

CITATION: Peel Condominium Corporation No. 542 v. Gorgiev, 2011 ONSC 7211
COURT FILE NO.: CV-11-3239-00
DATE: 20111207

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: PEEL CONDOMINIUM CORPORATION NO. 542 - and - JIMMY
BOZIDAR DIMITAR GORGIEV

BEFORE: Lemon J.

COUNSEL: Michael Gwynne, for the Applicant

Jimmy Bozidar Dimitar Gorgiev, on his own behalf

HEARD: October 14, 2011

ENDORSEMENT

The Issue

[1] The applicant condominium corporation seeks a declaration that Mr. Gorgiev has altered the common elements of Peel Condominium Corporation No. 542 in contravention of the Condominium Act and the Declarations of the Condominium Corporation. It alleges that he cut the common element curbs, dug out the common element lawn and installed an asphalt parking pad on the exclusive use common elements next to his residence. The corporation also seeks a declaration that it is not in breach of the Human Rights Code of Ontario.

[2] If it is successful in those parts of the application, a variety of other orders follow from that determination. Those are:

- (a) An Order requiring Mr. Gorgiev to comply with the Condominium Act, as well as the Declaration, the Bylaws, and the Rules of the corporation and all zoning by-laws of the City of Mississauga;
- (b) An Order that Mr. Gorgiev is prohibited from permitting a condition to exist or from carrying on any activity in a residence or in the common elements of the Condominium Project if the condition or activity is likely to cause injury to an individual, and/or result in a nuisance to the residence owners and residents of the Condominium Property;
- (c) An Order directing Mr. Gorgiev to immediately allow the condominium corporation to restore all common elements modified by him to their original condition;and
- (d) An Order that Mr. Gorgiev pay all costs incurred by the Corporation in relation to this matter and in restoring the common elements to their original condition and that the costs may be collected as common expenses against the Residence.

Ruling

[3] This matter came on before Bielby J. on September 15, 2011. His handwritten endorsement reads:

The applicant is requesting Mr. Gorgiev remove the changes he made to the common elements in front of his residence.

Mr. Gorgiev without permission paved the grass area wanting a second outside parking space. He argues he has a disability which includes claustrophobia which on some days prevents him from using his garage. The garage and driveway to the garage provides him 2 parking spots already.

Respondent advises he wishes to buy a second car so needs a second outside spot which because of his disability should be accommodated by the Condo Corp. and its Board.

It is quite clear he hired contractors, had the curb cut and driveway laid without approval of the Board and in the face of being told to stop. He also is in contravention of the City by-law.

Because Mr. Gorgiev has mental health issues I will allow an adjournment for him to consider his position, to consider the Human Rights Board claim he is talking about and consider how to legally challenge the Board. He has been advised to get legal advice.

[4] The matter was then adjourned to October 14, 2011 before me. At that time, Mr. Gorgiev advised that although he had spoken to the Human Rights Tribunal of Ontario, he did not file an application. He did not seek an adjournment of this application in order to do so. Based on the factual findings of Bielby J., I grant the order as follows

- (a) A Declaration that the Respondent has altered the common elements of Peel Condominium Corporation No. 542 (hereinafter "PCC 542" and/or the "Corporation") in contravention of Section 98 of the Condominium Act, 1998, S.O. 1998, c. 19, as amended (hereinafter the "Act") and Article IV(4)(a) and (b) of the Declaration of Peel Condominium Corporation No. 542 by cutting the common element curbs, digging out the common element lawn and installing an asphalt parking pad on the common elements and/or exclusive use common elements adjacent to the Respondent's Unit located at 455 Apache Court, Unit 16, Mississauga, ON, and blocking the fire route roadway with soil, without obtaining the approval of the Board of Directors.
- (b) A Declaration that the Respondent is in breach of sections 98, 98(1), 98(2), 119(1) and 119(2) of the Condominium Act, 1998, S.O. 1998, c. 19, as amended (hereinafter referred to as the "Act"), and Article IV(4)(a) and IV(4)(b) of the Declaration of PCC 542 and Rules 8(b), and 9(c) and (d) of the Rules of PCC 542.
- (c) A Declaration that the conduct of the Respondent is oppressive or unfairly prejudicial to the Applicant as well as the unit owners and residents of PCC 542 (hereinafter referred to as the "Condominium Project"), and unfairly disregards the interests of the Applicant as well as the unit owners and residents of the Condominium Project.
- (d) The Respondent shall immediately allow PCC 542 to restore all common elements modified by the Respondent to their original condition.

- (e) The Respondent shall pay all costs incurred by the corporation in relation to restoring the common elements to their original condition which were modified by him and the costs may be collected as common expenses against the Unit.

[5] Paragraph 1(i) of the application seeks costs incurred by the Corporation “in relation to this matter”. The costs of this proceeding ought to be dealt with pursuant to paragraph 1(j). I will deal with those later in these reasons.

[6] For reasons set out below, I can make no finding with respect to the human rights issue.

[7] The other requests are too general to be made into an order. Rather, they are simply a request for an order that Mr. Gorgiev comply with the law of Ontario. That is a given.

Background

[8] The basic history is not significantly in dispute.

[9] Mr. Gorgiev has been a registered real estate agent with expertise and knowledge in real estate matters. He has been the owner of Residence 16, Level I of Peel Condominium Plan No. 542, since June 25, 2010.

[10] According to the condominium rules, Mr. Gorgiev has an indoor and outdoor parking space available to him. He is entitled to park one vehicle in the garage and one vehicle on the driveway in front of the garage.

[11] Mr. Gorgiev has been observed parking in his garage and enjoying the use of his residence without incident since he purchased it.

[12] In May of 2011, Mr. Gorgiev asked permission of the Board of Directors of the Corporation to extend his patio stones in front of his house. After hearing from him and considering its decision, the Board did not allow him to do so.

[13] In July of 2011, Mr. Gorgiev, without notification to or approval by the Board, started the alterations to the common elements of the Corporation as described above.

[14] On July 13, 2011, he advised the Board that he was unable to park his car in his garage because of a disability.

[15] On July 22, 2011, Mr. Goriev told the Board that his mental disability resulted from a head injury when he was 17. This made him too claustrophobic to use his garage and accordingly, he needed a wider driveway to park two cars. Mr. Gorgiev also advised that he would bring an application to the Ontario Human Rights Tribunal because of his disability.

[16] On July 27, 2011, the Board advised Mr. Gorgiev that it was prepared to consider his request for accommodation on an immediate basis. They requested information pertaining to his disability and outlined steps for expediting the hearing of his request. In the meantime, they also requested him to cease and

desist making any further changes to the Corporation's common elements without the permission of the Board. Finally, they told him that should he fail to comply with the Board's request, the Corporation would hold him liable for all costs incurred in relation to this matter.

[17] On August 8, 9 and 10, 2011 Mr. Gorgiev's agents tore out the lawn, placed gravel and paved the driveway despite complaints by the corporation each of those days.

Position of the Applicant

[18] The Corporation submits that as a result of Mr. Gorgiev's breach of the Act and the Declaration, By-laws and Rules, Mr. Gorgiev has put other residence owners at risk due to materials left on the common element fire routes by Mr. Gorgiev's contractors, has degraded the value of the condominium property by affecting the aesthetic appearance of the property, has created concern within the condominium community about the Board's failure to enforce compliance with the Act and the Corporation's documents and has caused the Corporation to incur substantial costs in order to obtain Mr. Gorgiev's compliance with the Act and the Corporation's documents.

[19] The Applicant submits that there is no evidence that Mr. Gorgiev is unable to live in the condominium property without an additional outdoor parking spot.

Mr. Gorgiev lives alone, owns one vehicle and, as provided to all owners without discrimination, has the use of an outdoor parking spot immediately in front of his garage as well as an indoor spot inside his garage.

[20] It is the position of the Corporation that, despite his condition, Mr. Gorgiev has used his garage for over a year without incident. Therefore, Mr. Gorgiev's mental disability has not prevented him from living in and enjoying his residence, parking areas or the condominium property.

[21] The Corporation submits that Mr. Gorgiev has failed to provide the Corporation an opportunity to assess his request for accommodation and failed to provide the Corporation with an opportunity to propose alternatives to the modification of the common elements in front of Residence 16. He has provided nothing other than a note from a general medical practitioner requesting that Mr. Gorgiev be allowed to park outside.

[22] Accordingly, the Corporation submits that Mr. Gorgiev has failed to make a prima facie case of discrimination and has failed to provide the information requested by the Board, and has failed to cease and desist making changes to the common elements of the Corporation.

Positon of the Respondent

[23] In response, Mr. Gorgiev says that he suffers from claustrophobia that precludes him from using the garage as a parking space. He deposes that he suffers from a diagnosed mental disorder that was caused by a serious head injury that he sustained in a motor vehicle accident on McLaughlin Road in Mississauga in the summer of 1993. He submits that he needs to be able to park 2 vehicles in front of his home on his exclusive use land to accommodate his mental disorder. He submits that there is nothing in the condo declaration or in the Condominium Act that denies him the opportunity to alter an exclusive use area for private medical reasons. Ultimately, he submits that he purchased a 2 parking spot townhouse and should be allowed to own two vehicles and park them where he is not affected adversely by his mental disorder.

[24] He now agrees to provide psychiatric medical reports if ordered to do so, but submits that the Board has not properly considered his medical necessity, given that he has provided a note from his family doctor. He submits that he does not need notice or approval at this point because the Board ignored his original request.

[25] In any event, his driveway alterations do not have an adverse effect on residences owned by other owners, nor affect the structural integrity of the building. His driveway alterations do not give rise to any expense to the

corporation nor do they detract from the appearance since asphalt was used for the widening of the driveway.

Authority of the Corporation

[26] In its factum, the corporation has set out the relevant legislation and case law to support the following propositions. I accept them as a fair statement of the law that applies to this case.

[27] Pursuant to Subsection 17(3) of the *Condominium Act*, the corporation has a duty to take all reasonable steps to ensure that the owners, the occupiers of residences, the lessees of the common elements and the agents and employees of the corporation comply with the Act, the declaration, the by-laws and the rules.

[28] Section 98(1) of the Act provides that:

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;(Emphasis mine)

[29] Article IV of the Declaration of the corporation deals with the Common Elements of the Corporation and Article IV(4)(a) provides as follows:

(a) No alterations, work, repairs, decoration, painting, maintenance, structure, fence, hedge or erection of any kind whatsoever (the "Work"), shall be performed, done, erected or planted within or in relation to the common elements, including any part thereof over which any owner has exclusive use,

except by the Corporation or with its prior written consent or as permitted by the by-laws and rules.(Emphasis mine)

[30] Rule 8(b) restricts the alteration of the landscaping work on the property without the prior written consent of the Board and Rules 9(c) restricts the number of parking spaces for each residence to two parking spaces and specifically states that one of the parking spaces is in the garage and the other is on the driveway in front of the garage. Rule 9(d) restricts the parking of vehicles side-by-side or the parking of vehicles on the common elements.

[31] The role of the court in such an application as this is not to substitute its own opinion for that of the Board, but to ensure the Board has acted in good faith and in compliance with the Act, declaration, bylaws and rules. In deference to the rules, the court should not pronounce on the propriety of rule except where the rule is clearly unreasonable or contrary to the legislative scheme. The court should accept the board's decision unless it has acted capriciously or unreasonably.

[32] Where the Board acts reasonably in carrying out its duty to enforce the By-laws and Declaration, the Board will be supported by the Court.

[33] Here, I can find no fault with the Board's decisions. Mr Gorgiev has carried out work on common elements without the corporation's consent. He has not provided, either to the Board or this court, evidence of his disability. Without

that, I cannot fault the Board in its decision and cannot find for Mr. Gorgiev in this application.

Exclusive Use

[34] Although Mr. Gorgiev emphatically states that the area in question is for his own exclusive use, he does not focus on the legislation and by-laws that affect him.

[35] The reason for defining the exterior areas of the residence as exclusive use common element is to ensure that a condominium development remains aesthetically consistent from property to property. Owners are responsible for maintaining the exclusive use common element area and must seek board approval if they wish to alter any part of it.

[36] Section 17(3) of the Act requires a condominium corporation to enforce the declaration and rules. These provisions are crucial to the orderly operation for condominium and for the protections of condominium residence owners and occupiers. Condominium residence owners are not at liberty to deal with the property in the same manner as the owner of a single-family residential dwelling. In return for advantages gained through common ownership of certain elements, some degree of control is given up. It is both the right and obligation of a residence owner to comply with the Declaration, by-laws and rules of the

corporation. Mr. Gorgiev has not done so. He has not provided evidence to show that he has a right not to comply.

[37] Article IV of the Declaration and description relating to the condominium states as follows:

2. Exclusive Use of Parts of Common Elements - subject to compliance with the Act, the Declaration, by-laws and rules passed pursuant to the Act, each owner shall have the exclusive use of those parts of the common elements adjacent to each residence and designated in the description by being numbered the same as the sum of the residence with the letter "A" following and each owner shall be responsible for the lawn maintenance and snow removal on the portion of the common elements for which such owner has the exclusive use.

4. Additions, Alterations and Improvements

- a) **No alteration**, work repairs, decoration, painting, maintenance, structure, fence, screen, hedge or erection **of any kind whatsoever** (the "Work") **shall be performed, done, erected or planted within or in relation to the common elements, including any part thereof over which any owner has the exclusive use, except by the Corporation or with its prior written consent or as permitted by the by-laws or rules.(Emphasis mine).**
- b) The Corporation shall have access at all reasonable times to any part of the common elements over which any owner has the exclusive use in order to do the Work.

[38] From the documents filed, the driveway and yard in question are in an area marked "A". Accordingly, Mr. Gorgiev requires the permission of the corporation to carry out the alterations acts that he has. Mr. Gorgiev has not followed the appropriate procedure to obtain that permission. He has not provided sufficient medical information either to the corporation or to this court to allow either to consider his request.

Human Rights Issues

[39] In considering whether there is discrimination, the court or Tribunal should consider whether the declaration, by-laws or rules, either expressly or by necessary implication contain a provision that prevents the person suffering from the disability or handicap from residing in the subject premises.

[40] In order to find the discrimination necessary to defeat the Declaration, the provision must have the effect of preventing Mr. Gorgiev from living in his residence.

[41] The principles associated with the duty to accommodate suggest that there are certain obligations on person seeking accommodation. The person requesting accommodation must do his part as well. There is a duty to facilitate the search for such an accommodation. In determining whether the duty of accommodation has been fulfilled, the conduct of the person requesting accommodation must be considered. The request will be dismissed if the person requesting accommodation fails to take reasonable steps.

[42] A person requesting a particular accommodation of disability must provide sufficient evidence to establish that the accommodation is required. Mr Gorgiev has provided nothing other than a note from his general practitioner. That is not sufficient for him to uphold his end of the investigation. While Mr. Gorgiev has

now agreed to provide medical information to support his claim of disability, he is too late. He was given an opportunity to do so and has not proceeded with his application with the Human Rights Tribunal, nor provided that information to this court,

Result

[43] For these reasons, the application is granted.

Costs

[44] Should the applicant seek costs of this matter, it shall provide written submissions within 30 days. Mr. Gorgiev shall have 30 days thereafter to respond to those submissions. Each party's submissions shall be no more than three pages not including any bills of costs or offers to settle.

Lemon J.

DATE: December 7, 2011

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DIMITAR GORGIEV

BEFORE: LEMON J.

COUNSEL: Michael Gwynne, for the
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