Case Name:

Carleton Condominium Corp. No. 291 v. Weeks

Between
Carleton Condominium Corporation No. 291, and
Lee Weeks and Earleen Crawford

[2003] O.J. No. 1204
Court File No. 02-CV-22094

Ontario Superior Court of Justice
R. Smith J.

March 28, 2003.
(42 paras.)

Land regulation — Land use control, remedies — Application for just order — Injunctions (incl. cease and desist orders).

Application by Carleton for an order to restrain Weeks from conducting themselves in a manner which disturbed and threatened the owners and occupants of other units. Weeks denied the alleged conduct, which included conduct necessitating police intervention, throwing objects in the common areas, quarrelsome and threatening behaviour, kicking and smashing doors and windows, having loud, aggressive arguments, using vulgar offensive language, glaring at other residents in a hostile manner and making rude gestures at other residents. Weeks submitted that the conduct complained of constituted merely a nuisance and not conduct which would cause injury to an individual or damage to property and that Carleton was not entitled to bring the application without first pursuing mediation and arbitration.

HELD: Order granted for cross-examination on the affidavits filed, followed by a settlement conference and, if necessary, a trial of an issue as to whether Weeks engaged in conduct which was injurious to other residents. An interim injunction was granted restraining Weeks from glaring aggressively at other unit owners, from making rude gestures to other unit owners, and from using obscene, vulgar and offensive language. The numerous police visits to the Weeks' unit, which ceased in December of 2001 did not constitute conduct which justified proceeding with an application without first proceeding with mediation and arbitration. There was minimal evidence of kicking and smashing doors and windows except for one incident. This could have been dealt with under the mediation arbitration provisions. The playing of music at excessive levels was merely a nuisance. However, if it was proved that the Weeks acted in the threatening and abusive manner towards other residents, as alleged, that conduct would constitute conduct likely to cause injury to an individual and would allow Carleton to bring the application. Issues of credibility had to be determined to prove those allegations. There was a serious issue to be tried and the continuation of such conduct would constitute irreparable harm. The balance of convenience favoured granting the interim relief requested by Carleton.

Statutes, Regulations and Rules Cited:

Business Corporations Act, s. 248. Condominium Act, ss. 117, 132, 134(1).
Ontario Rules of Civil Procedure, Rule 14.05(2).

Counsel:

James Davidson, for the applicant.
Laurie A. Tucker, for the respondents.

R. SMITH J. (endorsement):—

Nature of the Proceedings:

¶ 1 The Applicant ("CCC No. 291") seeks an order to restrain the owner of one of the units from conducting themselves in a manner which disturbs and threatens the owners and occupants of other units.

¶ 2 The alleged conduct is denied by the Respondents.

¶ 3 The court must decide the following issues:

(I) Is the alleged conduct likely to damage the property or cause injury to an individual? (if yes, the Applicant may bring the application);

(II) If issue (I) is decided in the negative, then are their issues of credibility to be determined which require a trial of an issue?

(III) If issue (II) is decided in the affirmative should an interim cease and desist order be made until the trial is heard?

Background:

¶ 4 The Applicant ("CCC No. 291") seeks an order that the Respondents cease and desist from the following conduct:

(i) Engaging in conduct which necessitates police intervention;

(ii) Throwing objects within the boundaries of the common elements or neighbouring units;

(iii) Engaging in quarrelsome and threatening behaviour; and

(iv) Kicking and smashing the doors and windows of unit 6471 Natalie Way.

¶ 5 Counsel for the Applicant further specified that the conduct which was "harmful" or could cause injury to an individual was the following:

(a) Having loud aggressive arguments which could be heard by owners of neighbouring condominiums;

(b) The use of vulgar offensive language by the Respondent, Lee Weeks;

(c) The glaring at other residents in a hostile manner; and

(d) Flipping the finger at other residents.

¶ 6 The Applicant argues and the Respondents agree that if the Respondents permit a condition to exist or carry on an activity in their unit or in the common elements which is likely to damage the property or cause injury to an individual then, the Applicant can proceed to bring an application under s. 117 of the Condominium Act 1998 (the "Act") without first proceeding under the mediation and arbitration provisions of the Act.

¶ 7 The Respondents' position is as follows:

(a) They deny that they have committed the conduct alleged by the Applicant;

(b) They state that the resident who complained the most, Jackie Holt, and who recently moved out, was overly sensitive to noise levels;

(c) The conduct complained of will not damage the property or cause injury to an individual;

(d) The conduct complained of would constitute a nuisance and not conduct which would cause injury to an individual or damage to property; and

(e) The Applicant is not entitled to bring an application under s. 134(1) of the Condominium Act to enforce the provisions of the declaration and by-laws, which prohibit carrying on activities which constitute a nuisance, without first following the mediation and arbitration provisions in s. 132 of the Act and failing to obtain compliance.

¶ 8 The Issues which have to be decided are as follows:

(I) Is the Conduct Complained of a Nuisance or Conduct, which is likely to Damage the Property or Cause Injury to an Individual?

(II) Are Findings of Credibility Required to Determine if the Alleged Harmful Conduct Occurred and, if so, should a Trial of an Issue be Directed?

(III) Should Interim Injunctive Relief be Granted Pending a Final Hearing on the Merits?

Issue (I) - Nuisance or Actions Injurious to Persons and Property

Police Visits

¶ 9 The conduct, which necessitated numerous police visits to the unit, was explained by the problems created by a boarder who resided at the unit and who the Respondents evicted in December of 2001.

¶ 10 Several further police visits related to a vehicle owned by Ms. Crawford, which was stolen.

¶ 11 In early December of 2001, the boarder, Mr. Cordeiro, left and removed his belongings. The police were called on three or four occasions due to Mr. Cordeiro making harassing phone calls and re-attending at the premises.

¶ 12 I do not find that the numerous police visits to the unit, which ceased in December of 2001 in any event, constitute conduct, which would justify proceeding with an application under s. 117 of the Act in October of 2002 without first proceeding with mediation and arbitration as required by s. 134(2) of the Act.

Door Slamming and Window Breaking

¶ 13 During one incident, a door was slammed and some glass was broken, however, minimal evidence was presented that the Respondents were throwing objects within the boundaries of their unit or in the common elements. The Respondents admit that a guest threw a piece of broccoli onto a common area, which was subsequently picked up.

¶ 14 Other than this one incident of the broken glass, there was minimal evidence that the Respondents were kicking and smashing doors and windows of unit 6471. This matter could also have been dealt with under the mediation arbitration provisions.

Playing Music at Excessive Levels

¶ 15 Mrs. Holt complained that the Respondents played music at excessively high levels on many occasions.

¶ 16 The by-law officers were called on nine occasions and only one charge was laid.

¶ 17 The Respondent, Earleen Crawford, admitted to turning up the volume when she liked a particular song and then stated that she would turn the level back down to a normal range.

¶ 18 I find that this type of conduct would be considered a nuisance and should have been dealt with under the mediation provisions of the Act prior to bringing an application.

Threatening Conduct

¶ 19 The last allegation is that the Respondents have caused other unit owners and occupants, including Jackie Holt's twelve-year-old daughter, to feel threatened and to become fearful for their safety due to the following actions of the Respondents:

(a) The Respondent, Lee Weeks, is alleged to have "flipped" the finger at Mrs. Holt's 12-year-old daughter and glared aggressively at Mrs. Holt and her 12-year-old daughter; and

(b) The Respondents are alleged to have used extremely vulgar offensive and demeaning language, which can be heard by the occupants of other units, which included young children.

¶ 20 Three separate witnesses for the Applicant complained about the Respondents' conduct and maintained their position under cross-examination.

¶ 21 The evidence of Mrs. Pantalone is that she was frightened by loud yelling and cursing between the occupants of unit 6471 on August 16, 2002.

¶ 22 Notwithstanding the letter from the solicitor for the Plaintiff and the Respondents' apology on August 23, 2002 and the Respondents' agreement to pay the sum of $200.00 for legal fees, the conduct of loud, foul language continued on September 7, 2002 as evidenced by the affidavit of Dora Lee.

¶ 23 The evidence of Dora Lee is that on September 7, 2002 between 10:00 p.m. and 12:00 a.m. she heard foul language, quarrelsome and belligerent voices and hysterical laughter at unit 6471.

¶ 24 Mrs. Jackie Holt stated that the Respondents were drunk and engaged in loud and abusive dialogue and behaviour on many occasions during the weekends during the summer of 2002, including Friday nights.

¶ 25 The Respondents are alleged to have repeatedly glared in an aggressive manner at Mrs. Holt and her 12-year-old daughter, flipping the finger at Mrs. Holt and her 12-year-old daughter and using vulgar obscene demeaning language, which can be heard by the adjoining occupants, which did include a young child.

¶ 26 The Respondents claim they have only occasional normal arguments between spouses.

¶ 27 I am satisfied that if it is proven that the Respondents acted in the threatening manner, as alleged, that the alleged conduct would likely cause injury to an individual, namely the occupants of the other units, which would allow the Applicant to bring this application without first proceeding with the mediation provisions of the Act.

Issue II - Are Findings of Credibility Required?

¶ 28 The Respondents have denied committing the threatening acts and, denied using loud obscene language, which can be heard by the adjoining residents. Owners of other condominium units have filed affidavits alleging such conduct.

¶ 29 Rule 14.05(2) of the Rules of Practice allows a proceeding to be commenced by an application if a statute so authorizes.

¶ 30 Section 117 of the Condominium Act authorizes a proceeding by way of application when the conduct complained of is likely to cause damage to property or harm to individuals.

¶ 31 However, in the case of Gordon Glaves Holdings Ltd. v. Care Corp. of Canada Ltd. (1999), 170 D.L.R. (4th) 520 (Div. Ct.) aff'd 186 D.L.R. (4th) 577 (C.A.), the Ontario Court of Appeal held that when a proceeding may be commenced by application pursuant to a statute, such as an application for an oppression remedy pursuant to s. 248 of the Business Corporations Act, the matter was directed to proceed at trial, where issues of credibility had to be determined.

¶ 32 I find that on the facts of this case issues of credibility must be determined to find on the balance of probabilities whether the Respondents have engaged in the threatening conduct and used loud obscene language as alleged by the Applicant, but denied by the Respondents.

¶ 33 I order that the cross-examinations on the affidavits constitute discovery and the filing of affidavits of documents shall be dispensed with. I order that a settlement conference be held and if the matter is not resolved then, I order that it be immediately set down for a trial to determine if the conduct as alleged by the Applicant occurred and to determine the remedy, if any, to be granted.

¶ 34 As a result, I order a trial of an issue on whether the Respondents engaged in conduct which is injurious to other residents namely;

(i) Have either of the Respondents glared aggressively at other unit residents?; and

(ii) Have either of the Respondents flipped the finger at other unit residents?; and

(iii) Have either of the Respondents or other occupants of unit 6471, Natalie Way, used loud obscene demeaning language, which can be heard by other unit residents?

¶ 35 I invite counsel to make submissions within seven (7) days of the release of this endorsement if they wish to further define the issues to be determined at trial.

Issue III - Interim Injunctive Relief

¶ 36 In applying the test to determine whether an interim injunction or cease and desist order should be granted, the court must be satisfied that a serious issue has been raised, that harm which cannot be compensated in damages occurred and that the balance of convenience favours granting the injunction or cease and desist order.

¶ 37 The Applicant is, in fact, seeking injunctive relief in its application by seeking a cease and desist order.

¶ 38 I find that the Applicant has demonstrated a serious issue to be tried. If an injunction is not granted the other condominium owners, including children, would be subject to listening to loud vulgar obscene language and possibly being the subject of harassing glaring and subject to further obscene gestures.

¶ 39 I find that being subject to such conduct could constitute irreparable harm, to young children in particular, which is not compensable in damages. I further find that the balance of convenience favours granting the interim relief as the Respondents would not be harmed by such an order and the residents of the condominium units would be protected from harmful conduct until a final hearing in this matter is held.

¶ 40 By allowing the parties to have a hearing this will allow for a proper findings of credibility to be made to determine whether such conduct occurred and what remedy is appropriate.

¶ 41 I, therefore, grant an interim injunction and order the Respondents not to glare aggressively at any other unit owners, occupants or guests, not to make rude gestures to other unit owners, occupants or guests, and not to use obscene, vulgar and offensive language at levels that can be heard by other unit owners, occupants or guests.

Costs:

¶ 42 The costs of this application shall be dealt with by the judge hearing the evidence at the trial.

R. SMITH J.

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