CITATION: McFlow Capital v. Simcoe Corporation, 2010 ONSC 6260
COURT FILE NO.: CV-09-00376660
DATE: 20101116

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: McFlow Capital Corp., Applicant

AND:

Simcoe Condominium Corporation No. 27
Kenneth James, Respondents

BEFORE: Madam Justice Himel

COUNSEL: Paul D. Guy for the Applicant

George F. Vella for the Respondent Simcoe Condominium

Ranjan Das for the Respondent Kenneth James

James Diamond for Pencor Construction Inc.

HEARD: November 1, 2010

ENDORSEMENT

[1] McFlow Capital Corp. ("McFlow") brings a motion for an order removing Joseph L. Vero ("Vero") as administrator of Simcoe Condominium Corporation No. 27 (the "Corporation") and replacing Vero with Schonfeld Inc. ("Schonfeld"). McFlow also seeks directions to provide for short-term funding to enable Schonfeld to discharge its mandate as administrator. McFlow further requests an interim order freezing funds held by the Corporation or by Vero as administrator, funds held in trust by George Vella on behalf of the Corporation or Vero and funds held by Kenneth James ("James") on behalf of the Corporation or the majority owners or mortgagees of the units in the condominium development. The notice of motion had also requested that the case be transferred to the Commercial List but that relief is no longer being sought by the applicant.

FACTUAL BACKGROUND:

[2] Simcoe Condominium Corporation No. 27 is a condominium property consisting of 44 residential townhouse units in Orillia, Ontario. In March 2005, McFlow loaned $1.39 million to 1652030 Ontario Limited secured by a blanket mortgage on 14 units. James is the owner of two units and the authorized representative and lawyer for 27 of the 30 unit owners other than McFlow.

[3] For some time, the affairs of the Corporation were not being managed by the Corporation. There was no reserve fund, no bank account, no funds to manage the Corporation and the Corporation was involved in litigation. In April 2009, the Corporation took enforcement proceedings concerning the 14 units for failure to pay common expenses and a special assessment. On April 15, 2009, McFlow brought an application for an oppression remedy and sought injunctive relief. On May 27, 2009, at the request of McFlow, Justice Forestell appointed Vero as administrator having found that "there has been a substantial inability to manage the affairs of the corporation over the past ten years" and that "substantial misconduct or mismanagement or both in relation to the affairs of the Corporation has been demonstrated". The order appointing Vero authorized him to manage the affairs as if he were the board of directors and gave him various powers: the power to determine and collect common expenses, levy and collect special assessments, enter into contracts for the management of the property of the Corporation, control the records of the Corporation, hire such experts it deemed advisable and taken any steps reasonably necessary in the exercise of its powers. He was also ordered to pass accounts "from time to time" to a judge of the Superior Court of Justice and to apply to the court for advice and directions in the discharge of the administrator's powers and duties.

[4] In the materials filed on the motion before Justice Forestell, James disclosed the existence of $2 million which had been received from unit owners for common expenses. Justice Forestell did not grant McFlow's motion for a freezing order of the $2 million being held by James on behalf of the Corporation.

[5] In June 2009, Vero brought a motion against James for an order that the $2 million be paid into court pending determination of its ownership. Wilton-Siegel J. granted the motion and found that James had caused the $2 million to be sent to his client Eveline Holdings Limited in the Turks and Caicos after he was aware of the motion to freeze the assets. According to McFlow, Vero has not taken steps to enforce the order of Justice Wilton-Siegel.

[6] The administrator has 23 years of experience managing condominium corporations in Ontario. Since his appointment, the administrator has adopted two budgets, has attempted to obtain audited financial statements, levied special assessments, collected monies for common expenses from 27 of 44 units in December 2009, and has registered liens against properties where common expenses remain unpaid. It has obtained a Reserve Fund Study and placed insurance on the properties. It has also carried out certain repairs of the common elements. Of the monies paid towards common expenses, a large amount has been earmarked to deal with the construction lien registered by the roofing contractor Pencor Construction Inc. ("Pencor") who performed work before the administrator was appointed. Pencor is a judgment creditor in the amount of $276,136.33 against the Corporation. It received notice of the motion as someone

who could be affected by the relief sought by McFlow as it wants to access the monies being held in trust by the administrator.

[7] The administrator has obtained appraisals on the 14 units mortgaged to McFlow and listed those units for sale because of non-payment of common expenses.

POSITIONS OF THE PARTIES:

[8] While it was McFlow that had initiated the process to have Vero appointed as administrator, it is now McFlow's position that Vero should be removed and replaced. McFlow alleges that he has failed to put the affairs of the Corporation in order. McFlow argues that it is the only party trying to move things forward. It is submitted that the condominium units are still in a state of disrepair and Vero has been non-responsive to the needs of the Corporation. In particular, McFlow argues that in the 17 month period since Vero was appointed, Vero has never reported to the court, has never passed accounts, has never sought advice or directions from the court, has operated without a budget, has incurred excessive professional fees, has not acquired an understanding of the finances and cannot answer questions of a financial nature, has failed to respond to requests made by McFlow, has taken eight months to respond on a study on the Corporation's reserve funds, has taken 11 months to respond on the matter of insurance, and has had an order of costs awarded against him personally in connection with litigation with Pencor.

[9] McFlow asks that the court exercise its discretion and remove Vero for failure to discharge his duties as administrator and appoint Schonfeld to replace him. McFlow has filed a report from Schonfeld setting out what it would do if appointed and has taken steps to have funds available for Schonfeld to access if appointed in the place of Vero.

[10] On the question of the interim freezing order, McFlow argues that such an order would be just in accordance with section 131 of the *Condominium Act* and that there would be no prejudice to the parties. McFlow submits that the funds that have been paid by James into trust to manage the affairs of the Corporation should be preserved until the motion concerning the administrator is considered by the court. McFlow also takes the position that Pencor should not be participating in this motion as it is only affected by the funds being held in trust and should have no role in opposing the request to replace the administrator.

[11] James takes the position that McFlow is bringing this motion in response to steps taken by the Corporation exercising its power of sale as against units held by McFlow for failure to pay common expenses and special assessments. James argues that the majority ownership group has had to fund all the administration costs in paying $450,000 and McFlow has paid nothing. Although McFlow described itself as a "mortgagee in possession" in correspondence written to Vero and, as such, would have the obligations of an owner to pay common expenses, its representative asserts that it has made a mistake. It has not funded any common expenses or paid the special assessment.

[12] James argues that the present administrator should be permitted to continue to undertake his duties with some direction by the court. While he initially opposed the appointment of Vero,

he argues that Vero should now be allowed to continue with his mandate. Further, James takes the position that monies paid into trust for the benefit of Pencor as lien claimant should not be used by McFlow to retain the services of a replacement administrator. While James does not take issue with Schonfeld's qualifications, James strongly objects to his appointment. The costs associated with replacing the administrator would be a waste of money and resources.

[13] Vero takes the position that he has taken reasonable steps to administer the affairs of the corporation and that McFlow is only bringing these proceedings in order to avoid having its units sold under a power of sale. He argues that he was not obliged by the court to pass accounts on specific dates and that he was having difficulty obtaining audited statements in order to pass accounts. Vero submits that McFlow is attempting to replace him with a receiver who usually deals in bankruptcy and insolvency matters and has little experience in managing condominium corporations. Vero takes the position that James represents 27 out of 44 units and that it is his view that it is not in the interests of that group at this time to have a new administrator appointed. Vero asks that McFlow's motion to remove Vero as administrator be dismissed and the motion to freeze all funds being held be dismissed.

[14] Pencor takes the position that the administrator was authorized to negotiate a settlement with Pencor to resolve the lien action. Pencor was granted partial summary judgment on terms which resulted in payment to the trust account of the solicitors of the administrator. Pencor opposes McFlow's motion to replace the administrator and freeze the funds as it argues that those funds have been earmarked for Pencor in satisfaction of its judgment.

ANALYSIS AND THE LAW:

[15] The *Condominium Act*, 1998 S.O. 1998 Chapter 19 governs the ownership of property held by a condominium corporation. Section 27 of the legislation provides that a board of directors shall manage the affairs of the corporation. Where a board is not fulfilling its mandate, the legislation provides as follows:

> 131.(1) Upon application by the corporation, a lessor of a leasehold condominium corporation, an owner or a mortgagee of a unit, the Superior Court of Justice may make an order appointing an administrator for a corporation under this Act if at least 120 days have passed since a turn-over meeting has been held under section 43.
>
> (2) The court may make the order if the court is of the opinion that it would be just or convenient, having regard to the scheme and intent of this Act and the best interest of the owners.
>
> (3) The order shall:
>
> (a) specify the powers of administrator;
>
> (b) state which powers and duties, if any, of the board shall be transferred to the administrator; and
>
> (c) contain the directions and impose the terms that the court considers just.

> (4) the administrator may apply to the court for the opinion, advice or direction of the court on any question regarding the mismanagement or administration of the corporation.

[16] The test for removing an administrator is the same as for appointing an administrator, that is, is it in the best interests of the owners having regard to the scheme and intent of the Act that the administrator be removed?: see *Fortunato v. Atrens* (2007) CarswellOnt 9008 (Ont. Sup. Ct.) at para. 8; aff'd [2008] O.J. No. 591 (C.A.).

DECISION:

[17] The issue before me is whether it is just and convenient that the administrator be removed and replaced. While s. 131 does not specify the process for removal of an administrator, certainly the same considerations should apply as to standing and the criteria for removal as for the appointment of an administrator. This court has the authority with reference to the scheme and intent of the Act to determine whether it is just or convenient to replace an administrator appointed by it.

[18] There is no question that Schonfeld has the knowledge, skill and experience to act as administrator, consents to the appointment and understands the obligations and responsibilities involved. Schonfeld has prepared a report outlining a plan with an estimate of fees for the steps believed to be necessary. Although the majority of Schonfeld's expertise is as a receiver, the appropriateness of Schonfeld as administrator of a condominium corporation is not the issue. There is no reason to doubt that Schonfeld would make an excellent administrator. Rather, the issue is whether the circumstances are such that Vero should be removed and replaced and whether an interim freezing order should be issued.

[19] In determining whether Vero should be replaced, I am to consider the actions or inactions of the administrator and the circumstances of the case to decide whether it is just and convenient having regard to the scheme and intent of the *Condominium Act* and the best interests of the owners: see *Bahadoor v. York Condominium Corp.* No. 82 [2006] O.J. No. 4794 (Ont. Sup.Ct.), 53 R.P.R. (4th) 281 at paras. 23-24. The scheme of the Act was discussed in Re *Carlton Condominium Corp. No. 279* and *Rochon* (1987), 59 O.R. (2d) 545 (C.A.) cited In *Bahadoor*, *supra* at para. 25: "The *Condominium Act* was passed to permit individuals to be owners of the freehold estate in residential units in a building as opposed to tenants in an apartment building." The corporation is to manage the property and assets of the corporation on behalf of the owners and to control, manage and administer the common elements and assets of the corporation. The management of the affairs of the corporation is to be done by a board of directors. Only where it is necessary to do so, the court will intervene and appoint an administrator to act. Similarly, the court will consider the circumstances and determine whether the administrator should be terminated.

[20] In considering the circumstances, the court will decide whether the administrator has conducted himself in a reasonable and prudent manner: see *Fortunato v. Atrens*, *supra*.

[21] I recognize that there are a number of tasks undertaken by Vero which may be considered late: providing financial information, studying and reporting on the reserve fund and providing evidence of adequate insurance. However, those tasks are now completed or at least underway.

[22] There are allegations that the failure to report to the court and the failure to pass accounts are indications of conduct falling below the standard. In fact, the order appointing Vero as administrator was done at the instance of McFlow and was drafted by it; the order does not prescribe the timing for reports to the court or the passing of accounts. While it may be reasonable to report to the court and pass accounts annually, that is not required by the appointment and is not mandated by the statute or jurisprudence. The administrator has provided an explanation for the delay because of the problems in obtaining an audited financial statement for the prior years. In these circumstances, the fact that the administrator has not passed accounts since its appointment in April 2009 would not render it just or convenient to remove Vero.

[23] McFlow alleges that Vero acted improperly in consenting to partial summary judgment with Pencor without providing an explanation to McFlow. In my view, the administrator had the authority to settle the matter with Pencor. There is nothing to suggest that the settlement was not in the best interests of the owners. An administrator standing in the shoes of the board of directors which is responsible for managing the affairs of the condominium corporation has the powers to spend common expenses or settle a law suit: see *Condominium Act*, 1998, s. 27(1).

[24] Frankly, I cannot agree that the same circumstances that were before Justice Forestell when she appointed Vero apply today. Although there is much left to be done by the administrator, it cannot be said that there is substantial mismanagement and that the affairs of the corporation must still be put in order. I am of the view that Vero should be permitted to continue with his mandate. It would not be in the interests of the owners to have fees and expenses duplicated as a result of a new administrator being appointed.

[25] For these reasons, I am of the view that it is not just and convenient to remove and replace the administrator.

[26] With respect to the second aspect of the motion concerning the request for an interim freezing order, this issue was before Justice Forestell in June 2009. I do not see any material change in the circumstances that existed since Justice Forestell's decision that would justify an interim freezing order concerning the funds being held by the Corporation, Vero, Vero's counsel or by James. The administrator requires these funds in order to carry out the affairs of the Corporation. The motion for an order freezing the funds held by the Corporation or Vero, by Vella on behalf of the Corporation or Vero and by James on behalf of the Corporation or the majority owners or mortgagees of the units is dismissed.

[27] Finally, although the parties did not request an order specifying the obligations of the administrator concerning reports to the court or the passing of accounts, in my view, it would be in the best interests of the owners to have the administrator report to the court and pass accounts within two years after its appointment on May 27, 2009 and every two years thereafter. If the

parties are of the view that the reports to the court should be more frequent or sooner, they should bring the matter back before the court to address this issue.

[28] With respect to the issue of costs, counsel made brief submissions to me concerning their positions on costs. In accordance with s. 131 of the *Courts of Justice Act* and Rule 57.03, I exercise my discretion and order that the applicant pay costs of $10,000 to the respondent the Corporation and to the respondent James and the sum of $5,000 to the lien claimant Pencor within 30 days of this order. In fixing these costs, I consider the circumstances of the case, the time and complexity involved in the motions, the conduct of the parties, the amount involved, and I deem these amounts to be fair and reasonable in the circumstances of this case.

Himel J.

Date: November 16, 2010