CITATION: Channa v. Carleton Condominium Corp. No. 429, 2011 ONSC 7260
COURT FILE NO.: 09-46682/10-49099
DATE:20111214

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
GEETA CHANNA	)	Diane Condo, for Geeta Channa
	)	
Applicant (Respondent)	)	
	)	
– and –	)	
	)	
	)	
CARLETON CONDOMINIUM CORPORATION NO. 429	)	
	)	Nancy Houle, for Carleton Condominium Corporation No. 429
Respondent (Applicant)	)	
	)	
	)	
	)	
	)	
	)	**HEARD:** November 10, 2011

REASONS FOR JUDGMENT

POLOWIN J.

[1] Geeta Channa is the owner of a unit in Carleton Corporation No. 429 (the "Condominium" or "Corporation"). The Condominium is an industrial/commercial condominium corporation. Ms. Channa has brought an Application dated October 3, 2009 seeking the following:

(i) An Order vacating a lien registered by the Corporation;

(ii) A permanent injunction restraining the Corporation from exercising its power of sale rights;

(iii) A permanent injunction restraining the Corporation from proceeding in any way pursuant to the Notice of Sale Under Lien;

(iv) An accounting of monies owed under the lien; and

(v) Costs on a substantial indemnity basis plus GST.

[2] The Corporation brought an Application, dated July 30, 2010 seeking:

i. An order that Ms. Channa pay to the Corporation all costs incurred by the Corporation in relation to:

   a. Charges incurred to gain access to Ms. Channa's unit to turn on the main water supply to the remainder of the building;

   b. Charges incurred in relation to unauthorized modifications to the common elements undertaken by Ms. Channa;

ii. An Order that Ms. Channa comply with the provisions of section 98 of the *Condominium Act*, 1998, S.O. 1998, Chapter 19 (the "*Act*") including the following:

   a. That Ms. Channa obtain the consent of the Board of Directors of the Corporation prior to undertaking any modifications to the common elements;

   b. That Ms. Channa enter into an agreement with the Corporation governing all permitted modifications to the common elements undertaken by Ms. Channa; and

i. Costs on a substantial indemnity basis plus GST.

[3] The parties conducted cross-examinations with respect to the various affidavits filed in this matter on May 17, May 19, May 27 and August 3, 2010. Three volumes were provided with respect to answers to undertakings. The parties agreed that the Applications would be heard together.

Background

[4] Ms. Channa purchased a unit in the Condominium on December 15, 2005. Her husband Mr. Raman Agarwal is president and CEO of Akran Marketing which company has occupied the unit since its purchase. According to Ms. Channa, Mr. Agarwal is the person who usually deals with issues with respect to the unit and the payment of common expenses related thereto. The documentation provided to the Court supports that Mr. Agarwal acts at times, and on the written instructions of Ms. Channa, as her representative in dealings related to the Corporation. Axia Property Management ("Axia") is the property management company engaged by the

Corporation to manage the Condominium Corporation pursuant to a management agreement between Axia and the Corporation.

[5] Ms. Channa and Mr. Agarwal have not enjoyed a good relationship with the Corporation or Axia. It is the Corporation's view that its Board of Directors has been involved in various incidents involving Ms. Channa and/or Mr. Agarwal. According to the Corporation, Ms. Channa and/or Mr. Agarwal have failed to abide by the provisions of the *Act* and the provisions of the Corporation's governing documents, including the Declaration, By-Laws and Rules. Further, as a result of these incidents and breaches of the *Act*, and the Corporation's governing documents, the Corporation has been required to incur costs, including legal fees and consulting fees, to deal with and/or remedy these breaches. According to the Corporation when it has written to Mr. Agarwal or Ms. Channa concerning such breaches, they have responded with allegations of harassment, racism, sexual harassment or have refused to acknowledge the breaches. The Corporation states that on one occasion Mr. Agarwal made an indirect implied threat against a member of the property management team for the Corporation.

[6] The documentation before the Court fully supports the difficult relationship between Ms. Channa and Mr. Agarwal on the one hand and the Corporation and Axia on the other. For example, Mr. Agarwal indicated in an e-mail dated January 10, 2007 that he did not need to attend Board meetings as they are "run mafia style". On October 2, 2007, Ms. Channa wrote to Julian Walker at Nelligan O'Brien Payne to advise that Greg Smith (from Axia) was to immediately cease communicating with her or her staff, that he was racist, his actions were of a discriminatory nature, that he was manipulative, a puppet of the Corporation and a liar. She threatened to charge him with trespassing. On September 2, 2008, Mr. Shawn Paul (Vice president, Axia) wrote to Mr. Agarwal by e-mail, and stated that Mr. Agarwal had been rude with his staff and that moving forward he had instructed his staff to forward all future communications from Mr. Agarwal to Mr. Paul and that Mr. Paul would be his contact for accounting purposes.

[7] It appears on the materials filed that the first major incident between the parties related to what the Corporation characterizes as an unauthorized/unapproved modification to common elements more particularly the roof. The details with respect to this are set out in the Affidavits

filed in this matter but for the purposes of this decision I need only to summarize. Apparently, a hole was cut in the roof in November 2006 by Mr. Agarwal's contractor, for the purposes of installing an HVAC unit. The roof of the building is part of the common elements of the Corporation. Ms. Channa and Mr. Agarwal had not received authorization from the Board of Directors to proceed with this work. The Corporation's consultant inspected the work completed by Mr. Agarwal's contractor in December 2006 and reported that remedial action was required. Mr. Agarwal was advised that he would not be permitted to install an HVAC unit until the remedial work was done. Both sides engaged legal counsel and much correspondence ensued between counsel. Following several months of delay the work was completed and inspected by a consultant to ensure compliance with building code and industry standards. Ms. Channa and Mr. Agarwal were warned throughout that all costs incurred in relation to this matter would be charged back to the unit.

[8] From March 2007 to November 2007, communications were exchanged between legal counsel. The purpose of these communications was to resolve the outstanding costs related to the modifications and to ensure compliance under s. 98 of the *Act* which governs modifications to the common elements. The costs issue was never resolved. Further, at that time and to date Ms. Channa and Mr. Agarwal still have not executed any agreement to govern the modifications to the common elements which is required pursuant to s. 98 of the *Act*.

[9] In October 2007 various invoices were sent to Ms. Channa both for legal fees and engineering services related to this issue. In a letter to Mr. Max (then counsel for Ms. Channa and Mr. Agarwal), dated November 7, 2007, counsel for the Corporation advised that these costs would be added to the common expenses for her unit. To that date the legal costs incurred were approximately $5,600.00 and the engineering and other contractor's costs were $1,902.52.

[10] Another incident occurred between the parties in April 2007. Again this incident is detailed in the various Affidavits filed in this matter but will only be briefly summarized. On a Friday in April, Mr. Agarwal had a plumber into the unit to repair a leak found in the bathroom. The plumber turned off the water supply but needed a part which would not be available until Monday after the weekend. Unbeknownst to Mr. Agarwal or Ms. Channa, the main water pipe for the entire complex went through their unit and the entire water supply for the complex was

turned off. Mr. Agarwal was in Kingston and did not provide access to the unit. It was unacceptable to the Corporation that there would be no water in the building for an entire weekend as the fire sprinkler systems would be inoperative. On the Saturday, the police were called and agreed that immediate access to the unit was required. A locksmith was called to gain access to the unit to have the water turned back on. The police remained on the premises the entire time until the unit was secured. The Corporation incurred costs in the total amount of $731.82 related to the required access to the unit. These costs were added to the common expenses for the unit.

[11] A lien was imperfectly registered on the unit with respect to the $732.82 amount and had to be removed. The November 7, 2007 letter referred to above references this amount and the lien.

[12] According to the Corporation, there have been other unauthorized modifications by Ms. Channa and/or Mr. Agarwal including:

a) Signs improperly placed on the common elements;

b) Unauthorized installation of a satellite dish;

c) Unauthorized installation of security cameras on the exterior of the unit;

d) Unauthorized installation of an intercom on the exterior of the unit.

[13] On February 22, 2008 the Corporation sent a letter to Ms. Channa indicating that $6,656.43 was owed for common expenses. This was due to the expenses related to the access to the unit in April 2007 to turn on the water and the expenses related to the unauthorized modification to the roof. A final notice was sent on May 12, 2008 for common expenses in the amount of $5,426.87. No response was received by the Corporation to these letters. However, the Corporation could not take steps to arrange for a registration of a lien in relation to these arrears since the arrears fell outside of the three month period of arrears which can be secured by way of a lien. These arrears remain as unsecured.

[14] Another dispute arose about common expenses and arrears (separate from those outlined above) in August, 2008. On April 29, 2008 a letter was sent to all unit owners in the Condominium, including Ms. Channa, outlining the budget for the 2008/2009 fiscal year, including a breakdown of the total amount due for Ms. Channa's unit. The letter informed Ms. Channa that the common fees were due on the first of each month and would be increased, effective June 1, 2008 as follows:

a) For the fiscal year 2008/2009 monthly contributions for budgeted common expense contributions, including GST, total $634.88.

b) For the fiscal year 2008/2009 monthly special assessment charges (related to a roof replacement loan) of $201.41.

[15] However, for the months of June, July and August of 2008 cheques in the amount of $772.88 (the previous years' common expenses) were received by the Corporation from Ms. Channa (according to Ms. Channa and Mr. Agarwal by mistake and/or inadvertence). According to the Corporation for each of the months of June, July and August 2008, Channa "overpaid" the monthly budgeted common expenses in the amount of approximately $138.20. Further as per standard practice at the Corporation and, according to it in the condominium industry, these "overpayments" were applied to the past arrears (that is, the outstanding arrears described above.) No separate cheques or cash payments (of $201.41) were received for the months of June, July and August 2008 for the payment of the special assessment. According to the Corporation, Ms. Channa was $604.23 in arrears but that even if the $138.00 had been applied to the special assessments owing for those amounts as of August 2008, the account would still be in arrears (approximately $189.63), as the payments received were insufficient to cover the total assessment amounts owing. The Corporation directed its law firm Nelligan O'Brien Payne to commence collection proceedings.

[16] On August 19, 2008, a letter was sent from Nelligan O'Brien Payne advising the Applicant that the Applicant was in arrears. A Notice of Lien was attached to the letter. It set out a total amount of $1,162.99 which included $604.23 for unpaid common expenses ($201.41 x 3), interest of $8.76 and legal costs ($490.00 plus disbursements and GST estimated at $60.00).

Ms. Channa was advised that she was required to pay the outstanding arrears in the amount of $604.23 plus legal costs and interest by no later than 5:00 p.m. on August 28, 2008. She was also advised that failure to pay the full amount of the arrears plus legal costs and interest would result in the registration of a lien on title to the unit. The lien also included a note concerning unsecured arrears of common expenses in the amount of $5082.03.

[17] Communications between the parties ensued thereafter, Mr. Agarwal and Tashika Wilson (his employee) seeking clarification with respect to amounts owing. On August 26, 2008 Krystal Hines of Axia provided a breakdown of the amounts owing on the account. She did so numerically, that is by numbers she showed that the $138.20 per month ($414.60) had been applied to the outstanding common expenses (for the access to the unit and hole in the roof issues) as opposed to the special assessment of $201.41 per month. No narrative was provided with respect to the Corporation's' standard practice outlined above.

[18] On August 29, 2008 Mr. Agarwal contacted Elaine Richard of Nelligan O'Brien Payne. He acknowledged that some monies were owed to the Corporation for the months of June, July and August, 2008 in addition to the special assessment. By email dated August 29, 2008 Ms. Richard advised him that payment of the arrears including legal fees in the amount of $540.00 would have to be made by "NOON" in order to avoid the lien being registered. The lien was registered at 4:22 p.m. However, at 4:28 p.m., Mr. Agarwal advised Ms. Richard that he would be forwarding payment totalling $604.23 representing the amount of unpaid special assessment claimed as common expenses under the Notice of Lien with additional post-dated cheques to cover the special assessment for the following months. On Tuesday September 2, 2008 at 8:52 a.m. (Monday being Labour Day) Mr. Agarwal sent an e-mail to Ms. Richard confirming that he had mailed five cheques to the property manager (one cheque dated September 2, 2008 for $604.23 and post-dated cheques for the special assessment for the four following months).

[19] The saga continued. It was the evidence of Mr. Agarwal that his company paid in advance for the fiscal year June 2009 to May 2010. This is supported by an email dated May 12, 2009 from Jodie Marion (an employee of Axia) to Tashika Wilson setting out that the total common expenses charge for June 1, 2009 to May 31, 2010 was $9,159.96 and an email to

Tashika Wilson, that same day, from Mr. Agarwal instructing her to pay it in full in one cheque. Ms. Wilson deposed that on or about June 1, 2009 she sent, via regular mail, cheque number 6290 in the amount of $9,159.96 made payable to the Corporation and that she followed up on a number of occasions to ensure it had been received but no reply was forthcoming. It was the evidence of Mr. Paul however, in his Affidavit dated April 7, 2010, that since May 2009, the Applicant had failed to make any payments towards common expenses. This evidence was supported by the Affidavit of Jodie Marion dated May 13, 2010 who stated that she could not recall ever receiving a lump sum cheque from Ms. Wilson, Ms. Channa or Mr. Agarwal to cover expenses for the months in dispute. The cheque appears not to have been received by Axia but I am advised that payment was made in full for this amount following cross examinations in this matter.

[20] However, since the Corporation held belief that Ms. Channa stopped paying the common expenses since May 2009, a decision was taken by the Board of Directors to commence power of sale proceedings. A Notice of Sale was issued on September 17, 2009. The Notice of Sale stated that the amount due under the lien for common expense, interest and costs was $10,893.20 made up as follows:

a) $3,053.32 for condominium fees;

b) $730.07 for special assessments;

c) $4,379.81 for HVAC/Legal Fees/Structural Engineering Charges;

d) $710.00 for interest on condominium fees, special assessments and HVAC charges;

e) $750.00 for administration costs, including collection fees and disbursements;

f) $1,270.00 for legal fees and disbursements.

[21] Following receipt of the Notice of Sale, Ms. Channa commenced her Application to discontinue the Power of Sale proceedings. In May 2010, Ms. Channa and/or Mr. Agarwal provided cheques for the fiscal year June 2010 through May 2011. No further payments have

been made towards outstanding arrears prior to August 2008 (for the incident relation to the access to the building and related to the unauthorized alteration of the roof), nor have any payments towards legal fees or interest related to the lien been made.

Decision

[22] The *Act* contains the following provision with respect to the obligations of a condominium corporation to manage and administer the common elements and assets of the Corporation and to assess and collect common expenses:

a) Section 17(1) of the Act states that the objects of the Corporation are to manage the property and assets, if any, of the corporation on behalf of the owners;

b) Section 17(3) of the Act states that the Corporation has a duty to take all reasonable steps to ensure that the owners and occupiers of all units comply with the Act, the Declaration and the By-Laws and the Rules;

c) Section 84(1) states that all owners are required to contribute to the common expenses in the proportions specified in the declaration.

d) Section 84(3) of the Act states that an owner is not exempt from making common expense payments even if the owner is making a claim against the Corporation.

e) Section 85 of the Act provides that upon default of the obligation to contribute to the common expenses, the corporation has a lien against the owner's unit and its appurtenant common interest for the unpaid amount together with all interest owing and all reasonable legal costs and reasonable expenses incurred by the corporation in connection with the collection or attempted collection of the unpaid amount.

f) Section 85(2) of the Act states that the lien expires three months after the default that gave rise to the lien unless the corporation within that time registers a certificate of lien.

g) Section 85(3) confirms that a registered lien covers amounts by which the owner defaults in the obligation to contribute to the common expenses following the registration of the certificate of lien.

h) Section 119 (1) requires a corporation, its directors, officers and employees, an owner and an occupier of a unit to comply with the Act, the Declaration, the By-Laws and the Rules.

[23] Further, s. 98 of the *Act* provides the following:

> (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. 1998, c. 19, s. 98 (1).
>
> 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. 1998, c. 19, s. 98 (2).
>
> 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. 1998, c. 19, s. 98 (3).

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. 1998, c. 19, s. 98 (4).

Agreement binds unit

(5) An agreement binds the owner's unit and is enforceable against the owner's successors and assigns. 1998, c. 19, s. 98 (5).

[24] Section 132 of the *Act* deals with mediation. It provides in part:

(1) Every agreement mentioned in subsection (2) shall be deemed to contain a provision to submit a disagreement between the parties with respect to the agreement to,

(a) mediation by a person selected by the parties unless the parties have previously submitted the disagreement to mediation; and

(b) unless a mediator has obtained a settlement between the parties with respect to the disagreement, arbitration under the Arbitration Act, 1991,

(i) 60 days after the parties submit the disagreement to mediation, if the parties have not selected a mediator under clause (a), or

(ii) 30 days after the mediator selected under clause (a) delivers a notice stating that the mediation has failed. 1998, c. 19, s. 132 (1).

Application

(2) Subsection (1) applies to the following agreements:

1. An agreement between a declarant and a corporation.

2. An agreement between two or more corporations.

3. An agreement described in clause 98 (1) (b) between a corporation and an owner.

4. An agreement between a corporation and a person for the management of the property. 1998, c. 19, s. 132 (2).

Disagreements on budget statement

(3) The declarant and the board shall be deemed to have agreed in writing to submit a disagreement between the parties with respect to the budget statement described in subsection 72 (6) or the obligations of the declarant under section 75 to mediation and arbitration in accordance with clauses (1) (a) and (b) respectively. 1998, c. 19, s. 132 (3).

Disagreements between corporation and owners

(4) Every declaration shall be deemed to contain a provision that the corporation and the owners agree to submit a disagreement between the parties

with respect to the declaration, by-laws or rules to mediation and arbitration in accordance with clauses (1) (a) and (b) respectively. 1998, c. 19, s. 132 (4).

Duty of mediator

(5) A mediator appointed under clause (1) (a) shall confer with the parties and endeavour to obtain a settlement with respect to the disagreement submitted to mediation. 1998, c. 19, s. 132 (5).

[25] Section 134 provides in part:

Compliance Order

(1) Subject to subsection (2), an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of a leasehold condominium corporation or a mortgagee of a unit may make an application to the Superior Court of Justice for an order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules or an agreement between two or more corporations for the mutual use, provision or maintenance or the cost-sharing of facilities or services of any of the parties to the agreement. 1998, c. 19, s. 134 (1); 2000, c. 26, Sched. B, s. 7 (7).

Pre-condition for application

(2) If the mediation and arbitration processes described in section 132 are available, a person is not entitled to apply for an order under subsection (1) until the person has failed to obtain compliance through using those processes. 1998, c. 19, s. 134 (2).

Contents of order

(3) On an application, the court may, subject to subsection (4),

(a) grant the order applied for;

(b) require the persons named in the order to pay,

(i) the damages incurred by the applicant as a result of the acts of non-compliance, and

(ii) the costs incurred by the applicant in obtaining the order; or

(c) grant such other relief as is fair and equitable in the circumstances. 1998, c. 19, s. 134 (3).

[26] The Corporation By-Law No. 5 governs the assessment and collection of common expenses and costs incurred by the Corporation in the fulfillment of its obligations and duties. It provides:

a) Article 5.0 states that the duties of the Corporation shall include but shall not be limited to:

(i) Collection of common expenses contributions

b) Article 11.01 states that all expenses, charges and costs of maintenance of the common elements and any other expenses, charges, or costs which the Board may incur or expend pursuant hereto shall be assessed by the Board and levied against the owners in the proportion in which they are required to contribute to the common expenses as set forth in the Declaration...The Board shall, from time to time and at least annually prepare a budget...The Board shall allocate and assess such common expenses as set out in the budget for such period among the owners, according to the proportion in which they are required to contribute to the common expenses...

c) Article 11.02 states that each owner shall be obligated to pay the Corporation, or as it may direct, the amount of such assessment in equal monthly payments on the first of the day or each and every month next following delivery of such assessments until such time as a new assessment shall have been delivered.

d) Article 12.01 states that arrears of payment required to be made under the provisions of Article XI shall bear interest at the rate of 36% per annum and shall be compounded monthly until paid. In addition, there shall be a charge of $50.00 for the first default by an owner of monthly payment not made by the 1st day of the month in which it is due. In addition to any remedies or liens provided by the Act, if any owner is in default in payment of an assessment levied against them, for a period of 15 days, the Board may bring legal action for and on behalf of the Corporation to enforce collection thereof and there shall be added to the amount found due all costs of such action including costs as between a solicitor and his own client and such costs may be recoverable against the defaulting owner in the same manner as common expenses.

e) Article 13.02(d) states that any charges incurred by the Corporation in relation to an owner's failure to comply with the requirements of Article 13.02 and an agreement governing modifications to the common elements may be added to the common expenses payable for the owner's unit, and may specify a time for payment.

[27] A Board of Directors of a condominium corporation has, among its obligations the following:

a) to manage and administer the common elements and assets of the condominium corporations;

b) to take all reasonable steps to ensure compliance by all owners;

c) to assess and collect common expenses as required;

d) to take collection steps, including registration of a lien as may be necessary in the event of default of payment by any owner.

[28] I turn then to the issue of the lien registered on August 18, 2008 and the Notice of Sale served on September 17, 2009. It is the position of Ms. Channa that the Notice of Lien was flawed as to the amount owing and despite her (through Mr. Agarwal's efforts) to ascertain the correct amount owing and providing payment thereto, the Corporation registered a lien against the unit on August 29, 2008. It is the position of Ms. Channa that as of August 29, 2008, there were no monies owed for common expenses and in fact, there was an over payment of $138.20 and no lien should have been registered against the Applicant. In the alternative, it is submitted that as of August 29, 2008 there was an amount of $189.63 in arrears in relation to the special assessment for June through August 2008, which Mr. Agarwal attempted to resolve with counsel for the Corporation. Counsel for Ms. Channa submitted that if the special assessment is characterized as a common expense (as indicted in the Notice of Sale) then it was improper for the Corporation to split Ms. Channa's cheques for June, July and August 2008 and apply monies to the outstanding arrears of common expenses. Finally, it is submitted that as of September 2, 2008 there were no longer any arrears left owing and the Corporation ought to have discharged the lien pursuant to s. 87(5) of the *Act*, but failed to do so.

[29] Ms. Channa's position ignores one important point. As provided in s. 85.1 of the *Act* legal costs expended can properly be included in the lien. Ms. Channa has never paid any monies to the Corporation for legal costs or interest, which form part of the arrears owing to the Corporation for common expenses. It can in no way be said that Ms. Channa has paid all of required amounts on the lien registered on August 29, 2008.

[30] Ms. Channa and Mr. Agarwal have asked this court to note that the lien was registered at 4:22 p.m. on August 29, 2008 at a time when Mr. Agarwal was still communicating with counsel at Nelligan O'Brien Payne and that at 4:28 p.m. he advised by email that he would be forwarding payment totalling $604.23. Again this ignores that legal costs and interest were not sent. Moreover, initially the deadline for payment was August 28, 2008 and it was extended by counsel to noon August 29th. No monies were received by 4:22 p.m.

[31] Counsel for the Corporation has provided case law which supports the action of the Corporation in applying the payments received from Ms. Channa to previous amounts owing to the Corporation for unpaid arrears of common expenses in the absence of any direction from Ms. Channa or Mr. Agarwal to the contrary. (*Malva Enterprises Inc. v. Rosgate Holdings Ltd.*, [1993] O.J. No. 1724, *John Cox v. Halton Condominium Corporation No. 177, et al.*, (28 April 1994), 939/93 (Ont. Gen. D. Ct.) ("John Cox"), *Amoah v. York Condominium Corp No. 42*, [2005] O.J. No. 5266, and *Chris Kidney v. Carleton Condominium Corporation No. 571 et al* (2005), S.C. No. 081577 ("Chris Kidney").)

[32] In *Chris Kidney*, *supra*, the issue was the payment of outstanding common expense that had not been paid by the unit owner. Although the owner had ultimately paid the arrears of the condominium fees, he refused to pay the legal costs that had been incurred by the condominium corporation. The Corporation proceeded with the registration of a lien and the owner brought a claim seeking recovery of the entire amount under the lien. The Court referred to the decision in *John Cox*, *supra*, and found that a condominium can apply an owner's monthly expense to the oldest amount of arrears outstanding. The Court noted that "this principle creates a new default each month."

[33] Based on this case law it appears that the Corporation is entitled to apply the payments made by Mr. Agarwal to the arrears of common expenses owed to the Corporation as it did, unless he specified that the payments are to be credited differently. However, even if he had so specified in the circumstances of this case, he still would have been $189.63 short and would have not made any payment for legal fees or interest. There is no doubt that on August 29, 2008 such monies were owed to the Corporation by Ms. Channa.

[34] In this regard I note the case of *York Condominium Corporation No. 482 v. Ken Christiansen et al*, 02-CV-231437 CM2 ("Christiansen") were the following was stated at paragraphs 48-51:

> The form of the Certificate of Lien is prescribed by Ontario Regulation 49/01, Form 6, and it has been followed by the corporation with the one problem that there are claims for lien over units which I have held are not lienable in the circumstances and the amounts are lumped together. There is nothing in the Form

> itself to confine it expressly to one unit. Assuming that there is a [page82] failure to include all relevant information called for by the Form, it must still be read together with the Notice to Owner which does give all the data. Even if strict compliance is required, the documents taken together fully comply.
>
> More fundamentally, the applicant responded that the entire analogy was wrong. The strict compliance of the Notice of Sale under the Mortgages Act, R.S.O. 1990, c. M.40 was imposed because it was the basic step in the process of actually selling the security; but the lien is not the equivalent step. The Act provides that the lien may be enforced "in the same manner as a mortgage", thus a Notice of Sale would issue at a later stage and the strict compliance rules would apply at that stage. Further, if the Notice of Sale is faulty, all that is lost to the mortgagee is the time to issue a new one. In the case of the lien, if it is set aside, the three months of lienable arrears must be recalculated and some lien rights will be forever gone. This is a serious penalty for want of precise compliance at so early a stage, and should not be read in to the Act unless it is necessary for its operation, which is not the case.
>
> In my view this is a sensible analysis. Importing the strict compliance requirement at the Certificate of Lien stage, when it will have to be met at a later stage if sale is actually contemplated, is adding an extra hurdle for the condominium administrator and giving defaulting owners a protection that they do not need since they will be sent a Notice of Lien with those particulars. Owners will normally know perfectly well that they are in arrears and how much and if they don't, the information is readily available from the corporation office. At this stage some showing of prejudice should be a requirement for setting aside a certificate of lien for non-compliance with the requirements in s. 85 and the Forms at the instance of an owner. No prejudice has been shown.
>
> For these reasons, I do not set aside the Certificates of Lien. Rather, I direct that the applicant register discharges of its lien against all units as to which there were no arrears of common expenses at the date of registration.

[35] There is no question in this matter that the Notice of Sale issued on September 17, 2009 was flawed. Section 85(3)(a) of the *Act* specifically provides that a certificate of lien only covers the amount owing under the corporation's liens against the unit that have not expired at the time of registration of the certificate of lien. The amount set out in the Notice of Sale clearly includes unsecured debts for the unauthorized alteration of the roof as set out above. These amounts were in default for more than 90 days prior to the registration of the certificate of lien. They could not form part of the amount of money required to be paid under the Notice of Sale pursuant to the lien. As noted in *Christiansen*, *supra*, strict compliance is required for Notices of Sale to be

valid. As the Notice of Sale dated September 17, 2009 was flawed it us not valid. However as is also noted in *Christiansen*, all that is required is that a new Notice of Sale be issued in proper form.

[36] I turn now to the Application of the Corporation. I am satisfied on the evidence before me that amounts are owed by Ms. Channa for the expenses incurred by the Corporation in remedying the shut off of water in her unit in April 2007 and in dealing with the unauthorized modification of the roof undertaken by Mr. Agarwal and that these expenses form charges that can be added to the common expenses for the unit (see *Mancuso v. York Condominium Corporation No. 216*, (2008) CanLII 20343 (ON S.C.), *York Condominium Corporation No. 228*, Court File No. Re. 5917195 and *Italiano v. Toronto Standard Condominium Corporation No. 1507*, (2008) CanLII 32322 (ON S.C.).) A Corporation is entitled to apply the costs of remedying breaches by an owner of a unit to the common expenses payable for the unit.

[37] Unfortunately for the Corporation it is out of time to recover these costs pursuant to the lien. The Corporation did not file proper liens in accordance with the three month limit set out in s. 85(2) with respect thereto. Moreover, on the evidence before me, the Corporation is statute barred pursuant to the *Limitations Act*, 2002 S.O. 2002, c. 24. Section 4 of the *Limitations Act* provides that a claim shall not be commenced after the second anniversary of the day which the claim was discovered. A claim is defined as being "a claim to remedy and injury, loss or damage that occurred as a result of an act or omission." (s.1.)

[38] The Corporation essentially argued that since Ms. Channa failed to respond to its earlier letters with respect to these charges (February 11, 2008, May 12, 2008) that it did not know that she would not pay those amounts. It submitted that up until August 2008 they were waiting for a response and that it was only in August 2008 that Mr. Agarwal made clear that they would not pay those amounts, by only paying $604.00. It submitted that the two year limitation period runs from that date. In my view, an acceptance of such position would render the limitation provision meaningless.

[39] In October 2007, various invoices were sent to Ms. Channa for legal costs and engineering fees related to the unauthorized alteration of the roof. In the November 7, 2007 letter

to Mr. Max, counsel for the Corporation referred to the lien filed (later admitted to be imperfect) with respect to the costs associated with the access to the unit to turn on the water and that the Corporation was seeking its costs for this as well as the costs associated with the unauthorized alteration of the roof, totalling some $7,500.00. Invoices were attached. On February 11, 2008 a letter was sent to Ms. Channa entitled "Second Notice." On May 12, 2008 a "Final Notice" letter is sent. Both these letters threatened lien proceedings with their associated costs. On the evidence before the Court, it is apparent that the Corporation had notice of its claims against Ms. Channa for the costs, including legal costs of the unauthorized altercation of the roof and those associated with the access to the unit to turn on the water, from October or November, 2007. The Application was not brought until July 30, 2010. The Corporation is out of time with respect to its claim for these costs.

[40] With respect to the Corporation's claim for compliance with s. 98 of the *Act*, counsel for Ms. Channa has submitted that compliance in the present case is not appropriate as the Applicant is not attempting to modify or alter the common elements in anyway. Further, it is argued that as the work has now properly been completed on the roof, no agreement pursuant to s. 98 is required. Finally, it is argued that mediation and arbitration are a precondition to the bringing of an Application in relation to a disagreement between two parties.

[41] Section 98 of the *Act* provides that an owner may make an alteration or modification to the common elements that are not contrary to the *Act* or declaration of the corporation if the board has approved the alteration or modification and the owner and the corporation have entered into an agreement with respect thereto. This agreement is to allocate the costs of the proposed alteration or modification and sets out the respective duties and responsibilities for the costs of repair after damage, maintenance and insurance. The agreement binds the owner's unit and is enforceable against the owner's successors and assigns. It has an immediate (that is when the alteration or modification is made) and prospective effect. It confirms the obligations of the owners and the corporation going forward once the alteration or modification is completed.

[42] There is no doubt that the roof of Ms. Channa's unit is a common element. According to Schedule C of the Declaration, the ceiling is the upper boundary of her unit. Making a hole in the roof for the installation of the HVAC equipment is surely an alteration or modification of the

roof and therefore the common elements. Ms. Channa was and is still required to enter into an agreement with respect to this issue, pursuant to s. 98 of the *Act.*

[43] In my view there was no requirement for the Corporation to enter into mediation and arbitration prior to seeking a compliance order in the legislation. Section 134 of the *Act* states that a condominium corporation is entitled to commence an application for an order enforcing compliance with any provision of the *Act*, the Declaration, the By-Laws or the Rules of the corporation. Section 132 of the *Act* requires that some disputes between an owner and a corporation proceed by way of mediation and arbitration. It provides that disputes relating to the Declaration, By-Laws and Rules, or disputes relating to an existing agreement governing a modification to the common elements must form the subject of mediation and arbitration. But surely, the issue of whether one must comply with the law itself, that is the requirement to seek approval and enter into an agreement with respect to the alterations to common elements, cannot be the subject of mediation or arbitration. The language of the sections 132 and 134 simply does not support the interpretation sought by Ms. Channa. The dispute herein relates to a direct breach of the *Act.*

[44] I note in this regard the case of *Peel Condominium Corp. No. 283 v. Genik*, [2007] O.J. No. 2544. Ms. Genik caused a satellite dish to be installed on her unit without the permission of the corporation. Section 98 of the *Act* was considered by the Court. The Court held that the satellite dish was installed in violation of the legislation. The Court further stated that this was not a situation for which mediation or arbitration was required.

[45] The Corporation has gone further however and has asked for what I will refer to as a general and open ended compliance order, as opposed to a compliance order with respect to the alteration to the roof. To that end she has relied on *Chan v. Toronto Standard Condominium Corp. No. 1834.* [2011] O.J. No. 90. ("Chan"). In *Chan* the Court stressed the importance of unit holders and occupiers complying with the *Act.* It stated at paragraphs 3 and 4:

> Subsections 134 (1), (2), (3), and (5) allow a unit owner, an occupier, a corporation, among others, to apply to the Superior Court of Justice for an order enforcing compliance with the *Act*, the declaration, by-laws and rules. The court may grant the order requested; require the persons named in the order to pay

> damages the applicant incurred as a result of non-compliance and to pay the costs the applicant incurred in obtaining the order. The court may grant any other relief fair and just in the circumstances. The costs or damages awarded together with any additional costs are added to the owner's common area expenses to be paid within a time that may be specified by the Corporation.
>
> Courts have stressed the importance of unit owners and occupiers complying with the *Act*, the declaration and the rules of a condominium corporation.

[46] However in *Chan, supra*, the corporation was seeking an order that Ms. Chan and her unit comply with the provisions of the *Act* with respect to leasing the unit and with respect to the internal locks placed on doors of the unit. The corporation had become aware she had rented out rooms to three different tenants as a boarding house. The rules of the corporation allowed only for single family tenants. The Court found Ms. Chan to be in breach of s. 119 of the *Act*, the declaration and the rules and ordered that "the respondents cease the improper use of unit 2308 for other than as a single family unit." The Court did not appear to make a general and open ended order, although it is difficult to know with certainty as at the end of the decision the Judge simply said "Order to issue in accordance with the relief the Corporation seeks at paragraph 1(a) to (i) of its Notice of Application."

[47] The Corporation has sought a general and open ended Order that Ms. Channa comply with s. 98 of the *Act.* Obviously, Ms. Channa must comply with s. 98 of the *Act* should she seek in the future to make an addition, alteration or improvement to the common elements. That is the law. But judges don't generally baldly order people to comply with the law in the future with respect to some unknown situation. People are expected to follow the law. That Ms. Channa would be well advised to do so in the future goes without saying. Otherwise, she will undoubtedly face compliance proceedings being brought against her with the cost consequences that would surely follow.

[48] In summary I find and order as follows:

(1) The Lien registered on title to the unit on August 29, 2008 was validly registered. Ms. Channa has paid the $604.23 set out therein. However, she is still required to pay the interest thereon and the legal costs of $550. It remains due and owing.

(2) The Notice of Sale Under Lien dated September 17, 2009 is invalid. The Corporation is entitled to proceed with power of sale proceedings pursuant to s. 85 of the *Act* should Ms. Channa fail to make full payment of the amounts set out in (1) above.

(3) The Corporation's claim with respect to all costs including legal costs and any other expenses incurred by the Corporation related to the water shut off in Ms. Channa's unit and related to the unauthorized alteration or modification of the roof is denied. These claims are statute barred.

(4) Ms. Chan is ordered to enter into an agreement with the Corporation with respect to the alteration or modification of the roof, pursuant to s. 98 of the *Act* forthwith. For clarity, it is noted that on a go forward basis, the Corporation may add the costs, charges, interest and expenses to the common expenses for her unit should she fail to do so.

[49] Turning to costs. I am not inclined to order costs with respect to these Applications to either party. The Corporation did not achieve success on its claim with respect all costs and expenses associated with the water shut off issue and the unauthorized alteration of the roof of Ms. Channa's unit. However, Ms. Channa has been ordered to enter into a s. 98 Agreement with the Corporation with respect to the unauthorized altercation of the roof. Ms. Channa did not achieve success on her request that the lien dated August 29, 2008 be vacated, nor did she receive a permanent injunction restraining the Corporation from exercising its power of sale, but the Notice of Sale Under Lien dated September 17, 2009 has been declared invalid. In the circumstances, each party shall bear their own costs.

The Hon Madam Justice H. Polowin

Released: December 14, 2011

CITATION: Channa v. Carleton Condominium Corp. No. 429, 2011 ONSC 7260
COURT FILE NO.: 09-46682/10-49099
DATE:20111214

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

GEETA CHANNA

Applicant (Respondent)

– and –

CARLETON CONDOMINIUM CORPORATION NO. 429

Respondent (Applicant)

REASONS FOR JUDGMENT

Polowin J.

Released: December 14, 2011