CITATION: MCC No. 710 v. Unit Owners, 2010 ONSC 1873
COURT FILE NO.: CV-10-399627
DATE: 20100330

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Metropolitan Toronto Condominium Corporation No. 710, Applicant

AND:

All Unit Owners and Mortgagees on Record of Metropolitan Toronto Condominium Corporation No. 710, Respondents

BEFORE: D. M. Brown J.

COUNSEL: J. Fine and J. Moher, for the Applicant

R. Conway and M. Gwynne, for the Requisitionists

HEARD: March 29, 2010

REASONS FOR DECISION

I. Nature of injunction sought

[1] Metropolitan Toronto Condominium Corporation No. 710 ("MCC 710") moves for an injunction enjoining the holding of an owners' meeting, requisitioned by a group of unit owners (the "Requisitioners"), scheduled to be held at 7:30 p.m. tonight, Tuesday, March 30, 2010.

[2] MCC 710 submits that the meeting, while duly requisitioned, should be deferred until after the hearing of its application for the appointment of an administrator of the affairs of MCC 710. The Requisitioners submit that they are entitled to exercise their democratic rights as unit owners to hold the meeting. Although the Requisitioners do not oppose the appointment of an administrator, it was clear that they conceived an administrator more as an advisor to the elected board of directors, not as a replacement for the board.

II. Procedural background

[3] On March 22, 2010, MCC 710 commenced an application (CV-10-399627) seeking the appointment of Harold Cipin as Administrator of the corporation pursuant to section 131 of the *Condominium Act, 1998*, S.O. 1998, c. 19. The next day counsel appeared before Conway J. in

Motions Scheduling Court and she authorized the hearing of the motion to restrain the Requisitioners' meeting on an urgent basis.

[4] MCC 710 has only made partial service of its materials. On March 24 MCC 710 filed a lengthy Motion Record, factum and book of authorities. It filed a brief Supplementary Motion Record two days later. On March 24, 2010, MCC 710 served all unit owners by regular mail with a letter attaching copies of the notice of application and notice of motion and advising that a full copy of the motion record was available for inspection in the corporation's management office. Given the service by mail, some unit owners may have not yet received the letter. Counsel for the Requisitioners was served with a copy of the materials in Motion Scheduling Court.

[5] The Requisitioners did not file any evidence in response to the motion for an injunction. They did file brief submissions, together with the CV of Mr. Armand Conant, their nominee for an administrator, should the court appoint one.

III. Analysis

[6] I am satisfied that the moving party has met the three-part test for the granting of an interlocutory injunction: *RJR-MacDonald Inc. v. Canada*, [1994] 1 S.C.R. 311.

A. Serious question to be tried

[7] A serious question exists as to whether the court should appoint an administrator of MCC 710. First, the corporation is in significant financial trouble. Unaudited financial statements as of January 31, 2010 show negative retained earnings of $5.111 million, caused largely by first and second mortgages totaling close to $4.72 million. Unaudited financial statements for the year ended August 31, 2009 recorded a net operating loss of $221,520.98. For the period September 1, 2009 until January 31, 2010, a modest operating surplus of $3,494.18 was shown.

[8] An affidavit from a representative of the mortgagee, Morrison Financial Services Limited, stated that the corporation has payables of $238,000 of over 90 days, effectively constituting further borrowing, and representing an event of default under the mortgages. The mortgagee also pointed to use by the corporation of its reserve funds for purposes not authorized by the Act, another event of default. The mortgagee stated that if the court did not appoint an administrator, it would "seriously consider appointing a receiver and manager." Ms. Conway took issue with the Board providing the mortgagee with its motion materials. I see nothing improper in that conduct. A mortgagee is entitled to information about material events, which would include an application to appoint an administrator.

[9] Second, the governance structure of MCC 710 is not functioning as it should. The 2009 Annual General Meeting of unit owners was not held because of the absence of a quorum.

[10] By letter dated August 4, 2009, MCC 710 notified unit owners that the budget for the current financial year would contain an increase of 5.1% in common element fees in order to meet loan and operating expense obligations. The letter also stated that the board had approved

the installation of smart meters to monitor electricity consumption by each meter, resulting in direct payment by unit owners for the energy they consumed. The Requisitioners, a group of unit owners, sought a special meeting in October, 2009, evidently as a result of the increase in the common fees and the plan to install unit smart meters. That meeting was not held; the Board took the position that the requisition was defective.

[11] In December, 2009, a group of unit owners engaged in a very vocal meeting with the corporation's manager, voicing their opposition to separate unit energy meters. Such opposition raises significant concerns about whether unit owners recognize the financial challenges facing their condominium.

[12] Later in December the Board resolved to apply to court to seek the appointment of an administrator, but it did not issue an application until last week. By notice dated March 4, 2010, the Requisitioners sought to held a special meeting to elect a new board of directors. In response, the current board declined to call a meeting of unit owners, so the Requisitioners have scheduled one for tonight.

[13] In sum, the financial problems of the corporation, coupled with the factionalism amongst unit owners and significant governance difficulties, clearly indicate that a serious question exists as to whether the appointment of an administrator would be appropriate.

B. Irreparable harm

[14] As to irreparable harm, I concur with the conclusion reached by Herman J. in *York Condominium Corporation No. 25 v. Persaud*, 2006 CarswellOnt 6439 that "the holding of a meeting to elect a new board of directors has the potential to add further instability and uncertainty to an already difficult situation": para. 24. (See also, *York Condominium Corp. No. 414 v. All Unit Owners and Mortgagees of York Condominium Corp. No. 414*, 2008 CarswellOnt 5845, para. 21) While courts have commented on the democratic nature of the governance of condominiums, the Act also recognizes that duly elected boards can lose their powers, at least temporarily, in the face of exigent financial difficulties.

[15] In my view, one simple question faces the unit owners of MCC 710 – should the court appoint an administrator of the corporation's affairs, or do the unit owners have a viable plan to return the corporation to financial stability? There is no evidence before me that the meeting scheduled for this evening would answer that question – the requisitioners did not file any plan. Accordingly, I think it best to restrain the meeting pending the hearing of the application at which all unit owners can have their say about whether an administrator should be appointed.

C. Balance of convenience

[16] For similar reasons, the balance of convenience favours deferring the requisitioned meeting until the application for the appointment of an administrator is heard. To permit the meeting to proceed inevitably would only add a further layer of litigation to this dispute and increase legal fees.

[17] Counsel for the Requisitioners submitted that I could appoint an administrator with limited powers to work with whatever board emerges from tonight's meeting. I do not think that is an appropriate way to proceed. I am not satisfied that all unit owners would have received notice of the application. Each should have an opportunity to respond, if he or she wishes, before the court determines whether it should appoint an administrator.

D. Order and directions

[18] For these reasons, I grant an order restraining the holding of the requisitioned unit owners meeting scheduled for 7:30 p.m. tonight until after the hearing of the application for the appointment of an administrator. But I do so on terms.

[19] First, the Board of MCC 710 shall deliver copies of these reasons to all unit owners by Thursday, April 1, 2010.

[20] Second, I am imposing a two week "cooling off period". I encourage the unit owners to put aside their personal disputes and obvious differences and to use the next two weeks to meet informally to try to come up with a realistic plan to address the real financial problems that are staring them in the face. Hard decisions must be made – either significantly cut expenses, or significantly raise common fees, or both. Inaction is not an option. If the level of distrust amongst the unit owners is too high to permit reaching a solution, then perhaps they should think about appointing an administrator who can make the tough decisions for them. I will give the unit owners two weeks to engage in this kind of "reality check" and to explore a common solution.

[21] Third, if the unit owners cannot reach a solution by Monday, April 12, 2010, then I direct counsel for both sides to appear in Motions Scheduling Court on Wednesday, April 14, 2010, to secure the earliest possible date for the hearing of the application to appoint an administrator. Counsel shall consult in advance and bring to the Motions Scheduling Court a timetable for all pre-hearing steps. It would be my wish that the application is heard by the end of May, 2010, if possible.

[22] The judge hearing the application can issue further directions regarding the holding of the requisitioned meeting in accordance with his or her disposition of the application.

[23] Costs of this motion are reserved to the judge hearing the application.

D. M. Brown J.

Date: March 30, 2010