Court File No. C-224-12

1719286 ONTARIO INC. v. WATERLOO STANDARD CONDOMINIUM CORPORATION NO. 435 et al

ENDORSEMENT

The Applicant is an owner of a unit in a five unit commercial condominium development. It has applied for a declaration that the respondents, who are the condominium corporation (the "Corporation") in which the Applicant is a unit holder, and its current directors breached various sections of the *Condominium Act, 1998* S.O. 1998, c.19 (the "Act") and for related relief. It also seeks a declaration, relying on section 135 of the Act, that the Respondents have acted in a manner which is oppressive to it, or which unfairly disregarded or unfairly prejudiced the Applicant and its interests.

At the heart of the matter is a dispute between the Applicant, represented by its principal Gerald Millar ("Millar"), and the Board of the Directors of the condominium corporation (the "Board") respecting whether the Applicant should be permitted to store various materials utilized in its business in the common element space to the rear of the building, in areas immediately adjacent to the rear wall of the Applicant's unit and against the rear fence of the property. The materials are not fully described in the record, but appear to be metal components, wood pallets and various other industrial materials. Part of the materials appear to be stored on exposed metal shelving and part seem to be piled or grouped together. The materials are visible and exposed to the elements.

Millar was one of the first directors elected at the turnover meeting on October 2, 2008, but was removed by the owners shortly thereafter on December 5, 2008 and replaced by Andrezej Wyszomierski ("Wyszomierski"). It appears that Millar's removal was related, at least in part, to an issue relating to his installation of a non-approved window in his unit.

Since Millar's removal, the Board has taken the position that the outside storage of materials by the Applicant in the area adjacent to the rear fence, and against the rear wall of the unit, not in covered containers, is not permitted, and has been seeking to have him remove the offending materials. Various efforts to achieve that end have proven unsuccessful, including engaging a lawyer to write a letter demanding removal of the materials and purporting to invoice Millar for rent of the common element space in the sum of $500.00 per month, and increased subsequently to $1,000.00. The situation ultimately culminated in the Corporation commencing a Small Claims Court action against Millar on September 26, 2011, seeking payment of the invoiced "rental payments".

Millar defended the Small Claims Court Claim and on March 1, 2012 commenced this Application. Mr. Dowhan for the Applicant candidly admitted in argument that Millar, for the Applicant, had not previously raised any complaint with the Board respecting the corporate

governance issues. The complaints, first raised in this Application, were brought forward in response to the Small Claims Court action brought by the Corporation in connection with the outside storage issue.

The Applicant states that the breaches of the Act by the Respondents include the following:

(a) Failure to call annual general meetings within 6 months of each fiscal year end in respect of the 2008, 2009, 2010 and 2011 fiscal years;
(b) Failure to allow the owners to appoint an auditor, due to the previous consent of Millar to dispense with an audit for the first year having expired;
(c) Failure to allow the owners to elect new directors at Annual General Meetings upon the expiration of the terms of incumbent directors;
(d) Failure to have a reserve fund study completed within the time required by the Act, (although a reserve fund study was completed in November 2010).

Millar asserts the Applicant's outside storage has not been effectively prohibited in accordance with the formalities required under the Act, and accordingly the Board was not entitled to demand that it be discontinued, nor to purport to impose rental charges for his use of the common elements. He points to Article IV (1) of the Declaration which provides that, subject to the Act, the Declaration, the By-laws and the Rules, each Unit Occupant has the full use, occupancy and enjoyment of the whole or any part of the common elements.

Moreover, Millar asserts that the Respondents have acted in an inconsistent manner in relation to the use of outside common element space to the rear of the building by allowing other unit owners to use some of the space for visitor parking, and, on one occasion, by permitting a unit owner to store materials in sealed containers on a short term basis while in the process of moving out of the development.

Millar says that he had a reasonable expectation of being able to use the common element space for outside storage on the basis of assurances given to him in that respect by the Respondent Piotr Lis, as Declarant, prior to the formation of the Corporation.

The Respondent directors say that they have used their best efforts to comply with all of the legal requirements on them, however, they are inexperienced and the small size of the condominium development does not permit them to retain legal counsel or property managers to attend to corporate governance issues. They say that, although there may not have been Annual General Meetings identified as such, there have been meetings of unit owners. The directors have not organized regular elections of directors as they say they are only persons who attend meetings in any event. There were audited financial statements in one year, but the cost is prohibitive, and they have been unable to secure the consent of Millar to dispense with an audit. They also so that a former director who resigned upon the sale of her unit had been investigating the reserve fund

study matter, however due to her departure, it was not completed in a timely fashion. However, a reserve fund study has now been completed.

It is clear that the technical corporate governance requirements of the Act apply to all condominium corporations, whether it is a small five unit commercial condominium in Cambridge or a 500 unit development in downtown Toronto. Lack of sophistication or inexperience on the part of the directors does not excuse a condominium corporation from compliance with the act. Having said that, there does not appear to be any evidence that the Respondent directors wilfully set out to breach the requirements of the Act, or to inflict injury on the Applicant. They appear to have been trying to run the corporation in the best way they know how, volunteering their time, without any remuneration, and without the training or resources required to achieve strict compliance with the Act.

Respecting the Applicant's outside storage, the Respondents point to Article IV (3) of the Declaration which provides that the "Board may from time to time designate part or parts of the common elements... as visitor parking or may lease any or all of the said common elements". They refer to the Minutes of the Board Meeting dated October 24, 2008, which Millar attended, at which the use of the common elements was discussed and it was determined that owners have the right of access to 4 areas - a sidewalk in front of the building, 3 parking spaces, a 5 x 3 metre storage space adjacent to their respective units as well as a pad on the roof. The Minutes reflect in bold letters that Millar was notified during the meeting that he was required to "remove all items that do not meet the standards stipulated in the Condo Act, City By-law or Condo By-laws and Business Rules on the back of his unit." He was also directed "to install appropriate storage units that are safe and meet industrial and commercial grade to hold all production related material stored outside his unit."

Mr. Dowhan argues that a designation or direction by the Board relating to the use of common elements can only be done by the enactment of a rule or rules pursuant to section 58 of the Act which provides as follows:

> **58.** (1) The board may make, amend or repeal rules respecting the use of common elements and units to,
>
> (a) promote the safety, security or welfare of the owners and of the property and assets of the corporation; or
>
> (b) prevent unreasonable interference with the use and enjoyment of the common elements, the units or the assets of the corporation. 1998, c. 19, s. 58 (1).

The balance of section 58 sets forth requirements for giving notice to owners of the enactment of rules, the right of owners to vote to repeal or amend rules, provisions respecting the coming into force of rules and the like. In short, Mr. Dowhan argues that the regulation of the use of common elements can only be done by the Board with the formality associated with the

enactment of rules under section 58 of the Act. For the reasonable protection of owners, the Board is not permitted to regulate the use of common elements by simple resolution, or in an informal or *ad hoc* manner.

I do not need to make a determination of whether the conferring of authority on the Board, in Article IV (3) of the Declaration, to designate areas of the common elements as visitor parking permits the Board to by-pass the requirement to make a Rule to that effect under section 58 of the Rule, as I find that the Board did not, clearly and effectively, by resolution or otherwise, restrict the Applicant's outside storage in the common elements. A verbal direction in a meeting to "remove all items that do not meet the standards stipulated in the Condo Act, City By-law or Condo By-laws and Business Rules on the back of his unit" is not enough, particularly since none of those documents appear to clearly place restrictions on outside storage. I do note section 10 of the Rules which states that "common element areas must remain clear at all times." However that provision was not referred to in argument, and in any event, it is apparent that the Board has allowed parking in the common element areas notwithstanding this provision.

I do not find that the oppression provisions of section 135 of the Act have been engaged by the actions of the Board vis-a-vis the Applicant. The Applicant has not suffered any detriment by the actions of the board in its unsuccessful attempts to have the Applicant remove its stored materials from the common element areas. The materials remain in place and the Applicant has not paid any of the purported rental charges.

Moreover, I am not persuaded that any expectation that the Applicant may have had to be able to store material in the common element areas on a long term basis, and without limitation, would be regarded as reasonable. Article IV (1) of the Declaration speaks of the use and enjoyment of the common elements by *all* unit owners, not just the Applicant, who seeks to monopolize portions of it on a permanent or semi-permanent basis for outside storage. The Applicant must be taken to be aware of section 58 of the Act which permits rules to be enacted to reasonably regulate the use of the common elements. Buying into a condominium development necessarily carries with it a recognition that one's own personal interests may have to be modified to accommodate the reasonable interests of other owners, subject to the protections afforded by the Act.

Furthermore, I do not find that the Applicant has been subjected to unequal treatment by the position that the Board has taken. Outside storage of materials, on a permanent or semi-permanent basis, is something quite different in quality from parking, or short term container storage by an owner in the process of moving out.

It is apparent from the evidence that the Corporation needs to be placed on a firm corporate governance footing, so that the corporate democracy model of the Act may be adhered to and the corporation managed in accordance with the requirements of the Act, for the mutual benefit of all of the owners.

Since section 119 of the Act requires the Corporation, the directors, owners and other stakeholders to comply with the Act, the declaration, the by-laws and the rules, it would be unnecessary and redundant for me to order the Respondents to do so. However, in order to set the Corporation on a path toward bringing itself into compliance, it is ordered that the Respondents shall call a meeting of the unit owners for the purpose of electing a new board of

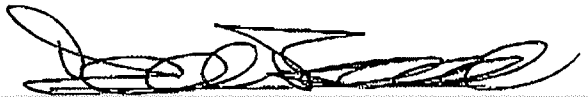
directors. Two of the directors shall be elected to hold office until the next annual meeting and one director shall be elected to hold office until the second succeeding annual meeting. The meeting shall be held no later than November 16, 2012. Notice of the meeting shall be given to all unit owners in accordance with the Act and the by-laws. In addition, the Corporation is ordered to hold an annual meeting by June 30, 2013, at which meeting, in addition to the election of directors to fill vacancies and the attending to of all other matters required by the Act, auditors shall be appointed and their remuneration fixed, unless all unit owners have consented in writing, as of the date of the annual meeting, to dispense with an audit.

I specifically decline to order that the individual Respondents be restrained from running for a position on the new board of directors.

In light of my finding that there is currently in place no effective restriction on the use by any owner of the common elements for outside storage, it is not necessary to make any order respecting the storage use by the Applicant (or any other owner) pending the election of the new board of directors and the enactment of any rule or rules thereafter respecting the use of the common elements pursuant to section 58 of the Act.

The parties may make brief written submissions on costs, not to exceed three double-spaced pages, exclusive of Costs Outline and any Offers to Settle, within 30 days hereof.

October 3, 2012



D.A. Broad, J.

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1719286 Ontario Inc. v. Waterloo Standard **Condominium Corp.** No. 435

1719286 Ontario Inc., Applicant and Waterloo Standard **Condominium Corporation** No. 435. Pauline Thomson, Andrezej Wyszomierska, and Piotr Lis, Respondents

Ontario Superior Court of Justice

D.A. Broad J.

Judgment: December 3, 2012
Docket: C-224-12

Counsel: Robert W. Dowhan, for Applicant

Devon M. Ryerse, for Respondents

Subject: Civil Practice and Procedure; Property

Real property

***D.A. Broad J.*:**

1 In my Endorsement dated October 3, 2012 I directed that the parties may make brief written submissions with respect to costs. The parties' submissions have now been received and the following is my disposition with respect to costs.

2 Section 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 provides that the costs of and incidental to a proceeding are in the discretion of the court and the court may determine by whom and to what extent the costs shall be paid.

3 The parties each seek entitlement to costs, on the basis that their position was vindicated by the disposition of the Application. The Applicant's position is that it is entitled to substantial indemnity costs on the basis that the **condominium corporation** was found to be not in compliance with the governance requirements of the ***Condominium Corporation Act, 1998*** S.O. 1998, c. 19 and was ordered to call a membership meeting by November 16, 2012 to elect a new board of directors, and to hold an annual meeting by June 30, 2013.

4 The Respondents seek costs on the basis that the Applicant did not succeed in achieving its main objective on

the Application, namely a finding that the Respondents had acted in an oppressive manner and that its claim of entitlement to maintain outdoor storage in the common element areas should be recognized.

5 Rule 57.01(1) sets forth a number of factors which the court may consider in exercising its discretion under Section 131 of the *Courts of Justice Act.* These include (e) the conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding, and (f)(i) whether any step in the proceeding was unnecessary.

6 As noted in my Endorsement, the heart of the dispute related to the Applicant's claim that it was entitled to store various materials in the common element space. Prior to that dispute coming to a head in the Small Claims Court action which was brought by the **condominium corporation**, the Applicant raised no complaint with respect to compliance by the corporation with the governance provisions of the ***Condominium Corporation*** *Act, 1998.* The Respondents readily acknowledged the technical non-compliance with the requirements of the Act and consented, in argument, to a remedial order in that respect. If technical compliance were the only issue, the matter no doubt would have been dealt with very readily and at very little expense. It was the oppression claim related to the outside storage issue which motivated the Applicant, which predominated on the Application and on which the Applicant was ultimately unsuccessful.

7 It is my view that, as the Respondents were largely successful on the Application, they should be entitled to partial indemnity costs. However, since they did not serve an Offer to Settle proposing settlement on the basis of a remedial order to correct the governance deficiencies, their costs should be discounted to reflect the fact that such an order was ultimately made at the instance of the Applicant.

8 On the question of the quantum of costs the overriding principle is fairness and reasonableness. The costs should generally reflect the amount that an unsuccessful party should reasonably expect to pay.

9 The Respondent's partial indemnity costs, in their Bill of Costs, total $ 13,120.99 in respect of fees, based on 78 hours of lawyers' time, plus 14.3 hours of students' time. This would appear to accord to the Applicant's reasonable expectations, as exemplified by its own Costs Outline and Bill of Costs, indicating total lawyers' time of 84.85 hours, plus clerks' time.

10 I would reduce the Respondents' claim for partial indemnity costs of $15,011.98 by $2,723.50, to account for the costs that would have been awarded to the Applicant had it confined its claim to a remedial order on the governance issues. This amount is comprised of $2,000.00 in respect of fees, HST in the sum of $260.00, application fee in the sum of $181.00, and service and photocopying in the sum $250.00, plus HST thereon of $32.50.

11 The Applicant shall therefore pay to the Respondents costs fixed in the sum of $12,288.48 inclusive of fees, disbursements and HST.

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