SUPERIOR COURT OF JUSTICE

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Date: February 9, 2010

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FROM: Daisy Ng, Secretary to The Honourable Madam Justice Low

TOTAL PAGES (INCLUDING COVER PAGE): 9

MESSAGE:

Re: MTCC 985 v Vanduzer
Court File No. CV-09-384842

Enclosed is the endorsement regarding the above matter that is released today.

CITATION: MTCC No. 985 v. Vanduzer, 2010 ONSC 900
COURT FILE NO.: CV-09-384842
DATE: 20100209

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 985, Plaintiff

AND:

JOAN ELIZABETH VANDUZER, Respondent

APPLICATION UNDER Sections 19, 98, 119 and 134 of the *Condominium Act*, 1998 and Rules 14.05(3)(d)(g)(h) of the *Rules of Civil Procedure*

BEFORE: Justice Low

COUNSEL: *Jonathan H. Fine* and *Bradley Chaplick*, for the Applicant

Robert Betts, for the Respondent

DATE HEARD: November. 12, 2009

ENDORSEMENT

[1] This application concerns a structure, a gazebo, placed by the respondent on an exclusive use common area of the condominium. The issues raised are whether or not the structure is an alteration, an addition or an improvement under s. 98 of the *Condominium Act, 1998* (The Act) and, if it is not, whether this application should be dismissed or stayed until the parties have pursued mediation and arbitration to completion.

[2] The condominium is located at 77 Avenue Road in Toronto. The respondent is the owner and resident of suite 204. Suite 204 gives on to an outdoor terrace measuring 24 x 24 feet. The terrace is a common element of which the respondent has exclusive use.

[3] The respondent indicated to the applicant that she wanted to make changes to improve the appearance of the terrace and between late 2008 and early 2009, the respondent engaged in the process established by the applicant's board of directors of the applicant for seeking approval of the work she wanted to do. The respondent was aware that approval of the board of directors of the applicant was required as a condition of placing structures on the common element. She met

with representatives of the condominium corporation and submitted various plans to the applicant for review and approval.

[4] The respondent wanted to replace lattice work, fencing, trees and planter boxes. She also wanted to erect a gazebo and a water fountain.

[5] A course of communications ensued in which the applicant raised the question of the attachment plan for the proposed gazebo structure. The respondent took the position that attachment to the surface of the terrace would not be necessary as the weight of the structure alone would hold it. The applicant indicated that would not likely approve the gazebo without an attachment plan and the board of directors of the applicant formed the view that for approval, the structure would have to be attached. The board was concerned that the height, weight and mass were too great for stability and that it represented a liability that the condominium corporation could not accept.

[6] In April 2009, the applicant approved, on the condition that the respondent enter into an agreement with the corporation, certain of the items submitted by the respondent. It did not approve the gazebo which had been removed from the respondent's proposal. It also did not approve the installation of a water fountain as there had been no proposal submitted for one.

[7] Despite absence of approval by the applicant, the respondent caused the gazebo to be erected in May 2009.

[8] The gazebo is described by the manufacturer as an "open top 11' D x 11.5' T Pavilion". It is made of steel and is further described: "[t]his unique open top pergola-style design will become a distinctive and tasteful addition to your backyard or garden. Manufactured with durable all-steel construction, the vaulted doorways provide easy access from all 8 sides. The leaf-inspired scrollwork provides the minute details needed to fully complement your dining set, deep seating set or outdoor fire pit." Exhibit E to the affidavit of the respondent dated October 1, 2009 shows that she has placed a dining set consisting of a table and four chairs within the gazebo.

[9] The gazebo is intended to be attached to the ground surface upon which it is built and the manufacturer provides a kit for attachment of the structure to concrete, wood or earth. The respondent caused the gazebo to be erected but not to be attached to the ground of the terrace. Instead, she has the footings of the structure weighted down with flower planters.

[10] On May 14, 2009, the applicant's property manager, Nataliya Lysenko, wrote to the respondent as follows:

> I received your letter dated May 14, 2009 regarding the installation of the gazebo without Board of Directors approval. Please be informed that under no circumstances can the gazebo be treated as a furnishing. The Board of Directors cannot allow this structure to stand unattached as it is a liability to the Corporation. Therefore, the gazebo must be removed immediately.

[11] The respondent did not remove the gazebo. The applicant sought an inspection of the terrace under s. 19 of the Act and the respondent refused to permit entry into her unit to obtain access for inspection.

[12] The applicant indicated to the respondent that there would be no approval of the gazebo in the absence of execution of an agreement described in s. 98 of the Act and registration of same against her unit. I find that the respondent indicated that she would not sign such an agreement. As a result no draft was drawn up by the applicant until after cross-examinations had taken place. It was on the cross-examination that the respondent expressed a willingness to execute an agreement. A draft was prepared by the applicant's solicitors and presented to the respondent in October 2009. The respondent is not satisfied with the draft and is not prepared to execute it.

[13] The applicant brought this application to obtain compliance with s. 19 of the Act which provides:

> On giving reasonable notice, the corporation or a person authorized by the corporation may enter a unit or a part of the common elements of which an owner has exclusive use at any reasonable time to perform the objects and duties of the corporation or to exercise the powers of the corporation.

[14] Section 17of the Act provides:

> (1) The objects of the condominium corporation are to manage the property and the assets, if any, of the corporation on behalf of the owners.
>
> (2) The corporation has a duty to control, manage and administer the common elements and the assets of the corporation.
>
> (3) The corporation has a duty to take all reasonable steps to ensure that the owners, the occupiers of units, the lessees of the common elements and the agents and employees of the corporation comply with this Act, the declaration, the by-laws and the rules.

[15] By the time the applicant commenced this application, it had information that the respondent had erected a gazebo without the approval of the board of directors, had done so without attaching the structure to the ground, and had refused to grant entry to the applicant under s. 19 to perform an inspection.

[16] There is no requirement for mediation or arbitration as a condition precedent for an application to court to enforce the Act and I find that this application was reasonably and properly brought. At the same time, the applicant held the view that the respondent was in breach of s. 98 of the Act which provides:

> (1) An owner may make an addition, alteration or improvement to the common elements that is not contrary to this Act or the declaration if,
>
> (a) the board, by resolution, has approved the proposed addition, alteration or improvement;

(b) the owner and the corporation have entered into an agreement that,

(i) allocates the cost of the proposed addition, alteration or improvement between the corporation and the owner,

(ii) sets out the respective duties and responsibilities, including the responsibilities for the cost of repair after damage, maintenance and insurance, of the corporation and the owner with respect to the proposed addition, alteration or improvement, and

(iii) sets out the other matters that the regulations made under this Act require;

(c) subject to subsection (2), the requirements of section 97 have been met in cases where that section would apply if the proposed addition, alteration or improvement were done by the corporation; and

(d) the corporation has included a copy of the agreement described in clause (b) in the notice that the corporation is required to send to the owners.

No notice or approval

(2) Clauses (1) (c) and (d) do not apply if the proposed addition, alteration or improvement relates to a part of the common elements of which the owner has exclusive use and if the board is satisfied on the evidence that it may require that the proposed addition, alteration or improvement,

(a) will not have an adverse effect on units owned by other owners;

(b) will not give rise to any expense to the corporation;

(c) will not detract from the appearance of buildings on the property;

(d) will not affect the structural integrity of buildings on the property according to a certificate of an engineer, if the proposed addition, alteration or improvement involves a change to the structure of the buildings; and

(e) will not contravene the declaration or any prescribed requirements.

When agreement effective

(3) An agreement described in clause (1) (b) does not take effect until,

(a) the conditions set out in clause (1) (a) and subsection (2) have been met or the conditions set out in clauses (1) (a), (c) and (d) have been met; and

(b) the corporation has registered it against the title to the owner's unit.

Lien for default under agreement

(4) The corporation may add the costs, charges, interest and expenses resulting from an owner's failure to comply with an agreement to the common expenses payable for the owner's unit and may specify a time for payment by the owner.

Agreement binds unit

(5) An agreement binds the owner's unit and is enforceable against the owner's successors and assigns.

[17] At the date of the hearing of this application on November 12, 2009, some of the relief sought in the application had become moot. Following the commencement of these proceedings, the respondent complied with s. 19 by granting entry to the applicant through her unit to inspect the terrace. She has also removed the water fountain for which she never sought approval. This was done on the eve of an earlier return date of the application.

[18] This application now centres on the gazebo.

[19] In my view, the gazebo is an addition and is a structure which falls under s. 98 of the Act requiring approval by the Board and an agreement registered on title.

[20] As noted in *Wentworth Condominium Corporation No. 198 v. McMahon*, [2009] O.J. No. 5298 (C.A.) at para. 22 "[a]n addition builds on or supplements what is already there."

[21] The definition of a gazebo as found in the Shorter Oxford English Dictionary, 2 vols. (Oxford Clarendon Press, 1993) is "1. A building or structure (as a turret, lantern, summer-house etc.) which commands a view. 2. A projecting window or balcony."

[22] The manufacturer of the structure termed it a "pavilion" which is defined in the same lexicon as, *inter alia*, "an ornamental building or summer-house, especially one in a park or large garden or at a resort". As quoted above, the manufacturer intends or contemplates that the structure is one in which furniture may be placed and into which a person or persons may enter.

[23] I find that if erected in accordance with the manufacturer's instructions and as intended, the gazebo or pavilion is attached to the terrace flooring. The fact that the respondent has chosen to erect the structure in a way that is not in accordance with the manufacturer's instructions and, arguably in a manner which could reasonably be seen to create risk, does not change the nature of the structure. The respondent relies on information she has received that if the gazebo is erected in a closed balcony, it need not be attached. This, in my view, is of no assistance as the terrace is not an enclosed balcony. It is open to the elements.

[24] It is submitted on behalf of the respondent that the applicant has an onus to show that the structure is unsafe or that it poses a risk both in relation to the applicant's position that respondent has breached s. 98 of the Act and in relation to the applicant's position that the respondent has breached the declaration.

[25] I do not accept that submission. Under the predecessor legislation, there was no right given to unit owners to make alterations, additions or improvements to common elements. The Act loosened the prohibition by allowing them on the conditions set forth in s. 98 of the Act. Under the Act there is still no right vested in an owner of a unit to make alterations, additions or improvements to common elements. There is merely a statutory mechanism whereby an owner may acquire permission to do so from the condominium corporation through compliance with the requirements in s. 98 and at the discretion of the condominium corporation.

[26] There are no statutory criteria limiting the scope of the discretion reposed in condominium boards in assessing a request and either giving or denying approval of proposed alterations, additions or improvements. The basis of a denial could be for reasons of safety concerns, as I find it was here, but they could equally be for aesthetic reasons, or reasons relating to the market value of the property among others.

[27] The board of directors had a safety concern that they articulated to the respondent. A complaint had also been received from a neighbor. There is neither evidence nor suggestion of bad faith and, in my view, it is unnecessary for the applicant to prove that the board of directors was objectively correct in its assessment that the structure posed a liability risk. To the extent that the statute or declaration prohibits the installation of structures and objects that pose a risk, it speaks only to a right conferred upon interested parties to enforce the prohibition, requiring that the thing posing the risk be removed even if the condominium corporation has given prior approval to its installation. The prohibition against the installation of unsafe things is not the statutory equivalent of a permission to install things that are not proved unsafe.

[28] The corporation has a statutory duty to manage the common elements and under s. 26 of the Act, "For the purposes of determining liability resulting from breach of the duties of an occupier of land, the corporation shall be deemed to be the occupier of the common elements and the owners shall be deemed not to be occupiers of the common elements." Under s. 23(6) "[a] judgment for the payment of money against the corporation is also a judgment against each owner at the time of judgment for a portion o f the judgment determined by the proportion specified in the declaration for sharing the common interests." Accordingly, condominium boards of directors have both the obligation and the right to manage common elements including what is placed thereon and the power to manage is not fettered by the statute.

[29] The foregoing is sufficient, in my view, to dispose of the application in favour of the applicant, but the applicant's alternative position would also lead to the same result.

[30] The declaration of the condominium provides, at s. 11(b)(d) and (g), the following:

> (b) The Owner of each residential Unit shall have the exclusive use of any terrace or balcony which is immediately adjacent to his Unit and accessible only from such Unit, as set out in Schedule F, subject to the provisions of the Act, this Declaration, the By-laws of the Corporation and the Rules and subject further to the Corporation's right of access to the exclusive use Common Elements at all reasonable times to perform repairs, additions, alterations or improvements.
>
> ....

(d) No alteration, repair, maintenance, decoration, painting, tiling, screen, awning, shade, hedge or erection of any kind is permitted upon the Common Elements, including any exclusive use Common Element, except:

(i) by the Corporation or with the prior written consent of the Corporation; or

(ii) as permitted by the By-laws or Rules; or

(iii) by an Owner to the extent necessary to carry out his duty to maintain and repair; or

(iv) by an Owner, to the extent necessary to perform any work which such Owner is entitled to perform pursuant to paragraph 10(g), provided that such Owner shall repair any damage to the Common Elements or to any other Unit caused by the performance of such work, and provided that the structural integrity of the Common Elements is not impaired and that such work shall not interfere with or impair any structure of the functioning or operation of any machinery and equipment which is part of the Common Elements.

All work performed shall be carried out in accordance with the provisions of all relevant municipal and other governmental by-laws, rules, regulations or ordinances.

....

(g) No furniture or any other item that may become hazardous to the Buildings or adjacent properties shall be kept or remain upon the Common Elements; including the exclusive use Common Elements.

[31] If the gazebo is neither an alteration, an addition nor an improvement, it is an erection (see also the admission in response to question 205 of the cross-examination of the respondent) and may not be placed on a common element without the applicant's prior written consent. The applicant has no obligation to give consent and, under its powers to manage, has the power to give consent on conditions. The applicant made known to the respondent the conditions under which consent would be given. The respondent was unwilling to comply with the conditions. There was therefore no consent. By erecting the gazebo the respondent breached s. 11(d) of the Declaration.

[32] The respondent argues that the application should be stayed or dismissed if the gazebo is held not to be an alteration, addition or an improvement. Instead, it is argued, the parties should be sent away to pursue mediation under the mediation and arbitration clause deemed under s. 132(4) of the Act to be in every declaration.

[33] In my view, even if the gazebo is not a structure that falls within s. 98 of the Act, the application should not be stayed. As indicated above, the application, as launched, concerned enforcement of s. 19 of the Act as well as s. 98. The issues, including the breach of the

Declaration, have been fully and ably argued and they are indivisible. To require the parties now to step back and pursue mediation and arbitration on a dispute that has already been fully litigated would be greatly wasteful of their resources and would create significant delay. Given the amount of time that has transpired during which the parties could have, had they had the inclination, to negotiate a consensual result, it is reasonable to infer that even if led to water, these parties are not likely to drink. Additional proceedings are not in the interests of either party and, in particular, not in the interests of the unsuccessful party who must ultimately pay costs. Further, the deemed mediation and arbitration clause under s. 132(4) of the Act is not a monolithic bar to a court proceeding and in this I would follow *McKinstry v. York Condominium Corp. No. 472*, [2003] O.J. No. 5006 at paragraphs 19 and 36 to 42.

[34] The application is granted. The respondent is to remove the gazebo from the common elements within thirty days or such longer period of time as the applicant agrees to.

[35] The costs incurred by the applicant in the application were for the purpose of obtaining compliance with the Act. I would fix substantial indemnity costs at $18,000 inclusive of disbursements. The applicant is entitled, however, to full indemnity, which would entail a top-up to costs on a scale as between a solicitor and his own client. In cases where an unsuccessful party is required to pay full indemnity costs to the successful party, there is an inherent danger of "overlawyering" a matter with the knowledge that it is the other party who will have to pay. I do not suggest that overlawyering has happened here. The matter was very ably prepared and argued by counsel for the applicant. On the other hand, a condominium corporation's right to full indemnity is not a carte blanche and the issue is whether the totality of the applicant's legal expenses in relation to this matter is reasonable and therefore recoverable from the respondent. On that point, the court is not in a better position to assess the matter than an assessment officer. I am therefore referring to the assessment officer the issue of full indemnity costs to be assessed as between a solicitor and his own client. The parties are at liberty, however, to agree to the quantum of costs to avoid the additional expense of the assessment.

Low J.

DATE: February 9, 2010