sue on its own behalf and on their behalf in respect of construction deficiencies.

[11] The first notice informed unit owners of TSCC 1703's intention to sue in respect of the alleged deficiencies in respect of the common elements. The second advised unit owners that TSCC 1703 intended to bring a claim on their behalf claiming damages for alleged construction deficiencies in their individual units. The second notice advised unit owners that they could opt out of this aspect of the Condo Action if they wished to pursue their own action for damages to their units.

[12] The parties have conducted documentary discovery in the Individual Action and the Defendant has examined the Plaintiff for discovery. During that examination it became clear that a large portion of the claim in the Individual Action relates to alleged deficiencies in the HVAC and the exterior doors and windows adjacent to the Plaintiff's units. It is agreed that these complaints are in relation to the common elements.

[13] The Defendant then brought the motion that is the subject of this appeal.

THE LEGISLATION

[14] Section 23(1) of the Act provides as follows:

> 23(1) Subject to subsection (2), in addition to any other remedies that a corporation may have, a corporation may, on its own behalf and on behalf of an owner,
>
> (a) commence, maintain or settle an action for damages and costs in respect of any damage to common elements, the assets of the corporation or individual units; and

(b) commence, maintain or settle an action with respect to a contract involving the common elements or a unit, even though the corporation was not a party to the contract in respect of which the action is brought.

[15] Subsection (2) of section 23 states that before commencing an action under subsection (1) the condominium corporation must, except in certain limited circumstances, give notice to all the unit owners.

THE MOTION JUDGE'S DECISION

[16] The motion judge first addressed the issue of whether the Plaintiff has the legal capacity to raise claims with respect to the common elements. She noted that section 23(1) provides that a condominium corporation "may" commence an action with respect to the common elements. In her view, the language of this section is permissive, not mandatory. Thus, section 23(1) grants a condominium corporation the ability to commence an action for damages in relation to the common elements; it does not preclude an individual unit owner from doing so as well. Therefore, she found that the Plaintiff did have the legal capacity to pursue the common elements claims in the Individual Action.

[17] In arriving at her decision on this issue, the motion judge referred to two cases from outside of Ontario. In the first, *Hamilton v. Ball*, [2006] B.C.J. No. 1098, the British Columbia Court of Appeal was dealing with a section of their condominium legislation that states that a "strata corporation [the British Columbia equivalent of a condominium corporation] may sue as representative of all owners, except any who are being sued, about any matter affecting the strata corporation, including ... the common property or common assets." The British Columbia Court of Appeal decided that this permissive language did not preclude an individual owner from suing directly for injury or damage to their interests in the common property.

[18] In the second case cited by the motion judge, *Kelly v. Reardon*, [2004] N.J. No. 30 (Nfld. Prov. Ct. (Sm. Cl. Div.)), the court was dealing with the condominium legislation applicable in Newfoundland and Labrador. In contrast to the arguably permissive language employed in the Ontario and British Columbia legislation, the governing legislation in Newfoundland and Labrador provides that "[a]n action with respect to, arising from, or relating to a common element **shall** be brought by or against the corporation in its own name" [Emphasis added]. Given this mandatory language, the court found that an individual unit owner has no legal capacity to sue in relation to the common elements.

[19] After finding that the Plaintiff had legal capacity to sue for damages to the common elements, the motion judge went on to examine whether the Individual Action should be stayed on the ground that there was another proceeding pending in Ontario between the same parties in respect of the same subject matter. The motion judge found that this was not one of the clearest of cases where a stay should be granted.

[20] In her view, the two actions did not meet the first criterion for a stay – namely, that the actions involve the same parties and same subject matter. While there is some degree of overlap between the Individual Action and the Condo Action, the two actions involve different parties

and encompassed different subject matters. In particular, in the Condo Action, TSCC 1703 is the Plaintiff and the Defendant is just one of nine defendants. Further, the Condo Action raises issues such as an alleged deterioration to the building foundation that are not part of the Individual Action. In addition, the Individual Action makes factual and legal allegations that the Condo Action does not – for example, the existence of a collateral agreement with respect to the special custom finishes that the Plaintiff requested for its units.

[21] The motion judge also examined the issue of prejudice, including the possibility and effect of inconsistent results, the potential for double recovery and the effect of a possible delay. She found that the Defendant had not satisfied its onus of establishing prejudice beyond mere inconvenience and expense. In her view, the risk of double recovery could be mitigated by raising the recovery in one action as a bar to recovery in the second action, and the risk of inconsistent findings was not large enough to justify a stay. Therefore, she dismissed the Defendant's motion to strike and/or stay.

ISSUES

[22] This appeal raises two issues. First, does the Plaintiff have the capacity to sue in relation to the common elements? Second, where a condominium corporation has commenced an action on behalf of all unit owners claiming to recover damages for unit construction deficiencies, can a unit owner maintain a separate action claiming damages for alleged deficiencies in their unit if he does not opt out of the corporation's action?

STANDARD OF REVIEW

[23] The first issue concerns the proper interpretation of s. 23(1) of the Act. This is a question of law that attracts a standard of correctness (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, at para. 8).

[24] The second issue involves the exercise of the motion judge's discretion. An appellate court will not interfere with a motion judge's exercise of discretion unless that discretion was exercised based on a material error in principle, a significant misapprehension or disregard of evidence, or the decision is clearly wrong. A decision that involves an error in the interpretation or application of the law to found facts is clearly wrong (*GEA Group v. Ventra Group Co.* 2009 ONCA 619, at paras. 58-59).

ANALYSIS

Does the Plaintiff have the legal capacity to assert a claim to recover damages for alleged deficiencies in the common elements?

[25] To arrive at a proper interpretation of s. 23(1) of the Act, the section must be examined in the context of the whole scheme of the Act, with a view to determining the legislature's intention in enacting the section (*Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27, at para. 21).

[26] In the Individual Action, the Plaintiff is suing in relation to the common elements and, more particularly, it is seeking remedies with respect to the portion of those common elements

that are adjacent to its units. In other words, the Plaintiff wishes to have the HVAC system that operates in its units fixed. The Plaintiff also seeks to have the exterior doors and windows in its units repaired and finished in accordance with what it says the agreement was with respect to the construction of those doors and windows. The first question that must be examined, then, is what legal interest does the Plaintiff have in the HVAC system and in the exterior doors and windows that are adjacent to its units?

[27] Section 11 of the Act deals with ownership. It provides as follows:

> 11. (1) Subject to this Act, the declaration and the by-laws, each owner is entitled to exclusive ownership and use of the owner's unit.
>
> (2) The owners are tenants in common of the common elements and an undivided interest in the common elements is appurtenant to each owner's unit.
>
> (3) The proportions of the common interests are those expressed in the declaration.
>
> (4) The ownership of a unit shall not be separated from the ownership of the common interest and an instrument that purports to separate the ownership of a unit from a common interest is void.
>
> (5) Except as provided by this Act, the common elements shall not be partitioned or divided.

[28] Thus, while the Plaintiff is an exclusive owner of the units that they purchased, they are not an exclusive owner of the common elements adjacent to those units. They own a proportionate share of those common elements, along with the other unit holders in the condominium development. Further, their share in those common elements cannot be partitioned or divided. Therefore, the Plaintiff cannot recover what they are seeking in the Individual Action, namely, repair of or damages for the common elements that are directly adjacent to their units. They do not own those doors and windows. They only have an indivisible proportionate share in those and all other doors and windows in the building. In other words, if the Plaintiff has the capacity to sue at all in relation to the common elements, that capacity does not entitle them to have a specific part of those common elements repaired or refinished.

[29] The Act also contains other provisions that speak to what would ordinarily be considered "ownership" rights and responsibilities. Pursuant to sections 89 and 90 of the Act, the condominium corporation has the obligation to maintain and repair damage to the common elements. Furthermore, pursuant to section 97 of the Act, in order to fulfill these obligations, the condominium corporation has the right, without notice to the owners, to make any necessary additions, alterations, improvements or changes to the common elements. Owners, on the other hand, may only make additions, alterations or improvements to the common elements with the approval of the board of the condominium corporation (s. 98 of the Act). Thus, unit owners do not co-own the common elements in a condominium corporation in the same way that co-owners

of real property at common law own property. Their "ownership" rights are creatures of statute and must be understood in the context of the statute as a whole.

[30] Under s. 23(1) of the Act, the condominium corporation has the power to sue in respect of damages to the common elements. Pursuant to s. 23(4), any monies recovered by the corporation when it sues on its own behalf become an asset of the corporation. These provisions are similar to the ones contained in predecessors to the 1998 version of the *Condominium Act*, which have been the subject of judicial interpretation by the Ontario courts.

[31] It is a rule of statutory interpretation that legislation should be interpreted in light of the common law that existed when the legislation was passed. As Ruth Sullivan states in her text *Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008) at 431:

> Although legislation is paramount, it is presumed that legislatures respect the common law. It is also presumed that legislatures do not intend to interfere with common law rights, to oust the jurisdiction of common law courts, or generally to change the policy of the common law. As explained in *Halsbury*, in a formulation adopted by many Canadian courts:
>
> > Except in so far as they are clearly and unambiguously intended to do so, statutes should not be construed so as to make any alteration in the common law or to change any established principle of law (36 Hals., 3rd ed., at 412, para. 625).

[32] In the leading Ontario case on this issue, *Loader et al. v. Rose Park Wellesley Investments Ltd.* (1980), 29 O.R.(2d) 381(H.C.J.), Gray J. dealt with an application to strike a class action on behalf of unit owners against the builders of three condominium buildings. The action was for damages arising out of alleged deficiencies in the construction of the common elements. Section 9(18) of the *Condominium Act*, R.S.O. 1970, c. 77, provided that:

> Any action with respect to the common elements may be brought by the corporation and a judgment for the payment of money in favour of the corporation in such an action is an asset of the corporation.

[33] That legislation, like the present Act, also provided that the assets of the corporation were to be shared in the same proportion as the proportions of the common interests provided for in the declaration. This, Gray J. found, provided "a method by which an action may be brought in respect of the common elements and the scheme of distribution is provided to benefit all the unit owners according to their interest in the common elements" (at 386).

[34] Gray J. concluded that s. 9(18) of the *Condominium Act* precluded the right of unit owners to bring a class action for themselves and other unit owners in respect of the common elements. In his view, the only proper party to bring such an action was the condominium corporation. If not, the possibility for double recovery was real. The unit owners who are part of the class could recover damages for the common elements, which would be paid to them personally. By virtue of the *Condominium Act*, if the condominium corporation sues on its own

behalf for damages to the common elements, "the fruits of litigation will become an asset of the corporation and will be distributed to the unit owners according to their share in the common elements. Under the Act, benefits of such litigation cannot be restricted to those who have not benefited from the class action" (at 390).

[35] The same reality exists under the current Act. Pursuant to s. 23(4), any monies obtained by TSCC 1703 in the Condo Action would be an asset of the corporation. By virtue of s. 18(2), unit "owners share the assets of the corporation in the same proportions as the proportions of their common interests in accordance with the Act ..." Thus, contrary to the finding of the motion judge, if the Plaintiff were to recover damages for their common elements claim in the Individual Action, it would also be entitled to a share of any damages recovered by the TSCC 1703 in the Condo Action, as those damages would become an asset of the corporation. The Act contains no exception for individuals who have already somehow recovered damages in their own actions for losses in relation to the common elements.

[36] In coming to the conclusion he did, Gray J. also focused on the fact that the class action as constituted did not and could not include all the unit owners of the condominium corporation. It only included those owners who had purchased new units and had not sold or otherwise disposed of their units. Thus, if the class action was allowed to proceed, all of the parties interested in the matter before the court would not be present. Gray J. pointed out that class actions were developed as a means to "permit a more convenient way of bringing all parties having the same interest before the Court at the same time" (at 391). When this happens, "a final end might be made of the controversy" (at 390-391). In the case before him, the only way to bring all of the parties before the court at the same time was through an action by the condominium corporation. This, according to Gray J., was the purpose behind s. 9(18) of the *Condominium Act*. In effect, by allowing the condominium corporation to sue, the legislature provided a means "to recover damages with respect to the common elements for the benefit of *all* members" (at 391).

[37] To allow individuals to sue in respect of the common elements would have the effect of allowing those individuals to collect damages for something that they cannot repair or change without the condominium corporation's permission. It would also promote a multiplicity of proceedings, which is antithetical to one of the primary objectives of the administration of justice. That is why the legislature enacted s. 23(1) and its predecessors. Given the structure of the Act and the limited "ownership" rights that unit owners have with respect to the common elements, it is the mechanism by which unit owners can bring their claims with respect to the common elements. It is a mechanism that allows all the claims to be litigated at once, thus achieving finality, which is another important end of the administration of justice. Finally, it allows all of the parties who should benefit from the litigation to benefit from the litigation. As put by Gray J. in *Loader, supra,* at 389:

> It is clear that the *Condominium Act* sets up a statutory scheme by which the fruits of any litigation in respect of the common elements will be equitably distributed amongst all unit owners. Furthermore, the condominium corporation is created to represent the best interests of the unit owners and since it is a creature created to

> represent their interests and is controlled by them, *it seems to me that it is the only proper party to bring such an action.* [Emphasis added.]

[38] In her text, *Condominium Law and Administration*, 2nd ed. loose leaf (Toronto: Carswell, 1989) at 2-7, Audrey Loeb confirms that unit owners cannot bring individual actions in respect of the common elements:

> Since damage to common elements affects all unit owners, the courts have held that the condominium corporation is the appropriate plaintiff. (Individual unit owners could, of course, sue for damages for their own units.)

[39] In agreeing with the conclusion that the condominium corporation is the only appropriate plaintiff in relation to an action concerning the common elements, it is important to remember that an individual unit owner is not without a remedy if the corporation refuses to bring such an action. He or she has a claim against the condominium corporation, the entity charged under the Act with the responsibility for maintaining and repairing the common elements.

[40] I agree with the Plaintiff that the view that I have taken with respect to s. 23(1) differs from the view taken by the British Columbia Court of Appeal with respect to their legislation. However, their legislation is not the same as our legislation. Among other things, in British Columbia a strata corporation has no capacity to sue in its own name in respect of the common elements. It can only sue on behalf of unit owners. Further, *Hamilton v. Ball, supra*, was decided in the context of a very different set of facts. In that case, individual unit owners were suing members of the "strata" council claiming damages resulting from allegedly improper conduct in repairing common property without the unit owners' approval.

[41] I also agree that the language of the Act is less clearly "mandatory" than the language in the legislation in Newfoundland and Labrador. However, an examination of the legislative scheme as a whole makes it clear that the intention of the legislature in both cases is the same. It is only the condominium corporation that can sue in relation to the common elements. In Ontario, the use of the word "may" is to signal that the condominium corporation has the capacity to sue, but not an obligation to do so.

[42] For these reasons, I find that the Plaintiff does not have the capacity to sue with respect to the common elements. Thus, I would allow the Defendant's appeal on this point and order that, to the extent the claim in the Individual Action relates to the common elements, that claim should be struck.

Should the claims in the Individual Action relating to the Plaintiff's own unit be stayed?

[43] Under Rule 23.01(3)(c), a defendant may move before a judge to have an action stayed on the ground that "another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter." Further, s. 138 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, provides that "As far as possible, multiplicity of legal proceedings shall be avoided."

[44] As noted by the motion judge, the power to order a stay must be exercised sparingly. It is never granted as a matter of course and will only be ordered in the clearest of cases. To get a stay under Rule 23.01(3)(c). the following conditions must be met:

(i) There must be another proceeding pending between the same parties in respect of the same subject matter.

(ii) The Defendant must satisfy the court that continuing the action would work an injustice because it would be oppressive or vexatious to him or her, or would be an abuse of process of the court in some other way. Factors to consider with respect to this aspect of the test are the possibility and effect of different results, the potential for double recovery and the effect of possible delay. If all the Defendant can demonstrate is inconvenience or expense, that is not enough.

(iii) The Defendant must satisfy the court that a stay would not cause an injustice to the Plaintiff: Farris v. *Staubach Ontario Inc.* (2004), 129 A.C.W.S. (3d) 969 (Ont. S.C.), at para. 15.

[45] The motion judge refused to exercise her discretion to grant a stay because, in her view, the first precondition was not satisfied. The parties to the Individual Action and the Condo Action are not the same. While the Defendant is a defendant in both actions, they are the only defendant in the Individual Action and they are one of eight defendants in the Condo Action. Further while both actions contain claims with respect to the Plaintiff's individual units, the claims in the Individual Action are broader than those in the Condo Action.

[46] I agree with this assessment of the two actions. However, in my view, the motion judge erred in her interpretation of the case law when she found that in order to satisfy the first precondition it is necessary to establish that the parties and the subject matter in the two actions are exactly the same. As the Divisional Court noted in *Williams v. 963659 Ontario Ltd.*, [2004] O.J. No. 5789 at para. 30, there are cases where stays have been granted in situations where the parties in one proceeding were both parties in another proceeding and there were issues in dispute in both proceedings that overlapped: see, e.g. *Sportmart, Inc. v. Toronto Hospital Foundation* (1995), 56 A.C.W.S.(3d) 818 (O.C.J. (Gen. Div.)).

[47] In this case, the Plaintiff is clearly a party in the Individual Action. The Plaintiff is also effectively a party in the Condo Action, since TSCC 1703 is suing on behalf of all the unit owners and they are a unit owner who has not opted out of the Condo Action. If they were to opt out of that action, they would no longer be a party to it.

[48] As noted, the Defendant is a party in both actions.

[49] The subject matter of the Individual Action overlaps with the subject matter of the Condo Action. In the Individual Action, the Plaintiff is suing for damages in relation to construction deficiencies in relation to its individual units. In the Condo Action, TSCC 1703 is suing on their behalf for the same thing.

[50] This overlap then raises the real possibility of inconsistent findings and double recovery, both of which are to be avoided, if it is possible to do so without working an injustice on the Plaintiff.

[51] The Defendant is only requesting a stay on the Individual Action that can be lifted if the Plaintiff chooses to opt out of the Condo Action. We were given no reason and I can see no reason why putting the Plaintiff to this choice would cause it to suffer an injustice.

CONCLUSION

[52] For these reasons, I would allow the Defendant's appeal and order that the Individual Action claims in relation to the common elements be struck, and that the remainder of the Individual Action be stayed with leave to lift that stay if and when the Plaintiff exercises its right to opt out of the Condo Action.

[53] The parties have agreed on the appropriate quantum to order by way of costs for both the leave to appeal motion and the appeal, namely, $13,000.00. I therefore order that the Plaintiff is to pay the Defendant its costs fixed in the amount of $13,000.00. With respect to the costs of the motion before Stewart J., she ordered costs to the Plaintiff in the amount of $4,500.00. The parties have agreed that those costs are to be repaid to the Defendant and that the Plaintiff is to pay the Defendant its costs for the motion, fixed in the amount of $4,500.00. It is so ordered.

H. SACHS, J.

I Agree

MOLLOY J.

I Agree

HERMAN J.

Released: December 9th, 2010

CITATION: 1420041 Ontario Inc. v. 1 King West Inc., 2010 ONSC 6671
DIVISIONAL COURT FILE NO.: 126/10
(Court File No. 05-CV-300372PD3)
DATE: 20101209

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

MOLLOY, SACHS and HERMAN JJ.

BETWEEN:

1420041 ONTARIO INC.

Plaintiff (Respondent in Appeal)

– and –

1 KING WEST INC.

Defendant (Appellant in Appeal)

REASONS FOR JUDGMENT

The Court

Released: December 9, 2010