CITATION: 1716243 Ontario Inc. v. Muskoka Standard Condo Corp. No. 54, 2014 ONSC 1848
BARRIE COURT FILE NO.: CV-13-0816
DATE: 20140324
CORRIGENDA: 20140403

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
1716243 Ontario Inc. Applicant	Wendy Greenspoon-Soer, for the Applicant
– and –	
Muskoka Standard Condominium Corporation No. 54 Respondent	Antoni G. Casalinuovo, for the Respondent

BARRIE COURT FILE NO.: CV-13-1172

AND BETWEEN:	
Muskoka Standard Condominium Corporation No. 54 Applicant	Antoni G. Casalinuovo, for the Applicant
– and –	
1716243 Ontario Inc. Respondent	Wendy Greenspoon-Soer, for the Respondent
	HEARD: February 26, 2014

REASONS FOR JUDGMENT

The text of the original endorsement has been corrected with the text of corrigendum (released today's date)

GILMORE J.:

Overview

[1] These two applications were heard together on the consent of counsel as they are related, and although the relief requested is somewhat different the facts are identical. In court file no. 13-0816 (application number one), the applicant numbered company seeks a declaration that it is not required to pay common expenses for parking units twenty-eight and twenty-nine at 130 Steamship Bay Road, Gravenhurst, Ontario, an order discharging the condominium lien registered by the respondent, Muskoka Standard Condominium Corporation No. 54 ("Muskoka"), on January 31, 2013, and costs.

[2] In court file no. 13-1172 (application number two), Muskoka seeks an order under section 134 of the *Condominium Act*, 1998, S.O. 1998, c. 19 (the "Act") declaring that 1716243 Ontario Inc. ("171") is in breach of Muskoka's by-laws, rules and declarations, and section 84 of the Act due to their failure to pay common expenses since May 1, 2012. In addition, Muskoka seeks an order under section 134 of the Act requiring 171 to comply with their duties and obligations under the Act, more particularly, an order requiring it to comply with section 84 of the Act; an order under section 134(3)(b)(i) of the Act requiring 171 to pay to Muskoka the full amount owed under the condominium lien registered on January 31, 2013; an order under section 134(3)(b)(2) of the Act that 171 pay to Muskoka its full costs in relation to application number one and application number two, and costs associated with the collection and attempted collection of the condominium lien; an order that 171 pay to Muskoka interest in the amount of twenty-four per cent, pursuant to Muskoka's by-law 6, section 4, on all amounts due and owing under the lien and including all costs incurred by Muskoka in bringing application number two and in responding to application number one; and an order under section 134(5) of the Act that any damages and costs awarded to Muskoka, together with their actual costs, be added to the common expenses payable with respect to 171's unit.

Background Facts

[3] 171 purchased the subject condominium on February 21, 2012, known as 130 Steamship Bay Road, Gravenhurst, Ontario (the "property"). The property included two parking units known as units twenty-eight and twenty-nine (the "parking spaces").

[4] Muskoka is a non-profit corporation created pursuant to the Act through the registration of a declaration on August 10, 2007. The said condominium development comprises sixty-four dwelling units and appurtenant common elements, legally described as Muskoka Standard Condominium Corporation No. 54 and municipally known as 130 Steamship Bay Road, Gravenhurst, Ontario.

[5] Prior to completing the purchase of the condominium unit and parking spaces, 171 requested and received a copy of a status certificate, along with the by-laws and declarations of Muskoka, on November 10, 2011. The status certificate described the property as including unit 605 and the two parking spaces, and provided for a monthly amount of common expenses of $804.04. It is conceded by Muskoka that the status certificate contained an error whereby it did not include the actual dollar amount associated with the common expenses for the two parking spaces associated with unit 605.

[6] 171 relies on section 76(4) of the Act, which provides that if the status certificate provided by a corporation under section 76(1) omits material information that it is required to contain, it shall be deemed to include a statement that there is no such information. Further, 171 relies on section 76(6) of the Act, which states that the status certificate binds the corporation as of the date it is given with respect to the information it contains, or is deemed to contain, as against a purchaser of a unit who relies on the certificate. 171 takes the position that as Muskoka is bound by the status certificate it is precluded from claiming against the unit owner for payments other than those proscribed in the certificate. 171, therefore, takes the position that Muskoka is estopped from pursuing payment with respect to any common expenses relating to the two parking spaces.

[7] After May 1, 2012, 171 ceased payment of common expenses for their unit other than for the actual suite 605. As such, Muskoka was compelled to register a condominium lien to secure the outstanding debt. Muskoka's fiscal year runs from April 1 of the current calendar year to March 31 of the preceding calendar year. 171's common expenses from May 2012 to the present are $1,012.83 a month.

[8] Muskoka's position is that the status certificate states at paragraphs 6 and 10 that the amount of common expenses due and owing on 171's unit were for the current fiscal year in which it was issued. As the status certificate was issued on November 10, 2011, it bound Muskoka for the fiscal year ending March 31, 2012. Further, the status certificate cannot be read in isolation as it was provided with Muskoka's by-laws and declarations on November 10, 2011.

[9] Although the common expenses associated with 171's unit according to Muskoka are $1,012.83 a month, since May 1, 2012, 171 has paid only $844.79. As such, each month there is a shortfall in the amount of $168.04, which represents the amount allocated for the two parking spaces. In order to secure Muskoka's position to register the condominium lien it applied all payments received by 171 to its oldest debt, and in that fashion advanced forward the default date and time to register the condominium lien.

[10] On January 18, 2013, Muskoka issued a notice of lien in accordance with the Act, which indicated that the amount owed to it was $6,944.99 and that if the amounts due and owing were not paid within ten days it would register a condominium lien. On January 31, 2013, Muskoka registered the condominium lien described above due to 171's non-payment.

The Position of 171 on Application Number One

[11] 171 submits that it has the right to rely on the status certificate and that the status certificate, in paragraph 6, is clear that the common expenses for the unit are $804.04 per month. 171 should be able, and has the right pursuant to section 76(4) of the *Condominium Act*, to rely on the certificate and it is not 171's responsibility to go behind the certificate. Muskoka is bound by it and concedes that there was an error in it. As such, 171 is only required to pay common expenses for the unit in the amount of $804.04, plus any further assessed increases for that unit, which it has always agreed to pay.

[12] 171 relies on *Fisher and Metropolitan Toronto Condominium Corp. No. 596*, 2004 CarswellOnt 6242 at paras. 3 and 10. In that case the status certificate received by the plaintiff was clear and did not indicate any problems with fireplaces or chimneys in the condominium building. As it turned out the condo corp. was aware of potential problems with the use of fireplaces, and a risk of the spread of smoke and fire and corrosion of the chimneys at the roof level. Initially the plaintiff refused to pay the special assessment of $3,899.97, but ultimately paid it under protest after the condo corp. registered a certificate of lien against his unit. The court took the view that the certificate bound the corporation and it was precluded from claiming against the unit owner for a special assessment, which was negligently excluded from the certificate.

[13] 171 also relies on *Durham Condominium Corporation No. 63 and On-Cite Solutions Ltd.*, 2010 CarswellOnt 9267 at paras. 21 and 28. In that case the court found that the corporation was aware of a problem with a wall and the potential financial issue associated with the restoration of the wall. The respondent in that case relied on the silence of the status certificate on the issue, and the court found that the condo corporation was estopped from pursuing the respondent for the restoration of the wall.

[14] 171 is aware of Muskoka's reliance on section 84 of the Act, but argues that that section does not deal with status certificates and is subject to other provisions of the Act, and it is therefore subject to section 76 on which 171 relies. Further, 171 is not advancing a claim but only a declaration, and as such section 84(3) does not apply.

[15] 171 has always paid the amounts required for unit 605. However, according to Muskoka's ledger they charged 171 $84.02 per month for each parking space. At the end of January 2013 arrears for the parking spaces, according to Muskoka, were $1,511.36. 171 argues that the lien can only be registered for amounts owing three months prior, and they are therefore not entitled to charge back to March 2012. Further, the lien was registered against unit 605 as well and there are no outstanding amounts owing for any common expenses for unit 605.

[16] 171 relies on section 85(1) of the *Condominium Act* with respect to a lien expiring after three months of default. As such, Muskoka was entitled to register only as against the parking spaces and for the amount accumulated over three months, plus some interest and reasonable costs.

[17] 171 argues that its title has been slandered by registering a lien when there is no default with respect to unit 605. 171 relied on the case of *York Condominium Corp. No. 482 and Christiansen*, 2003 CarswellOnt 6533 at para. 25. In that case the court interpreted section 85 of

the Act as imposing a lien only against units actually in arrears, and not against units belonging to the same owners but not in arrears. As such, 171 takes the position that no lien can arise with respect to unit 605 as common expenses for that unit were never in arrears.

[18] 171 argues that in the even the court finds that there are common expenses due and owing in respect of the parking spaces, that it should be charged only for the three months prior to January 31, 2013, that there should be a discharge of the lien as against unit 605, and no costs.

Muskoka's Position on Application Number One

[19] Muskoka argues that 171 has incorrectly viewed the certificate in isolation. It is inappropriate for 171 to request that the lien be discharged and that it be responsible for no future common expense in relation to the parking spaces. Muskoka argues that that is a violation of section 4 of the Act because each owner must contribute in an amount proportionate to the percentage of common elements owned as per the condominium declaration.

[20] In this case 171 owns a unit, a storage locker and two parking spaces, and that is considered the entire unit. The only reason that the parking spaces and the unit have different PIN numbers is because they are located in different places in the building, and different PIN numbers are required for registration purposes only. As well, pursuant to the condominium declaration, article 1, paragraph 1.1(1)(r), "unit" has the meaning ascribed to it in the Act, and includes a residential unit, a parking/storage unit and an open parking unit, as the context requires. As such, Muskoka takes the position that this is one unit owned by 171, comprised of three elements.

[21] The *Christiansen* case can be distinguished as in that case the owner had multiple units within the building with parking spots attached. The owner had defaulted on some of the units, but the condominium corporation registered a lien against all of the units owned by the owner.

[22] With respect to paragraph 6 of the status certificate, Muskoka submits that the purpose of the certificate is to explain what is owed in the current fiscal year. However, once a new fiscal year starts Muskoka passes a budget and allocates an increase based on percentage ownership. The conceded error in the subject certificate bound Muskoka until April 1, 2012, when a new budget came into place.

[23] Conceding the error was theirs, Muskoka is not seeking to recover for the period up to April 1, 2012, and notes that 171 paid the full amount for April 2012 and did not take the position that they were refusing to pay until May 2012.

[24] With respect to any limitation period that may apply to the registration of the lien, Muskoka submits that it has a positive statutory obligation to ensure compliance with its by-laws and declarations. Muskoka was required to register a lien in January 2013 because 171 was not responding. Muskoka went so far as to agree to waive the debt if they paid from April 2013 forward, but 171 refused.

[25] At this point Muskoka has now had to spend $30,000 to bring the matter to court. Muskoka relies on the case of *Durham Condominium Corporation No. 56 and Stryk*, 2013

CarswellOnt 7831 at para. 23 with respect to the proposition that it would be contrary to the Act to prefer the interests of the owner in ridding itself of the lien to the interest of the corporation in getting paid. As found in the *Stryk* case, the corporation should not be fettered in its ability to apply funds to outstanding debts owed to them as they see fit.

[26] Muskoka also submits that 171's actions effectively result in an amendment to the condominium declaration. Muskoka relies on *Caras & Callini Group Ltd. v. Peel Standard Condominium Corp. No. 837* for the proposition that declarations may be amended only in very limited circumstances.

[27] Counsel for Muskoka reminds the court that there is nothing in the Act that permits a unit owner to not pay common expenses in full, even if they have a dispute with the condo corporation. In *Carleton Condominium Corp. No 396 and Burdet*, 2012 CarswellOnt 4227 at para. 9, the court agrees that the Act provides that regardless of any other claims between the parties condominium fees must be paid. Counsel submits that even if 171 thought it was overpaying, it should have kept paying, and when the matter resolved it would have either received a credit for the full amount or a reduction in the payment of ongoing common expenses.

[28] Muskoka points out that 171 received a copy of the declaration and by-laws when they received the certificate. Interestingly, 171 did not question the amount of common expenses set out in the certificate, which was different again from that in paragraph 7 of the agreement of purchase and sale ($868). In summary, 171 cannot simply sit back, claim that it is refusing to pay common expenses that are validly charged by Muskoka and rely on an error, the results of which, effectively, amend the declaration and put the burden of payment on other condo unit owners.

Position of Muskoka on Application Number Two

[29] The applicant, Muskoka, seeks an order under section 134 of the Act requiring that 171 comply with their obligation under the Act and pay their common expenses. They are also seeking that 171 pay the costs of both applications with respect to the attempted collections of the outstanding common expense payments and the lien itself. They are also seeking interest at twenty-four per cent, which they are entitled to charge as per by-law number 6, paragraph 4.

[30] Pursuant to by-law number 1, article 11.1, the board of Muskoka has the ability to assess common expenses in accordance with the budget. Each new fiscal year a budget is passed regarding expenses and a capital fund, and then each owner is assessed as per their common interest and appurtenant interests.

[31] Section 134 of the Act entitles Muskoka to apply for an order enforcing compliance with any provision of the Act, the declaration, or by-laws of the corporation. The court's jurisdiction is found in section 134(3) which stipulates that:

> On 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.

Muskoka submits that there is nothing preventing the court from granting the order sought, particularly in light of the fact that 171 is in breach of section 84. Section 84 stipulates as follows:

> 84(1) Subject to the other provisions of this Act, the owners shall contribute to the common expenses in the proportions specified in the declaration;
>
> 84(3) An owner is not exempt from the obligations to contribute to the common expenses even if,
>
> (a) the owner has waived or abandoned the right to use the common elements or part of them;
>
> (b) the owner is making a claim against the corporation; or
>
> (c) the declaration, by-laws or rules restrict the owner from using the common elements or part of them.

In the case at bar Muskoka is requiring that 171 pay the full amount of common expenses for the unit, which includes unit 605, the two parking spaces and the storage unit. 171 had notice of the new budget, which came into effect after April 2012, but unilaterally chose not to pay. It is therefore in breach of section 84 and Muskoka is entitled to the relief under section 134(4).

Position of 171 on Application Number Two

[32] 171 argues that Muskoka is incorrect in describing unit 605 and the two parking spaces as one unit. Each has a separate PIN number and the ledger produced by Muskoka clearly charges separate common expense fees for unit 605 and each of parking spaces twenty-eight and twenty-nine. Muskoka cannot refer to unit 605 and the two parking spaces as one unit for the purpose of the certificate on which 171 relied, and then subsequently break them down into three separate units for the purpose of charging common expense fees.

[33] 171 maintains that Muskoka is out of time to register its lien. The cases relied upon by Muskoka deal with special assessments that were combined with common expense payments and

treated as common expense payments, and as such there is a question as to whether or not the lien has been registered within the limitation period.

[34] With respect to 171 having made a payment in April 2012, it was simply out of a misunderstanding on the part of 171 that the increase was proportionate to every other condo unit owner. Once 171 discovered that it was being charged more it paid only for unit 605.

Analysis and Ruling

[35] An error on the part of Muskoka in the status certificate relied upon by 171 has resulted in this extended and somewhat complex litigation given what is clearly an inadvertent error. I agree with Ms. Audrey Loeb, a well-known expert on condominium law, that the purpose of a status certificate required by section 76 of the Act is that it is intended to ensure that prospective purchasers and mortgagees have sufficient information to allow them to make an informed buying or lending decision. In the case at bar it is reasonable that 171 requested the status certificate and relied on it, somewhat to its detriment. However, the real question is whether 171 may go beyond the fiscal year in continuing to rely on the error with respect to the non-payment of common expenses for the two parking spots.

[36] I do not find that it is entitled to do so for several reasons:

(a) The cases cited by 171, *Fisher and Metropolitan Toronto Condominium Corp. No. 596* and *Durham Condominium Corp. No 63 v. On-Cite Solutions Ltd.*, both relate to situations in which a status certificate did not contain information regarding an issue which required a special assessment or charge back. The case at bar deals with an ongoing common expense payment, which is quite different from a one-time assessment;

(b) I accept that 171 received a copy of the by-laws and declarations of the corporation along with the status certificate. Those by-laws and declarations, along with section 84(3) of the Act, require an owner to contribute to common expenses, notwithstanding that the owner has made a claim. While 171 argues that it has not made a claim in this case, I do not find that is sufficient to avoid the payment of common expenses. I agree with Muskoka that 171 should have paid the increased amounts notwithstanding its objections, and filed its application with the anticipation of receiving either a credit for the full amount that is says it was owed, or a reduction in ongoing common expenses to reflect a credit. I agree with Muskoka that the actions of 171 in the circumstances could be interpreted as an amendment of the declaration and an amendment cannot be effected unilaterally by an owner;

(c) With respect to whether or not parking units twenty-eight and twenty-nine form part of the unit as described in the status certificate, I find that they do. In this regard, I rely on the definition of "unit" in Muskoka's

declaration at article 1.1(1)(r), in which unit is defined as including a residential unit, a parking/storage unit and an open parking unit. 171 received a copy of this declaration by way of enclosure with the certificate. Paragraph 6 of the status certificate references a payment on account of common expenses for the "unit". I therefore find that the definition of unit includes parking spaces twenty-eight and twenty-nine and that as such, and in accordance with the proportion of common interests, 171 is required to pay for unit 605 plus both parking spaces, which comprise its total proportion of common interests;

(d) I also find that the status certificate upon which 171 relied was valid only until the end of Muskoka's fiscal year. Paragraph 9 of the certificate clearly sets out that the budget on which the common expense payment is set (a copy of which was attached to the certificate and enclosures) was accurate, but that a new budget may result in increases which were undetermined as of the date of the certificate. Therefore, I find that the Muskoka is bound by the status certificate and its inaccuracy, but only insofar as the period of time to which the certificate attaches, which in this case is the end of its fiscal year or March 31, 2012; and

(e) With respect to the condominium lien I find that Muskoka had the right register a lien given its obligations under section 17(3) of the Act with respect to ensuring compliance, and with respect to its entitlement to a lien on default pursuant to section 85(1) of the Act. The amounts which Muskoka is entitled to collect under the lien, including costs, will be dealt with in respect to application number two, being court file number 13-1172.

Ruling on Application Number Two – Court File No. 13-1172

[37] In my view the lien in this matter should be confirmed as I accept the submissions of Muskoka that they have an obligation to enforce compliance with the Act and their own declarations, and that 171 cannot avoid the payment of common expenses for the two parking spaces, which I have already found to comprise a part of the unit which they own.

[38] I reject 171's argument with respect to the lien not being registered within the required three month time period. I rely on the *Christiansen* and *Stryk* cases for the proposition that the condominium corporation should be entitled to apply credits in the manner that they see fit by allowing the default to roll forward every thirty days. I do not find, therefore, that Muskoka is statute barred from the registration of its lien.

[39] However, there are other considerations in this case than simply the confirmation of the validity of the lien. There is the issue of costs and expenses to which Muskoka says it is entitled in collection and enforcement of the lien. Given the error of the status certificate, conceded by Muskoka, the common expenses due and owing by 171 shall be $804.04 per month up to and including March 31, 2012.

[40] As of April 1, 2012, the common expense payment shall include any common expense payments for the two parking spaces and shall increase to $1,012.83. Since the payment for April 2012 was made in full, 171 therefore owes the difference between $1,012.83 and $844.79, or $168.04, from May 1, 2012, to March 1, 2014, or a period of twenty-three months, for a total of $3,864.92.

[41] As the origin of this matter was an error on the part of Muskoka, in my view it would be inequitable to require 171 to pay the full amount of interest and costs to which Muskoka might otherwise be entitled pursuant to by-law number 6, section 4.

[42] In light of my jurisdiction pursuant to section 134(3) of the Act, I order that the condominium lien be amended to reflect the full amount owing for the period of May 1, 2012, to March 1, 2014, in the amount of $3,864.92 and a nominal costs amount of $750, for a total of $4,614.92. So long as 171 pays this amount within sixty days of the date of this judgment the lien shall be discharged without interest. Thereafter, Muskoka is entitled to charge interest at the rate set out in by-law number 6.

[43] In my view neither party had significant success. 171 is required to pay the additional common expenses, both arrears and ongoing, for the two parking spaces and Muskoka was unsuccessful in obtaining the full amount of the lien which they sought to enforce. However, if the parties cannot agree on costs I will receive written submissions on a seven day turnaround, commencing with the moving party, followed by responding submissions, then reply submissions, if any, commencing fourteen days from the date of release of this judgment. Cost submissions shall be no more than two pages in length, exclusive of any costs outline or offers to settle. All costs submissions shall be delivered via email through my assistant at alissa.livesey@ontario.ca. If no submissions are received by thirty-five days from above date, the issue of costs will be deemed to have been settled as between the parties.

C. Gilmore J.

Justice C.A. Gilmore

Released: April 3, 2014

CORRIGENDA

1. Paragraph [40] – in the last line the amount "$2,184.52" has been corrected to be "$3,864.92".

2. Paragraph [42] – in the third and fourth lines the amount "$2,184.52" has been corrected to be "$3,864.92" and the amount "2,934.52" has been corrected to be "$4,614.92".