

CITATION: Middlesex Condominium Corp. No. 195 v. Sunbelt, 2016 ONSC 6580
COURT FILE NO.: 3105-14(London)
DATE: 20161028

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
Middlesex Condominium Corporation No.)
195) Benjamin G. Blay, for the Plaintiff
)
Plaintiff)
(Defendant to the Counterclaim))
)
- and -)
)
)
Sunbelt Business Centres (Canada) Inc.,)
Douglas K. Good and Derek Quinn Tebbutt)
)
Defendants) Nelson Amaral, for the Defendants
(Plaintiffs by Counterclaim))
)
- and -)
)
)
Christine (Chris) Simmons, William (Bill))
Howard, Marilyn Howard, Patricia (Trish))
McKnight and Parkside Property)
Management Limited)
) Carolyn McKeen, for the Defendants to the
Additional Defendants to the Counterclaim) Counterclaim, Christine (Chris) Simmons
) and Parkside Property Management Limited
)
)
)
)
)
) HEARD: July 27, 2016

RULING ON MOTION

HEBNER J.:

- [1] This motion was brought by the defendant, Sunbelt Business Centres (Canada) Inc. ("Sunbelt"), for a limited-term appointment of an administrator to Middlesex Condominium Corporation No. 195 ("MCC 195"), pursuant to s. 131 of the *Condominium Act, 1998*, S.O. 1998, c. 19. The motion was opposed by all of the other parties.

Background Facts

- [2] MCC 195 is a condominium located at 55 Commissioners Road West in London, Ontario. It is comprised of seven floors, with the first two floors of the condominium containing 28 commercial units owned by Sunbelt and the remaining five floors containing 45 residential units. In 2010, the complement of the Board of Directors of MCC 195 was increased from three directors to five directors. The change in complement of the Board of Directors occurred as part of a settlement reached on a mediation between Sunbelt and MCC 195 in 2009. The mediation was held under ss. 132 and 134 of the *Condominium Act, 1998* and dealt with the cost of installing separate gas, water and hydro metres to the commercial units. The minutes of settlement dated December 8, 2009, included the following in para. 2:

The Corporation shall resolve to amend bylaw number 8 to provide there shall be 2 categories of reserved positions on the board of directors, namely that 3 of the 5 positions on the board of directors shall be reserved positions, such that no person other than owners of the residential units shall elect or remove a person for any of the said 3 reserved positions on the board and one of the 5 positions on the board of directors shall be a reserved position such that no persons other than owners of the commercial units shall elect or remove a person from the one said reserved position on the board.

- [3] Accordingly, three of the five positions on the Board of Directors are filled by owners of the residential units and one of the five positions on the Board of Directors is filled by Sunbelt. The fifth seat is "at-large" to be filled by a vote among all unit owners.
- [4] Sunbelt appointed Quinn Tebbutt into the commercial seat. In 2014, the Board called an owners meeting and ousted Mr. Tebbutt. The commercial seat was ultimately filled by Michael Biderman.

History of the Litigation

- [5] This action was commenced by MCC 195 on April 15, 2014, by way of statement of claim. In the statement of claim, MCC 195 claimed against Sunbelt for unjust enrichment and/or breach of its declaration and/or breach of the duties imposed pursuant to the *Condominium Act, 1998*. It appears, from a review of the statement of claim, that the major issues were hydro accounts paid by MCC 195 and the cost of window replacement. Sunbelt, in its statement of defence, denied any liability to MCC 195 for the hydro accounts and window expense and counterclaimed against MCC 195 and additional defendants alleging that Sunbelt's interests in the condominium had been oppressed.

- [6] A motion for partial summary judgment was brought by MCC 195 in December 2015 before Leitch J. In her reasons for judgment dated May 31, 2016, Leitch J. granted summary judgment as follows:
- a) Leitch J. was satisfied that there was no genuine issue requiring a trial in relation to the party responsible for the hydro accounts in issue. She found Sunbelt responsible for the hydro accounts servicing the commercial units. She left the calculation of that liability to the parties, with the assistance of counsel.
 - b) Leitch J. was also satisfied that there was no genuine issue requiring a trial with respect to responsibility for the window replacement. She found MCC 195 to be responsible for the cost of the window replacement.
- [7] It appears that the balance of the issues in the action remain outstanding. This motion for a limited-term appointment of an administrator was brought within that action.

The Issue

- [8] Section 131(1) of the *Condominium Act, 1998*, provides the following:

Upon application by the corporation, a lessor of a leasehold condominium corporation, an owner or a mortgagee of a unit, the Superior Court of Justice may make an order appointing an administrator for a corporation under this Act if at least 120 days have passed since a turn-over meeting has been held under section 43.

- [9] The factors to be taken into consideration for the appointment of an administrator are set out in *Skyline Executive Properties Inc. v. Metropolitan Toronto Condominium Corp. No. 1385* (2002), 17 R.P.R. (4th) 152 (Ont. S.C.); aff'd 2003 CanLII 24177 (ON CA), and *Lum v. Strata Plan VR519 (Owners of)*, 2001 BCSC 493 as follows:
- a) whether there has been established a demonstrated inability to manage the corporation;
 - b) whether there has been demonstrated substantial misconduct or mismanagement or both in relation to affairs of the corporation;
 - c) whether the appointment of an administrator is necessary to bring order to the affairs of the corporation;
 - d) where there is a struggle within the corporation among competing groups such as to impede or prevent proper governance of the corporation;
 - e) where only the appointment of an administrator has any reasonable prospect of bringing to order the affairs of the corporation.

- [10] Two additional factors are identified: the costs of involvement of an administrator and the principle that the democratic government of the corporation should not be overridden by the court except where absolutely necessary.

Position of Sunbelt

- [11] Sunbelt takes the position that an administrator ought to be appointed for the following reasons:

- a) there has been an established and demonstrated inability to manage the corporation;
- b) there has been demonstrated substantial misconduct or mismanagement in relation to affairs of the corporation;
- c) there is a struggle within the corporation between the residential unit owners and the one commercial unit owner, Sunbelt;
- d) there is a need for objectivity.

- [12] I will detail each of Sunbelt's arguments in turn.

a) Inability to manage the corporation

- [13] Sunbelt claims that the Board has demonstrated an inability to manage the corporation. Particulars of these allegations are set out in the following paragraphs.

- [14] Since the new Board has been put in place, there have been two special assessments. In July 2010, there was a special assessment of \$50,000 to cover the costs of the mediation agreement. In May 2012, there was a special assessment of \$415,230 to cover a variety of costs. In 2006, there was a reserve fund of \$15,925. In 2007, there was a reserve fund of \$8,771. Subsequently, a reserve fund study was put in place.

- [15] Counsel for Sunbelt, in his submissions, did not take issue with the need for funds, nor did he take issue with the need for the reserve fund study. Rather, Sunbelt's complaint is that the MCC 195 Board of Directors did not follow proper procedure by putting the need for the reserve fund study to the Board at a meeting and signing the required documentation at that meeting. In that regard, Sunbelt points to s. 32(1) of the *Condominium Act, 1998*, which provides the following:

Subject to subsection 42(5), the board of a corporation shall not transact any business of the corporation except at a meeting of directors at which a quorum of the board is present.

- [16] Sunbelt submits that MCC 195 did not follow s. 132(4) of the *Condominium Act, 1998*, which reads as follows:

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.

- [17] Sunbelt submits that the commencement of this action itself by MCC 195 is in violation of that section and that MCC 195's claims ought to have been dealt with by way of mediation and arbitration.
- [18] Sunbelt has complaints about a status certificate dated October 3, 2014. Sunbelt claims that the status certificate is incorrect in that, among other things, it does not identify that the condominium was \$50,000 over budget, proper notice had not been sent to the owners regarding the reserve fund study, and complete information on the outstanding legal action was not provided. When Mr. Biderman addressed the issues with Ms. Chris Simmons (of Parkside Property Management Limited, the property manager retained by MCC 195) she told Mr. Biderman that he was wrong on all of his concerns and said that she had obtained a "legal opinion" to the effect that the form they were using was correct. Apparently, there was no such legal opinion.
- [19] Sunbelt claims that Parkside Management has failed to adequately deal with problems such as icy outdoor steps, ceiling tiles that require repairs and keys to the laundry room.
- b) Demonstrated substantial misconduct or mismanagement in relation to the affairs of the corporation*
- [20] Sunbelt claims that there has been unfair treatment between the residential owners and the commercial owner. As an example, Sunbelt claims that minor repairs for water damage to the interior of several units on the second floor (commercial units) were not made on a timely basis. At the same time, a water problem in a third-floor residential unit was repaired within three days.
- [21] In the same vein, Sunbelt claims that MCC 195 failed to enforce rules respecting parking. Apparently, two particular residential owners took it upon themselves to park in spaces at storefronts when they had been requested not to as those spaces were reserved for commercial clients. Sunbelt claims that MCC 195 has not done enough to remedy this problem.
- [22] Sunbelt claims that information has been misstated to the Board by the residential Board members. As an example, Sunbelt claims that Mr. Howard said that there were no amendments to the mediation agreement, when there were actually no less than four amendments.
- [23] Sunbelt claims that a new laundry room was constructed within the common elements without a building permit.

- [24] Sunbelt claims that an information booklet was not approved by the board before it was distributed to owners.

c) Struggle within the corporation among competing groups

- [25] Sunbelt claims that there has been a continuous struggle within the corporation between the residential unit holders and the commercial unit holders. Counsel for Sunbelt submits that Sunbelt has been treated unfairly. Particulars of Sunbelt's claims are set out in the following paragraphs.
- [26] In the summer of 2014, a fax procedure was put in place by Parkside Management whereby Mr. Tebbutt was required to communicate with Parkside by fax only. From that point forward, all concerns of Mr. Tebbutt were to be in writing and faxed to Parkside's office. Mr. Tebbutt followed that protocol. He claims that more often than not, his complaints would fall on deaf ears. Sometimes the work was remedied and sometimes not. Sunbelt claims that its concerns were not adequately dealt with and were, for the most part, given lip service only.
- [27] Sunbelt claims that Mr. Tebbutt was left off of email streams. Similarly, Sunbelt claims that Mr. Biderman is not a party to discussions with the rest of the Board outside of formal Board meetings.
- [28] Parkside management is not on-site at the condominium daily. The site contact is Mr. Howard. Mr. Howard is paid \$600 a month for his services in that role. Sunbelt complains about that payment and suggests that Mr. Howard is in a conflict position as Mr. Howard is a residential unit owner.
- [29] On April 17, 2014, a meeting took place of the members of the Board and a decision was made to remove Mr. Tebbutt as a Board member. Sunbelt claims that the requirements set out in MCC 195 by-law number 9 (section 5.8) were not complied with at that meeting. Further, Sunbelt claims that the notice that was posted to inform owners of the result of the meeting was unnecessarily harsh. The notice read as follows:

The residential board members would like to thank all owners who helped us achieve a successful outcome to the special meeting last night to remove Mr. Tebbutt from the board of directors. We are aware some of the owners responded by driving miles (some ill at the time) to drop off their proxies, in order to help us regain control of our building and investment.

This has been a stressful few months for owners and directors alike, with floods, relocation and putting together of this meeting. The directors are continuing to work with our lawyers to recover funds paid by the corporation that have benefitted the commercial owner. The board of directors hopes to have a resolution to this issue in the not too distant future.

- [30] Sunbelt claims that there is an “us v. them” mentality among the residential unit owners, which is illustrated in the notice. After Mr. Tebbutt was removed as a director, the position of the representative for the commercial owner was vacant for a few weeks until Mr. Biderman was appointed.

d) Reasonable prospect of bringing order to the affairs of the corporation

- [31] Sunbelt submits that there is a need for objectivity on the Board. There is a core group of people that have been members of the Board since 2007. It is Sunbelt’s position that an administrator is required and is the only reasonable prospect for bringing to order the affairs of the corporation. Sunbelt requests an order appointing an administrator for a specified period of time in the hope that such appointment will assist in establishing some normalcy to the corporation’s affairs.

Position of MCC 195

- [32] Mr. Blay, on behalf of MCC 195, submits that Sunbelt has not come to court with clean hands. He submits that Mr. Good, the owner of Sunbelt, resides in New Mexico. Mr. Biderman and Mr. Tebbutt are not unit owners. They are paid by Sunbelt to represent its interests. Mr. Blay suggests that Mr. Good, Mr. Biderman and Mr. Tebbutt are bullies.
- [33] The evidence of MCC 195 was in the form of an affidavit of Patricia McKnight, the secretary and treasurer of the Board of Directors. According to Ms. McKnight, MCC 195 was created out of an existing apartment building around 1990. At the time of its creation, all units were owned by P.P. Commercial Holdings Inc. and the declaration provided for five directors. In approximately 1999, a by-law was passed to reduce the number of directors to three. At the time, there was no distinction between seats reserved for election by residential unit owners and seats reserved for election by commercial unit owners. As units were bought and sold, the present composition of unit owners in the building slowly migrated from being held exclusively by P.P. Commercial Holdings Inc. or, subsequently, Sunbelt, to a blend of units held by the commercial owners and units owned by individuals. Over the years, there was growing discontent among the individual residential unit owners as they perceived that the Board of Directors was favouring the interests of the commercial unit owners. By 2007, the residential unit owners had gathered up enough votes to elect three directors to the Board.
- [34] Ms. McKnight’s affidavit details the state of repair the building was in by 2007. The two roofs (one high and one low) were leaking badly and were beyond repair. The balconies were leaking into the residential units. The parking garage was falling to pieces. The building did not meet the fire code. There were many other examples of the state of the building in 2007.
- [35] In 2010, after extensive negotiation with Sunbelt, the Board was increased to five directors with one seat specifically reserved for election by the owner of the commercial units, Sunbelt. Sunbelt appointed Quinn Tebbutt to the Board to fill the commercial seat.

[36] The evidence of Ms. McKnight was that Mr. Tebbutt's presence on the Board was "poisonous and counterproductive" from the outset. Examples given included the following:

- a) He admitted that he enjoyed fighting with the residential Board members and that he used snide remarks to get under their skin.
- b) He refused to submit agenda items prior to Board meetings. He would then show up to the meetings demanding that his matters be heard in priority to all others. The result was that many Board meetings began with an argument over the order of the agenda items.
- c) Once a meeting was finally underway, Mr. Tebbutt would interrupt whoever was speaking in an attempt to depart from the subject at hand.
- d) Mr. Tebbutt has called Bill Howard (a Board member) a "liar" and said that Bill was "stupid" and that the Board members do not understand the condominium finances.
- e) Contemporaneous with board meetings, Mr. Tebbutt would inundate the other Board members with emails, variously insulting the members, demanding information he already had access to, or demanding to know why certain motions were passed (these motions being motions in which Mr. Tebbutt had been present and voted).

[37] Many other examples were given. The evidence of Ms. McKnight is that eventually the other four Board members called an owners' meeting to vote Mr. Tebbutt off the Board. After Mr. Tebbutt was removed, and Mr. Biderman was appointed, the business of the Board continued.

[38] Mr. Blay submits on behalf of MCC 195 that the timing of this motion brings its *bona fides* into question. This motion was brought requesting the appointment of an administrator shortly after the statement of claim was issued against Sunbelt for the cost of hydro and window repairs.

[39] In short, the position of MCC 195 is that, with Mr. Tebbutt removed from the Board and replaced with Mr. Biderman, the Board is able to function. The submission is that the appointment of an administrator is a last resort that ought not to be implemented in this case.

Analysis

[40] The governing test for the appointment of an administrator is set out in s. 131(2) of the *Condominium Act, 1998*, as follows:

The court may make the order if the court is of the opinion that it would be just or convenient, having regard to the scheme and intent of this Act and the best interests of the owners.

- [41] The scheme of the Act is that the unit holders govern themselves through an elected Board. The appointment of an administrator is, indeed, a last resort: see *Bahadoor v. York Condominium Corp. No. 82*, 2006 CanLII 40487 (ON SC), at para. 26:

When a court is considering either the appointment or termination of an administrator, good reason must be shown why unit owners should not manage their corporation's affairs through an elected board of directors. Self-governance is the norm: administrators are the exception.

- [42] I adopt the following words of Carey J. in *Middlesex Condominium Corp. No. 232 v. Middlesex Condominium Corp. No. 232 (Owners and mortgagees of)*, 2012 ONSC 4819, 29 R.P.R. (5th) 317, at para. 57:

Section 131 was designed as a last resort for condominiums in perilous circumstances. It was not intended to be used to allow a board which has lost the confidence of the majority of owners to get their way regardless of the democratic will of the owners.

- [43] The question I have to ask myself is, "Is the appointment of an administrator necessary in the circumstances of this case?" In terms of timing, the question must be asked as at the present time. To put the question another way, "Is the Board capable of functioning at the present time?"
- [44] The standard of care of directors is not one of perfection. The standard is set out in s. 37(1) of the *Condominium Act, 1998*, as follows:

Every director and every officer of a corporation in exercising the powers and discharging the duties of office shall,

- (a) act honestly and in good faith; and
- (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

- [45] In my view, that standard of care must be kept in mind when assessing the evidence and answering the question set out above.

Conflict between the commercial unit owners and the residential unit owners

- [46] From the material filed, I find that the conflict between the residential owners on the one hand and the commercial owner on the other had been building since 2007. The minutes of settlement dated December 8, 2009 were intended to reduce that conflict and provide a formula for the parties to move forward with representation on the Board. That formula did not work from the time that Sunbelt appointed Quinn Tebbutt to the Board to fill the commercial seat.

- [47] According to the evidence of MCC 195, which I accept, Mr. Tebbutt made governance extremely difficult during the four years that he was a Board member. He was openly confrontational and difficult at meetings. Mr. Tebbutt's intention was not to take part in the governance of the corporation in a productive fashion. Rather, his intention was to sabotage the governance.
- [48] Since Mr. Tebbutt was removed from the Board and his seat filled by Mr. Biderman, Board meetings have been noticeably more civil. Mr. Biderman has acknowledged, in his cross-examination, the good faith of the Board members. He said that "I think in their minds they really think they are doing a bang up job." He also acknowledged that the Board meetings, although they can get testy, are generally civilized. This is a noticeable improvement from the confrontational Board meetings that occurred with Mr. Tebbutt present.
- [49] There is still conflict between the commercial unit owner and the residential unit owners. The commercial unit owner feels that its concerns are not being addressed, or are not properly prioritized. However, it is clear from the evidence filed that the Board is attending to the concerns of all of the owners, including Sunbelt. In his cross-examination, Mr. Biderman said, "there's no question that a number of items that this board has done both before and with me have certain benefits to Sunbelt." I accept the evidence of Ms. McKnight on behalf of MCC 195 that Sunbelt has benefited from the following: new exterior lighting; a restoration of the second floor; a new exterior stairwell; a new roof; updates to comply with the fire code; repairs to the emergency generator; improved landscaping around commercial entrances; the addition of a handicapped front door system; a new laundry room located within the common elements, freeing up a Sunbelt unit on the second floor; and new exterior windows on the second floor. From the evidence filed, it appears as though the commercial unit owner is equally benefiting from projects undertaken by the Board.

Recordings

- [50] The evidence filed on behalf of Sunbelt consists of two affidavits of Mr. Biderman. Mr. Biderman attached, as an exhibit to his supplementary affidavit, a disc containing recordings of Board meetings taken by Mr. Tebbutt. Apparently, Mr. Tebbutt would attend at the Board meeting locale ahead of time and hide a tape recorder in a ceiling tile. Mr. Tebbutt did not swear an affidavit in support of the motion and so was not subject to cross-examination. Mr. Biderman was not present when the meetings were recorded. Mr. Biderman did not listen to all of the recordings to confirm their accuracy. MCC 195 challenged the tape recordings as to their accuracy and reliability.
- [51] In my view, for the tape recordings to be of any assistance to the Court, the individual who took the recordings would have to provide sworn evidence as to the circumstances under which the recordings were taken and confirm their authenticity and accuracy. That did not occur in this case. Accordingly, I find that the tape recordings are not properly evidence before the court and I did not consider the recordings in my deliberations.

Failure to mediate/arbitrate the dispute over hydro and window expenses

- [52] It appears from the decision of Leitch J. that s. 132 of the *Condominium Act, 1998*, was not raised before her. It seems to me that, if Sunbelt wishes to take issue with the action itself, that issue ought to have been raised on the summary judgment motion before Leitch J. I also note that there were a number of claims made both by MCC 195 in its statement of claim and by Sunbelt in the statement of defence and counterclaim that could not be interpreted as "a disagreement between the parties with respect to the declaration, bylaws or rules." I, therefore, do not accept the argument that the failure to refer these issues to mediation is indicative of an inability to manage the corporation.

Parkside Property Management Limited

- [53] Sunbelt takes issue with the management company hired by the Board to manage the corporation. The allegation made is that Parkside prefers the interests of the residential owners over the commercial owner. There is very little substance to the allegation, other than Parkside's insistence that communication with Mr. Tebbutt be through facsimile only. It is conceded that Mr. Biderman did not bring a motion to the Board to remove Parkside and replace it with another management company. It seems to me that, before suggesting that the Board is unable to manage the corporation because of the choice of management company hired, a motion ought to be brought to the Board to remove that management company and replace it with another.
- [54] Insofar as the use of Mr. Howard as Parkside's representative on site, I see no difficulty with that arrangement. It appears to be one of convenience. Mr. Howard is prepared to accept concerns of owners and effect minor repairs and is paid a relatively modest amount to do so. I cannot see how his willingness to act in a superintendent capacity is in conflict with his position as a unit owner.

Ability to manage

- [55] It seems to me that, considering all of the evidence as a whole, the corporation is able to manage the day-to-day operations and Sunbelt's complaints are unwarranted. There is evidence of Mr. Howard fixing a minor leak in a commercial unit on a weekend. There is evidence of Mr. Howard trying to deal with the parking issue by way of posting notices on unit owners' cars when they are parked in the wrong spot. There is evidence of improvements to the common elements that benefit all owners, including Sunbelt. The evidence is that the laundry room was built according to the building code and a building permit was obtained after the fact. The permit should have been obtained beforehand, but the fact of the matter is that the laundry room was built, again, for the benefit of all of the owners. There is evidence that the condominium information booklet referred to by Sunbelt was approved by the Board in 2009. There is no evidence that Sunbelt has been precluded from reviewing the condominium's finances. The special assessments and need for a bank loan are not unusual in circumstances where capital improvements and projects need to be undertaken.

[56] In short, MCC 195 appears to be functioning quite well in the circumstances. I find that, to date, the Board members have met the standard of care set out in s. 37 of the *Condominium Act, 1998*. This condominium corporation is able to govern itself. The differences of opinion over various governance issues are all capable of being resolved within the democratic framework of the corporation. I reject Sunbelt's suggestion that the circumstances are such that an administrator is necessary. On the contrary, on my review of all of the evidence, the condominium building is in a state of reasonable repair, the financial status of the corporation is reasonably well managed and the property is reasonably well maintained. The issues that arise appear to be dealt with by the Board in a reasonable manner.

Disposition

[57] For the foregoing reasons, the motion of the defendant, Sunbelt Business Centres (Canada) Inc., is dismissed.

[58] If the parties are unable to agree on costs, they may make written submissions, including a costs outline and any applicable offers to settle, according to the following timetable:

1. The plaintiff and additional defendants to the counterclaim shall provide their submissions within 20 days;
2. The defendant, Sunbelt Business Centres (Canada) Inc., shall provide submissions within an additional 10 days;
3. The plaintiff and additional defendants to the counterclaim may provide any reply submissions within an additional 10 days.



Pamela L. Hebner
Justice

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SUPERIOR COURT OF JUSTICE

BETWEEN:

Middlesex Condominium Corporation No. 195

Plaintiff
(Defendant to the Counterclaim)

– and –

Sunbelt Business Centres (Canada) Inc., Douglas K.
Good and Derek Quinn Tebbutt

Defendants
(Plaintiffs by Counterclaim)

– and –

Christine (Chris) Simmons, William (Bill) Howard,
Marilyn Howard, Patricia (Trish) McKnight and
Parkside Property Management Limited

Additional Defendants to the Counterclaim

RULING ON MOTION

Hebner J.

Released: October 28, 2016