CITATION: Hakim v. Toronto Standard Condominium 1737, 2012 ONSC 404
COURT FILE NO: CV-10-415818
DATE: 20120118

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
FARRAH HAKIM AND JAFFAR KAYYALI	)	Self-Represented
	)	
Applicants	)	
	)	
- and -	)	
	)	
TORONTO STANDARD CONDOMINIUM CORPORATION NO. 1737	)	*Michael A. Spears*, for the Respondent
	)	
	)	
Respondent	)	
	)	
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	)	
	)	
	)	
	)	**HEARD**: December 5, 2011

B. O'MARRA J.:

INTRODUCTION

[1] The applicants are husband and wife and own Unit 21, Level 10 of the Condominium Project known municipally as 18 Mondeo Drive, Suite 1042, in Toronto. From 2005 through June 2008 they resided there with their two children. They also own Unit 62, Level 1 of the Condominium Project which is a parking unit in the underground parking garage adjacent to the high-rise residential building.

[2] The respondent is a non-profit condominium corporation created pursuant to the *Condominium Act* 1998, S.O. c.19 ("the Act") for the purpose of managing a high-rise condominium project composed of 329 residential dwelling units together with their appurtenant common interests.

FACTS

[3] The applicants moved to 18 Mondeo Drive in February 2005. They parked their van in the underground parking lot. On December 15, 2005, the applicants sent a letter to the property manager stating that “the garage height was inadequate for our van to enter.” The property manager proceeded to refer the matter to the sales team that sold the condominium unit to the applicants. He took no further action on the matter.

[4] In early 2008, the applicants’ van caused damage to the garage door of the underground parking lot. Management issued a letter to the applicants on February 19, 2008, advising them that their van was in violation of Section 30 of the Condominium Corporation’s Declaration, which stated the following:

> Each parking unit shall be used and occupied for motor vehicle and/or bicycle parking purposes only...the term “motor vehicle”...shall be restricted to a private passenger automobile, motorcycle, station wagon, minivan or truck not exceeding 1.9 metres in height, and shall exclude any type of commercial vehicle...

[5] The letter informed the applicants that their van exceeded the height restriction of 1.9 metres. Similar letters were sent to seven other owners and residents of the building. The Board was concerned that over-height vehicles would cause damage to overhead fire sprinkler pipes and fire exit signs.

[6] It is unclear whether the damage to the garage door was caused by the applicants’ van or the garage door itself. The fact that the applicants were able to park their van in the underground parking lot for three years prior to the accident suggests that the garage door was the problem.

[7] The Board later discovered that the van was registered as a commercial vehicle. This was also in violation of Section 30 of the Declaration.

[8] To accommodate the applicants, the Board allowed the applicants to park their van underground until June 2008.

[9] The applicants met with the Board to discuss this matter on March 25, 2008. The Board confirmed that it would not exempt the applicants from the height restriction. However, to further accommodate the applicants and other owners of over-height vehicles, a motion was passed to permit owners with over-height vehicles to park in the visitor parking area for up to 30 days upon request.

[10] In April 2008, management distributed a notice to each of the residents of 18 Mendeo Drive alerting them to the garage door accident and requesting any oversized vehicles to be removed from the underground parking lot. The notice does not single out the applicants as the cause of the damage.

[11] Around the same time, the applicant, Mr. Kayyali, informed the Board that he would like to run for candidacy as a Board member. The Board decided that he could not, since he was involved in pending litigation against the condominium. Counsel for the condominium informed Mr. Kayyali of the Board decision at the annual general meeting, which was held about two weeks after the Board had made its decision to bar his candidacy.

[12] In March 2008, counsel for the condominium advised the Board that if a court were to decide the parking spot dispute that the Board's failure to enforce the Declaration for such a long period of time may give the applicants the right to have their van "grandfathered" – that is, it could be legally parked underground notwithstanding its violation of the Declaration.

[13] On June 18, 2008, the Board installed a steel beam across the parking garage entrance in an attempt to enforce the height restriction. An investigation initiated by the applicants revealed that the steel beam was not in compliance with the relevant building code.

[14] Mr. Kayyali requested a visitor's parking pass from the concierge. The concierge refused, arguing that owners are not permitted to park in the visitors' parking lot. At that point, the applicants decided that Mr. Kayyali must move out of 18 Mondeo Drive, because he had no place to park his van.

[15] Later that day, the applicants were advised that the Board had decided to issue a visitor's parking permit to Mr. Kayyali. He did not accept it. He observed a special parking permit issued to another resident and noticed that it expired at the end of the month. Mr. Kayyali assumed that the same terms would apply to the visitor's parking permit being offered to him, and he proceeded to move away from his family.

[16] The respondents served the applicants with a Notice of Arbitration in August 2008.

[17] The applicants met with the Board on March 25, 2009. In that meeting, the Board proposed to exempt the applicants' van from the height restriction, provided that the applicants would be liable for any damage caused by the van. The Board also offered to issue monthly parking permits to Mr. Kayyali so that he would not have to continue living away from his family. The applicants accepted these terms, but the matter was not concluded. It is unclear why the dispute was left unresolved at this point.

[18] The applicants attempted to initiate further discussions with the Board shortly after the March 25 meeting, but a Board member fell sick and was hospitalized, and the president of the Board resigned. This prevented the Board from responding to the applicants' requests.

[19] A second meeting on July 15, 2009, did not result in final settlement of the dispute. It consisted of an update by the applicants of the terms of settlement proposed on March 25, 2009. This was necessary because a new Board president had been appointed since that meeting. The applicants also raised a number of concerns with the Board, including the actual height of the van, the adverse effects that this issue has had on their family, and the lack of action taken by the Board to move the arbitration forward,

[20] A further meeting was held on August 19, 2009. In that meeting, the applicants proposed two terms of settlement: a grandfathering agreement for their van, and $150,000 in monetary compensation. The Board reserved the settlement proposal for consideration by counsel.

[21] On September 14, 2009, counsel for the corporation sent a letter to the applicants advising them that the settlement proposal of August 19 was rejected and that the corporation would be proceeding with arbitration.

[22] On November 25, 2009, the Board presented the applicants with a settlement proposal. This proposal required the applicants to sell their unit at 18 Mondeo Drive by June 30, 2010. A monthly visitor's parking permit would be issued to Mr. Kayyali to allow him to park his van until June 30, 2010. If the applicants failed to sell their unit by that date, then they would have no right to park their van anywhere on the condominium property.

[23] The applicants rejected the proposal in a letter dated December 7, 2009. The applicants informed the Board that they would be moving from 18 Mondeo Drive, and that the move was voluntary. The applicants also conceded that the Board could legitimately remove the special parking permit issued to Mr. Kayyali to park his van in visitors' parking. Ms. Hakim testified during discovery that this letter was entirely sardonic and not sincere.

[24] Consequently, the applicants were informed shortly after that the monthly visitor's parking permit issued to Mr. Kayyali would expire on January 31, 2010 rather than June 30, 2010. Mr. Kayyali moved out from 18 Mondeo Drive once again in February 2010.

[25] In June 2010, Mr. Kayyali altered a parking permit to allow him to park at 18 Mondeo Drive. He did so in order to help his family prepare for their move from 18 Mondeo Drive.

[26] In July 2010, Mr. Kayyali was also advised by management that he was in possession of a key that gave him access to restricted areas of the building. This key was mistakenly issued to Mr. Kayyali when he first moved into the building in 2005. Management advised Mr. Kayyali that a valid key would be exchanged for the restricted key at no cost to the applicants.

[27] When Mr. Kayyali attempted to exchange the keys, he was advised that there would be a cost of eight dollars. The applicants refused to pay this amount.

[28] On July 28, 2010, counsel for the corporation notified the applicants that the corporation would be seeking the costs of repinning the locks from the applicants. This amounted to $2,373. This application was rejected by Roberts J. on October 8, 2010, on the grounds that the costs of repinning the locks were not caused by Mr. Kayyali's actions.

[29] The applicants moved from 18 Mondeo Drive in September 2010 and began renting their unit to a tenant. The tenant complained to the applicants that she was being mistreated by management. This included allegations that the tenant parked illegally in a spot reserved for disabled individuals, and that the tenant's dog was disturbing the peace and quiet of other residents.

OPPRESSION REMEDY

[30] On application to the Superior Court, if it is found that the conduct of an owner, a corporation, a declarant or a mortgagee of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant, an order to rectify the matter may be made. The judge may make any order deemed proper including:

a) an order prohibiting the conduct referred to in the application; and
b) an order requiring the payment of compensation. s.135(1) (2) & (3)

[31] Section 135 of the Act came into effect in 2001. Courts in Canada have dealt with oppression remedies for many years in the context of company law. Those cases have considered whether the conduct complained of falls under the three types enumerated under statute, namely:

i) oppression;
ii) unfair prejudice; or
iii) unfair disregard.

[32] The courts have not drawn clear lines between any of the three statutory tests and have often found that conduct may fit into one or more of the categories. Unfair prejudice and unfair disregard are less rigorous tests than oppression. *Niedermeier v. York Condominium Corporation No. 50* (2006), 45 R.P.R. (4th) 182, at para. 4 ("*Niedermeir*")

[33] *Oppression* is conduct that is coercive or abusive. Oppression has also been described as conduct that is burdensome, harsh and wrongful, or an abuse of power which results in an impairment of confidence in the probity with which the company's affairs are being conducted.

[34] *Unfair Prejudice* has been found to mean a limitation on or injury to a complainant's rights or interests that is unfair or inequitable.

[35] *Unfair Disregard* means to ignore or treat the interests of the complainant as being of no importance. *Niedermeier, supra,* at paras. 5-8.

[36] Courts in Ontario have held that the use of the word "unfairly" to qualify the words "prejudice" and "disregard" suggest that some prejudice or disregard is acceptable provided it is not unfair. *Niedermeier, supra,* at para. 9.

[37] The oppression remedy is broad and flexible, allowing any type of corporate activity to be subject of judicial scrutiny. Nevertheless, the legislative intent of the oppression remedy is to balance the interests of those claiming rights from the Corporation against the ability of management to conduct business in an efficient manner. *McKinistry v. York Condominium Corporation No. 472* (2003), 68 O.R. (3d) 557 (S.C.), at para. 31 ("*McKinstry*")

[38] Section 135 protects legitimate expectations and not individual wish lists, and the court must balance the objectively reasonable expectations of the owner with the condominium Board's ability to exercise judgment and secure the safety, security and welfare of all owners and the condominium's property assets. *McKinstry*, *supra*, at para. 33.

[39] The duties of the condominium Board include the following:

> 1. The corporation has a duty to control, manage and administer the common elements and the assets of the corporation. s.17(2)
>
> 2. The corporation has an obligation to enforce the Act, Declaration, bylaws and rules against owners and occupiers of a unit. s.17(3)
>
> 3. The corporation, the directors, officers and employees of a corporation, a declarant, the lessor of a leasehold condominium corporation, an owner, an occupier of a unit and a person having an encumbrance against a unit and its appurtenant common interest shall comply with the Act, the declaration, the bylaws and the rules. s.119(1)

[40] It must be recognized that the Board is charged with the responsibility of balancing the private and communal interests of the unit owners, and their behaviour must be measured against that duty. The court does not look at the interaction between the Board and the applicant in isolation. The conduct of the corporation must be viewed in light of the behaviour of the applicant. *Orr v. Metropolitan Toronto Condominium Corporation No. 1056*, 2011 ONSC 4876, at paras. 158-160, 165 & 166 ("*Orr*")

[41] The court in exercising its discretion must balance the reasonable expectations of an owner with the duties of the Board to the ownership at large. *Orr*, *supra*, at para. 171.

[42] The test for oppression is two-pronged. The claimant must first demonstrate that there has been a breach of its *reasonable* expectations. If that is established, the court must consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard". *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, at para. 56 ("*Debentureholders*")

[43] The concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue and the entire context, including the fact that there may be conflicting claims and expectations. *Debentureholders*, *supra*, at para. 62.

APPLICATION

[44] The applicants allege a long-standing course of conduct by the corporation towards them that was oppressive and unfair, including the following:

- They were unfairly targeted for selective enforcement;
- There was a protracted failure or refusal by the corporation to discuss and negotiate ongoing issues with them in a reasonable and good faith manner;
- The respondent intentionally disqualified Mr. Kayyali as a candidate to serve on the Board of Directors by engaging him in litigation prior to the May 28, 2008 annual general meeting;
- The respondent installed a steel beam at the entrance ramp to the underground parking garage on June 18, 2008 that prevented Mr. Kayyali from parking his vehicle there. The beam was subsequently found to be not in compliance with municipal bylaws and the building code;
- Mr. Kayyali claims he was forced to live elsewhere and apart from his wife and children due to parking restrictions imposed on his vehicle;
- The respondent unfairly limited Mr. Kayyali to 12 visitor parking permits per month while the parties disputed the issue. Mr. Kayyali received parking tickets and finally altered a parking permit for 3 days in July of 2010 out of what he claims was desperation to be with his family;
- The applicants moved out of the unit in September 2010 and sublet the unit to other tenants. The applicants claim the corporation continued their vendetta against the applicants by harassing the new sub-tenants who eventually moved out; and
- In July 2010 the corporation sued the applicants related to disputes as to a replacement key as well as the altered visitor parking permit.

[45] The applicants presented very thorough materials on this application, including a sprawling factum of 117 pages. They refer to several examples of alleged oppressive or unfair treatment. The dominant issue and genesis of this dispute relates to enforcement of the corporation's Declaration regarding use of parking units (section 30 of the Declaration).

[46] At paragraph 273 of the applicants' factum, they refer to four serious issues to be dealt with:

1. Did the respondent fail to enforce the Declaration upon the applicants in a timely manner?

2. Did the respondent abuse its position of power and act in an oppressive manner towards the applicants in its attempt to enforce the Declaration?

3. Did the respondent ignore the best interest of the applicant in its attempt to enforce the Declaration?

4. Did the respondent propose grandfathering to the applicant and was this agreed and accepted by the applicant?

[47] A recurring theme in the applicants' materials is that the corporation ignored the best interests of the applicants in its attempt to enforce certain rules and regulations. Indeed, the applicants appear to view any enforcement that was not in their personal best interests as being unfair, unjustified and oppressive. For example, the applicants claim to have been "subjected" to the rules regarding 12 parking permits allowed to a unit/owner per month in the visitor area, notwithstanding the application of this rule to all residents. This view ignores the democratic and communal nature of a cooperative corporation and the mandate of the cooperative through the Board of Directors to balance the interests of all residents with the operational necessities of the corporation.

[48] The applicants engaged in protracted disputes with the corporation and sought to be exempted from certain rules and regulations that applied to other residents. In the course of the ongoing disputes and attempts at resolution the corporation extended temporary exemptions to certain regulations (i.e. parking in spaces reserved for visitors). This went on for months at a time. The applicants now claim that the corporation should be precluded from enforcing such rules due to unreasonable delay in the commencement of proceedings. This court takes a very different view. The corporation attempted over time to compromise and to accommodate certain of the applicants' demands. Any delay by the corporation in enforcing the regulations was a reasonable and good faith effort to balance the requests and interests of the applicants with the interest of the other residents and the corporation.

[49] The applicants were aware, or should have been aware, of the parking height restriction from the time they moved there in late 2005. The Board's attempts to enforce the restriction do not constitute oppressive conduct. In *Metropolitan Toronto Condominium Corporation No. 1272, et al v. Beach Development (Phase II) Corporation*, 2011 ONCA 667, at para. 13, the Court of Appeal found there was no oppressive conduct where "the Appellants voluntarily purchased their condominium units in the full knowledge and disclosure of the rights and obligations associated with their transaction."

[50] The Board's actions also do not constitute unfair prejudice. In February, March and April of 2008 the corporation sent enforcement letters on the parking issue to seven *other* owners/residents. This shows that the applicants were not being targeted in any way. On the

contrary, the Board had legitimate concerns about over-height vehicles causing damage to overhead fire sprinkler pipes and exit signs. As such, it notified several residents to comply with the height restriction.

[51] There was also no unfair disregard of the applicants' interests. The Board allowed the applicants an extension until June 2008 to park underground. To further accommodate the applicants, the Board met with them in March of 2008 and passed a motion to permit owners with over-height vehicles to park in the visitor parking area for up to 30 days on request. Additional special parking permits were offered to the applicants in June 2008 and March 2009.

[52] The applicants have failed to satisfy this Court that the decision to install the steel beam was in bad faith and aimed at them alone. The decision to install the beam was made after consultation with counsel, obtaining quotes for installation costs, and finding several vehicles in violation of the height restriction. The corporation had legitimate concerns about the potential damage that could result from the presence of over-height vehicles. The subsequent issues with the Licensing & Standards Office that led to removal of the steel beam do not advance the argument that the Board decision was made in bad faith or to oppress the applicants.

[53] I also do not agree with the applicants' submission that Mr. Kayyali's choice to move away from his family after the steel beam in June 2008 was installed was a result of oppressive or unfair actions by the Board. The Board decided to issue a special parking permit to Mr. Kayyali, but this offer was refused. Mr. Kayyali simply assumed that the permit would expire by the end of the month. He did not inquire into this reasonable option presented by the Board. The Board's willingness to offer Mr. Kayyali a monthly parking pass in March 2009 that did not expire at the end of the month suggests that the parking pass in June 2008 would have contained similar terms.

[54] There were numerous letters and communications between the parties as the disputes continued. The applicants on occasion sought an informal discussion of their objections and concerns. The Board responded that communications should be formalized and presented to the democratically elected Board when available. The fact that the Board did not agree with what the applicants submitted is not evidence of bad faith or oppression.

[55] The Board received and reviewed a proposal by the applicants to "grandfather" parking for their van based on the length of time they had already used the underground parking area. The Board sought legal advice to ensure it was acting in compliance with the Act and Declaration. It must be remembered that any exceptions or exemptions made for the applicants would have precedential implications for other residents in the limited parking spaces. Through several months in 2009 the Board held several meetings to discuss a possible resolution of the matter. Settlement ultimately failed based on what the Board deemed to be unreasonable demands by the applicants, including a claim of $150,000 for compensatory damages.

[56] The applicant, Mr. Kayyali, admits that he altered a parking permit for 30 days in July 2010. He claims it was out of "desperation" to be with his family. This incident of self help to

create a false document by Mr. Kayyali must be considered when he claims to be a victim of unfair conduct by the corporation. This act on his behalf shows how far he was prepared to go in opposition to the corporation.

[57] The applicants finally decided to live elsewhere based on their ongoing disputes and disagreements with the corporation. Based on all the evidence before me I cannot find that the actions of the corporation were oppressive or unjust. The applicants claim that their sub-tenants were harassed or oppressed by the corporation, presumably as part of the vendetta against them. The new tenants came into conflict with the corporation related to a dog creating a noise nuisance. Bearing in mind the close proximity of residents living in such a setting, there are rules governing such matters and there is no evidence they were unfairly enforced in this instance.

[58] The applicant, Mr. Kayyali, claims that the respondent intentionally disqualified him from serving on the Board by engaging him in litigation. The Declaration of the corporation bans anyone involved in litigation from so serving. The acrimonious relationship between the Board and the applicants led almost inevitably to litigation. I cannot find on the material before me that the respondent had the ultimate or ulterior motive of barring Mr. Kayyali from the Board. It was evident over time that resolution was unlikely and I am not prepared to find bad faith or oppression by resort to the courts over a matter of civil dispute by the corporation.

[59] Of some concern were the terms of settlement proposed by the board in November 2009. The settlement proposal resembled coercion, since it required the applicants to sell their unit in order to obtain a parking permit for Mr. Kayyali's van until June 30, 2010. However, I do not find that the proposal was coercive. The applicants were not required to sell their unit. But if they wanted to continue enjoying the parking exemption for their van until June 30, 2010, then they would have to sell their unit. In essence, the Board was merely enforcing the height restriction found in the Declaration, and it was within its right to do so. The applicants could have substituted their van for another vehicle and avoided the terms of the proposal all together.

[60] In addition, the Board's decision to seek the costs of repinning the locks from the applicants was not a reasonable one. Roberts J. commented as such in her endorsement. Nevertheless, this decision was not oppressive within the meaning of s. 135. Litigation is always burdensome on the parties involved. Though it may be coercive at times, it was not so in this case. There is no evidence that the litigation was brought by the Board for a reason other than compensation for the change of locks. There is also no evidence that the litigation was unduly burdensome or acrimonious.

Conclusion

[61] After carefully considering all of the material and submissions made, I do not find that the conduct of the respondent was oppressive or unfair to the applicants. The "best interests" of the applicants is not the test for assessing the respondent's conduct and intention. The Board of this cooperative condominium is not some faceless corporate entity. Rather, they were elected members from among the fellow residents who were charged to carry out the statutory and

internal rules of the corporation. The applicants viewed any decision other than what they wanted as unfair or oppressive. The circumstances of this case, unfortunately, came to resemble the breakdown of a marriage, with litigation inevitable and unhappiness all round. At virtually every instance the applicants adopted a very adversarial stance toward the corporation. Resolution became unattainable and litigation almost inevitable.

Disposition

[62] Application dismissed.

[63] Costs awarded to the respondent.

Costs

[64] The respondent seeks costs on a partial indemnity scale as well as disbursements of $5,979.98. The applicants submitted extensive and detailed materials that required specific responses. Section 44 of the Declaration of the Corporation sets out indemnification provisions by unit owners for the costs of litigation (amongst other matters). The overall objective of the fixing of costs is to set an amount that is fair and reasonable bearing in mind the factors set out in Rule 57.01. The applicants engaged the respondent in protracted litigation arising from a dispute related to parking facilities and privileges. Based on the particular chronology and the ultimate result on the merits, I fix costs at $45,000 plus disbursements of $5,979.98.

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B. O'MARRA, J.

DATE: January 18, 2012

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Applicants

- and -

TORONTO STANDARD CONDOMINIUM CORPORATION NO. 1737

Respondent

JUDGMENT

B. O'Marra J.

Released: January 18, 2012