CITATION: *Carleton Condominium Corp. No. 25 v. Patrick Eagan*, 2015 ONSC 4353
COURT FILE NO.: 14-61667
DATE: 2015/07/03

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Carleton Condominium Corporation No. 25, Applicant

AND

Patrick Eagan, Respondent

BEFORE: Madam Justice Sylvia Corthorn

COUNSEL: Christy Allen, for the Applicant

Self-represented, for the Respondent

HEARD: June 30, 2015

ENDORSEMENT

[1] This is an application by the Carleton Condominium Corporation. No. 25, pursuant to section 134 of the *Condominium Act*, *1998*, S.O. 1998, c. 19 ("the Act") for relief with respect to the failure of the respondent, Patrick Eagan to maintain and repair the condominium unit of which he is the registered owner. Mr. Eagan's unit is number 1417 located at 2020 Jasmine Crescent in Ottawa (the "Unit").

[2] The respondent, although properly served, has not filed a notice of appearance (Form 38A), and did not attend at the return of the application.

[3] The applicant has, for approximately two years, been attempting to address with the respondent: a) the hazardous condition of the Unit; and b) an infestation of bed bugs in the unit. Although the respondent has from time-to-time indicated that he would co-operate with the applicant and pest control contractors hired by the applicant, in the end the respondent has failed to co-operate in any meaningful way. For the reasons that follow and given the safety and health hazards, not only to the respondent, but to other residents of 2020 Jasmine Crescent, the application is granted on the terms set out at the conclusion of this Endorsement.

Preliminary Matter

[4] The applicant requested an order abridging the time prescribed by rule 38.09(1)(a) of the *Rules of Civil Procedure* for the filing of a supplementary motion record. The supplementary motion record is limited to an affidavit sworn on June 19, 2015 by Ms. Gagne, a clerk in the office of counsel for the applicant, and the exhibits to the affidavit. The purpose of the affidavit is to provide the Court with a chronology of events from November 2014, when the original application record was delivered, to June 2015.

[5] The Gagne affidavit provides the Court with evidence as to the efforts of the applicant from November 2014 to June 2015 in continuing to secure the co-operation of the respondent. The application was originally returnable on November 20, 2014. The matter was adjourned to December 2014 and again to March 2015, with both adjournments requested by the respondent. A third adjournment (from March to the June 30 hearing date) was requested by the respondent and consented to by the applicant on the basis of the respondent's apparent willingness, at the time, to co-operate with the applicant with respect to pest control treatment.

[6] Taking into consideration the contents of the Gagne affidavit, purpose for which the affidavit was served, and the discretion provided to the Court pursuant to rule 3.02(1) of the *Rules of Civil Procedure*, leave was granted to file the supplementary motion record.

Facts and Findings

[7] Based on the affidavit evidence filed, I make the following findings of fact with respect to the chronology of significant events from the summer of 2013 to the summer of 2015:

July 2, 2013	-	An attempt is made to conduct the annual fire inspection of the Unit. The inspection cannot be completed because access to much of the Unit is blocked by excessive amounts of debris and clutter in the Unit.
July 9, 2013	-	A second attempt is made to conduct the annual fire inspection of the Unit. Again, an inspection cannot be completed because access to much of the Unit remains blocked by debris and clutter.
August 20, 2013	-	The Fire Marshall attends at the Unit and informs the respondent that he has two weeks to clean up his unit.
October 21, 2013	-	The Fire Marshall informs counsel for the applicant that the condition of the Unit has been addressed by the respondent; the Unit is in compliance with the Fire Code; and additional work is required to address the bed bug infestation in the Unit.
October 29, 2013	-	An inspection of the Unit by Envirocontrol scheduled for this date does not proceed, as the respondent fails to provide access to the Unit.

November 1, 2013 - The applicant provides the respondent with a single-sheet, Bed Bug Treatment Prep Instructions ("the Prep Instructions") from Envirocontrol IPM Services Inc. ("Envirocontrol"). The Prep Instructions are provided to the respondent in anticipation of treatment scheduled for November 5, 2013.

November 5, 2013 - An inspection of the Unit by Envirocontrol scheduled for this date is cancelled by the respondent (directly with the pest control contractor).

December 3, 2013 - An inspection of the Unit is carried out by Envirocontrol. It is determined that the Unit is infested with bed bugs. The infestation cannot be treated because none of the Prep Instructions have been followed.

March 18, 2014 - Treatment of the Unit scheduled for this date does not proceed because the applicant is made aware that the respondent is in the process of removing belongings from his unit.

April 15, 2014 - An employee of Envirocontrol and one of the applicant's Superintendents attend at the Unit for a scheduled inspection. It is determined that the Unit has not been prepared for treatment.

April 28, 2014 - A member of the Board of Directors of the applicant and one of the applicant's Superintendents attend at the Unit to inspect and take photographs of it. It is once again determined that the Unit has not been prepared for treatment. The Unit remains full of clutter and debris.

June 24, 2014 - Unit 1416B of 2020 Jasmine Crescent, located immediately adjacent to the Unit, is treated by Envirocontrol for general pest control. The pest control contractor is unable to confirm the presence of bed bugs in this unit.

July 15, 2014 - Unit 1415B, located across the hall from the Unit, and unit 404B of 2020 Jasmine Crescent are treated by Envirocontrol for bed bugs. The pest control contractor notes that 30 days are required for the treatment to take effect and that a second application of the treatment may be required.

June 3, 2015 - A member of the Board of Directors of C.C.C. No. 25 and the property manager for the building are permitted by the respondent to enter and make observations as to the condition of the Unit. The general condition of the Unit appears to be as bad as, if not worse than, when it was originally inspected in 2013.

[7] Residence in a condominium is governed by the Act, and the Declaration, By-Laws and Rules of the condominium. When sections 89, 90, and 91 of the Act and Article VI of the Declaration for this condominium are read together, it is clear that the respondent has an obligation to maintain and repair the Unit. In addition, pursuant to section 117 of the Act, 'Dangerous Activities' are prohibited. That section provides, "No person shall permit a condition to exist or carry on an activity in a unit or in the common elements if the condition or the activity is likely to damage the property or cause injury to an individual."

[8] The applicant has an obligation, pursuant to section 17 of the Act, to ensure that the respondent complies with his obligations pursuant to the Act and the Declaration for this condominium. It is in fulfilment of its obligation pursuant to section 17 of the Act that the applicant brings this application for a 'compliance order'.

[8] The Declaration for Carleton Condominium Corporation No. 25 is dated May 1974 ("the Declaration"). Article VI, section 1 of the Declaration provides that:

- The corporation shall make any repairs that an owner is obligated to make and that he does not make within a reasonable time;
- The owner shall be deemed to have consented to having repairs done to his unit by the corporation; and
- The owner shall reimburse the corporation in full for the cost of such repairs, including any legal or collection costs incurred by the corporation in order to collect the cost of such repairs. (Emphasis added, mine.)

[9] On this application, the applicant not only addresses the failure of the respondent to maintain and repair his unit. The applicant also attempts to fulfil its obligations to: a) ensure an owner's compliance with the Act, etc.; and b) mitigate against the existence of dangerous conditions, whether in units or in the common elements, respectively.

[10] Based on the affidavit evidence, I find that the respondent is in breach of the Act and the Declaration as follows:

a) By permitting the Unit to become excessively cluttered and unsanitary, the respondent is in breach of section 90 of the Act and Article VI, section 1 of the Declaration; and

b) By failing to properly clean the Unit and prepare it for bed bug treatment, the respondent is in breach of sections 89 and 91 of the Act and Article VI, section 1 of the Declaration.

[11] I also find that by reason of his failure to address the condition of the Unit and to prepare the Unit for pest control treatment the respondent is in breach of section 117 of the Act. The bed bug infestation is a condition which is conducive to propagation and spread to other units, as may have been demonstrated by the finding of bed bugs in Unit 1415B in the summer of 2014.

Relief Requested

[12] The concerns with respect to the condition of the Unit have existed for approximately two years. The applicant is prepared to allow the respondent 30 days from the date of this order, within which to remedy the breaches he has committed and continues to commit of the provisions of the Act and the Declaration. The relief requested in that regard is reasonable, in particular in light of the relief granted in other similar cases. See *Nipissing C.C.C. No. 24 v. Smrke,* (ONSC File No. CV-11-5181, North Bay – Aug. 19/11).

[13] The applicant also requests relief with respect to expenses to be incurred for: a) the preparation of the Unit for treatment by a pest control contractor (to address the bed bug infestation) should the applicant not carry out that work within 30 days; and b) the treatment when carried out. In circumstances of this kind, where a condominium corporation carries out repair and/or maintenance of a unit which the unit owner fails to carry out, "the cost of the work shall be added to the owner's contribution to the common expenses." See section 92(4) of the Act and, as noted above, Article VI, section 1 of the Declaration. Once again, the applicant`s request is in keeping with the provisions of the Act and the Declaration.

[14] Included in the draft proposed order filed by the applicant at the return of the application is relief with respect to a Condominium Lien against the Unit. That aspect of the proposed relief was not addressed by the applicant in its materials or in the submissions of counsel for the applicant. I am not prepared, at this time, to grant relief with respect to a Condominium Lien. It remains open to the applicant to take additional steps, if required in the future, with respect to a Condominium Lien.

[15] Finally, in the draft proposed order filed by the applicant at the return of the application, a request is made for an order that the respondent, "maintain his Unit in a condition that does not pose health, safety and/or fire risk." I am not prepared to grant that element of the relief requested. In declining to do so I am mindful of the decision of Polowin, J. in *Channa v. Carleton Condominium Corporation No. 429*, 2011 ONSC 7260. In that case, the defendant condominium corporation sought an order requiring the plaintiff to comply with section 98 of the Act (additions, alternations, or improvements to the common elements). Polowin, J. refused to grant that relief, stating:

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

[16] Like Ms. Channa in the above-cited case, the respondent is expected to follow the law and would be well-advised to do so. In the event of future, similar breaches of the Act and/or the Declaration by the respondent, the applicant will be in a position to pursue compliance proceedings. No doubt the applicant will rely on the circumstances leading to and the outcome of this proceeding when addressing the matter of costs for any future compliance proceeding.

Order

[17] In summary and for the reasons set out above, I hereby order as follows:

1. The respondent, Patrick Eagan, shall immediately prepare his unit, known municipally as 1417-2020 Jasmine Crescent ("the Unit") for treatment of bed bugs in accordance with directions provided to him by the applicant's pest control contractor, Envirocontrol IPM Services Inc.
2. If, after thirty (30) days, the Unit has not been prepared for treatment in accordance with the directions provided by Envirocontrol IPM Services Inc., the applicant is granted immediate and ongoing access to the Unit for the purpose of: a) preparing the Unit for pest control treatment; and b) carrying out the required pest control treatment.
3. If the applicant is required to take the steps described in paragraphs 2(a) and/or (b) above, it is granted authority specifically to remove and/or discard and/or store items as the applicant deems necessary to reasonably prepare the Unit for pest control treatment.
4. The respondent is responsible to pay all costs associated with: a) the preparation of the Unit for pest control treatment; and/or b) carrying out the required pest control treatment.
5. The costs associated with the preparation of the Unit for pest control treatment and/or carrying out the required pest control treatment shall be added to the common expenses payable by the respondent to the applicant and recoverable as such by the applicant.

Costs of the Application

[18] The applicant seeks costs on a full indemnity basis as follows:

Fees	$ 13,498.75
HST on fees	$ 1,754.84
Disbursements	$ 588.47
HST on disbursements	$ 75.33
Total	$ 16,187.39

I award the applicant its costs of this application on a substantial indemnity basis in the amount of $9,703.80. My decision with respect to costs is based on the following reasons.

a) Scale of Costs

[19] I agree with the submissions of counsel for the applicant that the applicant was under a duty, pursuant to section 17(3) of the Act, to bring this compliance proceeding to ensure that the respondent complies with the provisions of the Act, the Declaration, etc. The breaches by the respondent of his obligations pursuant to the Act and the Declaration are such that he is placing others at risk from a health and safety perspective. The conduct of the respondent from 2013 forward left the applicant with no choice but to bring this application.

[20] I have also considered the factors set out in rule 57.01(1) in exercising my discretion with respect to costs. The importance of the issues (rule 57.01(1)(d)) is clear given the health and safety concerns. The respondent`s conduct with respect to this proceeding (rule 57.01(1)(e)) resulted in a delay from November 20, 2014 to June 30, 2015 for the application to be heard. The applicant relied upon the respondent's representations in late 2014 and the first half of 2015 that he was prepared to take the necessary steps to deal with the condition of the Unit. In the end, the respondent did nothing, did not deliver a notice of appearance in the proceeding, and did not attend at the return of the application.

[21] Counsel for the applicant referred to Article X of the Declaration as supporting an award of costs on a full indemnity basis. In my opinion Article X does not support the applicant's position in that regard. Article X addresses the conduct of a unit-owner as it may relate to "the common elements and/or all other units". The application deals exclusively with preparation for treatment and actual treatment of the Unit. The application does not address costs incurred by the applicant with respect to any other unit at 2020 Jasmine Crescent.

[22] Finally, I declined to order two elements of the relief requested.

b) Amount of Costs

[23] I have reviewed the bill of costs filed by counsel for the applicant at the conclusion of the application. I am satisfied that the hourly rates claimed for each of the timekeepers identified in the bill are reasonable. With respect to the time spent, I note the following:

- The bill of costs includes approximately $1,245.00 for time spent in communication with the respondent and the client prior to the commencement of the proceeding. That time is not reasonably included as costs for the proceeding.
- For preparation of the notice of application and application record there are four timekeepers, including senior counsel and a clerk. The total time for this portion of the work is approximately $5,800.00. To address duplication of effort as between the three counsel involved I reduce that time to $4,800.00.
- The time spent in preparation for the return of the matter in December 2014 includes client communication and at least one client meeting. I reduce the fees for this aspect of counsel's work from $2,652.00 to $2,000.00.

[24] In summary, I reduce the full indemnity fees identified from a total of $13,498.75 by $2,897.00 to $10,600.00 (rounded from $10,601.75). In arriving at a figure for fees on a substantial indemnity basis, I do not rely on the 90 per cent calculation suggested by the applicant in its bill of costs. I award fees on a substantial indemnity basis in the amount of $8,000.00, with HST over and above that amount.

[25] I have reviewed the list of disbursements included in the bill of costs and award the applicant the full amount claimed for disbursements ($663.80, including applicable taxes).

[26] In summary, I fix the applicant's costs in this matter on a substantial indemnity basis as follows:

Fees	$	8,000.00
HST on fees	$	1,040.00
Disbursements	$	588.47
HST on disbursements	$	75.33
Total	$	9,703.80

[27] I also order that the costs in the amount of $9,703.00 be added to the common expenses payable by the respondent to the applicant and be recoverable as such by the applicant.

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Madam Justice Sylvia Corthorn

Date: July 3, 2015

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Released: July 3, 2015