

Case Name:

Friman v. Toledo Estates Ltd.

Between

Andrea Ruth Friman and Harvey Gary Friman, Plaintiffs,

and

**Toledo Estates Ltd., Salomon Nezry, Taft Management
Inc., Pat Addeo, and York Region Standard Condominium
Corporation No. 1062, Defendants**

[2013] O.J. No. 1908

Court File No. SC-10-86051-00

Ontario Superior Court of Justice
Small Claims Court - Richmond Hill, Ontario

D.M.P. Gonsalves Deputy J.

Heard: March 27 and October 23, 2012.

Judgment: April 29, 2013.

(73 paras.)

Counsel:

David Rubin, for the Plaintiffs.

Larry Levine, Q.C., for the Defendants.

JUDGMENT

D.M.P. GONSALVES DEPUTY J.:--

INTRODUCTORY MATTERS

1 At the outset of this judgment the court would like to thank the parties and their counsel for

their preparation and presentation at trial. This case was a complicated one with 2 days of trial spread out over many months. The court heard oral testimony from 7 witnesses and well over 100 pages of documents were filed as exhibits. The organization and co-operation of all involved was much appreciated by the court.

FACTS AND BACKGROUND

2 York Region Standard **Condominium Corporation** No. 1062, located at 1 Cordoba Place, Thornhill, Ontario, known as Alvear Palace (YRSCC 1062), was registered on April 11, 2006. YRSCC 1062 consists of 44 residential units and 64 parking units. The directors on the Declare Board were the defendant Salomon Nezry (Nezry) and two other persons. Toledo Estates Ltd. (Toledo) was the developer of YRSCC 1062 and at all material times in this case was the employer of Nezry and the owner of various unsold residential and parking units at YRSCC 1062.

3 The plaintiffs Andrea Ruth Friman (Andi) and Harvey Gary Friman (Gary), collectively known as the Frimans, are a married couple presently residing in Richmond Hill, Ontario. Andi is a person living with epilepsy. The frequency of her seizures prevented her from attending at trial. Gary is her attorney under a power of attorney executed by Andi. The power of attorney was filed with the court (Exhibit 1, Tab 26) and counsel for the defendants had no objection to the non presence of Andi. The court does take note of the fact that all title documents and real estate offers presented in this case concerning the Frimans listed Andi as the owner or purchaser. Gary has spousal rights under the *Family Law Act* and signed as consenting spouse on all real estate documents where applicable. Gary also has health problems. He is living with multiple sclerosis, has a serious heart condition, and has had an ostomy requiring the use of a colostomy bag.

4 In March of 2009 the Frimans resided at 94 Thornway Avenue in Thornhill, Ontario (Thornway). Thornway is a multi level townhouse. Gary testified that his deteriorating health condition made the townhouse difficult for him to manage. The Frimans asked their real estate agent to start looking for a condominium for them to purchase. At their agent's suggestion, on or about, March 12, 2009, Thornway was put up for sale with a listing price of \$419,900. Gary testified that they preferred to list Thornway for sale only after securing a new residence. However, on this occasion, they went with the agent's recommendation and listed Thornway for sale before viewing any condominiums.

5 On March 19, 2009, the real estate listing for Thornway was suspended. The Frimans had looked for a suitable condominium but had had difficulty finding one that met their needs. Gary required bath bars to be installed in the shower, however, most of the condominiums that they viewed had molded plastic shower stalls which did not permit the installation of bath bars. The Frimans decided to suspend the sale of their property. No offers had been made on the property during the week that it was listed.

6 In late March of 2009 Gary found a listing on the internet for unit number 203 (unit 203) at YRSCC 1062. He called their real estate agent to set up a viewing appointment.

7 The Frimans viewed unit 203, with their agent, in late March of 2009.

8 Gary testified that upon leaving YRSCC 1062 after the viewing of unit 203 he observed a sign that advertised new units for sale from the developer. He phoned the developer and made an appointment to view the new units for sale (the Toledo units).

9 Gary met the next day with Nezry to view three of the Toledo units. Gary testified that the units were more expensive than unit 203 and that the layouts presented some obstacles for a person with limited mobility. Gary testified that after viewing the Toledo units he told Nezry that they had not made up their mind yet but stated that if he needed a parking spot then he would need a handicapped spot. Gary testified that Nezry told him that there'd be no problem. Gary also stated that in addition to his request for a handicapped spot, he told Nezry that he would also need a parking spot for his daughter who would be living with him. Nezry testified that after he showed the Toledo units to Gary he showed him the corresponding parking spots and another available spot, parking unit 36, that was closer to the elevator door than any of the spots that had been assigned to the Toledo units. Unit 36 is visible on Exhibit 3 which is a diagram of the parking spots that had been tentatively assigned to each unit. At the time of trial there were still some Toledo units that had not been purchased and parking units that had not been registered (Exhibit 1, Tabs 27 and 28).

10 The Frimans decided that the price and layout of unit 203 met their needs better than any of the Toledo units. They instructed their agent, Rise Salsberg (Salsberg), to put forward an offer to purchase unit 203. On April 2, 2009 an offer was made to purchase unit 203. The Frimans, in their first offer, added in a condition stating that the offer was conditional upon the purchaser being able to switch the unit 203 parking spot for a handicapped parking spot. The vendor rejected this condition. The Frimans then made the offer conditional upon the purchaser obtaining an existing handicapped parking space or a parking space that was within 50 feet of the entrance to the elevator lobby. The vendor rejected those conditions.

11 On April 7, 2009, a final agreement of purchase and sale was signed by Andi and the vendor of unit 203. The final agreement was conditional upon financing, a satisfactory review of the declaration, and upon the purchaser obtaining the board's approval to the removal of a second door in the bathroom of the master bedroom.

12 On April 8, 2009, the Frimans paid a \$20,000 deposit on unit 203. On that date at 9:47 a.m., Gary sent an e-mail to Salsberg asking her to forward a copy of the agreement of purchase and sale for unit 203 to Pat Addeo. Pat Addeo (Addeo) was the Executive Vice-President of Taft Management Inc. (Taft). Taft was the property management corporation for YRSCC 1062. Gary also asked Salsberg to request that Addeo exchange the parking spot assigned to unit 203 for one of the handicapped parking spots at the entrance and to inquire about renting another parking spot for his daughter.

13 On April 8, 2009, at 11:39 a.m., in response to Salsberg's e-mail to her, Addeo sent an e-mail to Nezry (Exhibit 2, Tab 6) stating that a potential purchaser was requesting a handicapped parking

spot and was looking for another parking spot to rent. Addeo attached, to the e-mail, Salsberg's fax with the agreement for the purchase of unit 203 and Gary's request concerning a handicapped parking spot. Nezry, however testified that he did not see the attachments. He did not provide any credible evidence to prove that he had not received the attachments and the e-mail indicates that they were attached. Within the hour Nezry replied by e-mail to Addeo that the Board did not rent parking spots but that they could sell a handicapped parking space at \$20,000 plus GST (Tab 2, Exhibit 7). In a second e-mail sent later on the same day at 12:28 p.m. (Tab 2, Exhibit 7), Nezry reiterated to Addeo that he could sell the one handicap parking spot that he had available for \$20,000 plus GST.

14 On April 13, 2009 at 1:33 p.m., Gary received an e-mail from Addeo (Exhibit 1, Tab 6) telling him that he would be able to purchase the only handicapped spot available at a cost of \$20,000 plus GST. She told him that the board does not rent any parking spots. She stated that the board had no objection to the removal of the second door in the master bedroom bathroom.

15 At approximately 3:00 p.m. on April 13, 2009, Gary e-mailed the Property Manager, Ileana Onose (Onose) (Tab 2, Exhibit 10) and stated that he needed to rent a parking spot for his daughter as he could not afford to purchase one from the builder as he could no longer work. He asked if she would see if the builder would rent him the handicapped spot that he was told is not being used by anyone. He told her that if there was a sale of a condo from the builder to a handicapped person he would give up the spot. This statement by Gary casts a doubt on the need for a handicapped parking spot being the sole motivator for backing out of the purchase of unit 203.

16 On April 14, 2009, Gary e-mailed Onose to find out how to contact Yuri Shapiro, the superintendent for YRSCC 1062 (Shapiro), to find out if there were any tenants renting out parking spots (Exhibit 1, Tab 7).

17 Sometime after April 14, 2009, Gary met with Shapiro at YRSCC 1062. Gary testified that he was told by Shapiro that there were no parking spots for rent by tenants. Gary further testified that in the presence of Shapiro he measured the distance from the elevator lobby door to parking spot number 36. Shapiro admits that he met Gary but denies that he showed Gary any parking spots or discussed parking spots. Shapiro testified that he had told Gary that he knows nothing about parking and that he just cleans the building. Specifically he said, "This is not my department, my department is to clean the building, you ask management about parking spots." Gary's recollection of what took place at this meeting differs from Shapiro's description. The court notes that Shapiro is still employed at YRSCC 1062.

18 On April 15, 2009, Andi waived the condition concerning removal of the master bedroom bathroom door.

19 On April 17, 2009, the first listing agreement for Thornway (which was in suspension status) expired. A new listing agreement at a lower price of \$399,900 was signed.

20 Gary testified that at some time between April 17 and May 28, 2009, he had a telephone conversation with Nezry, over the speaker on his phone and in the presence of Salsberg. He testified that Nezry told him that the handicapped parking spot and the parking spot that he had seen with Shapiro were no longer available. Nezry testified that there was such a call but that the nature of it had been that Gary screamed offensive comments to him related to his religious background. Nezry testified that there was no discussion between him and Gary other than the screaming at him by Gary. Salsberg who was present during this call testified that she recalls, "him saying that he could purchase a spot for \$20,000." The testimony of all three persons involved in this call differs as to its content such that the court cannot make a finding on what exactly was said during this call but will return to it later in this judgment as it appears to have been a turning point in the matter following which Gary's efforts to rent a handicapped spot changed to efforts to switch the existing unit 203 spot for a handicapped spot in accordance with the declaration.

21 On April 23, 2009, Andi agreed to delete the status certificate clause in the agreement to purchase unit 203. A certificate dated April 17, 2009 had been received.

22 Gary received the April 13, 2009 e-mail from Addeo (Exhibit 1, Tab 6) telling him that he would be able to purchase the only handicapped spot available at a cost of \$20,000 plus GST. Nezry testified that it was his recollection that such an offer was made and terms discussed with Gary. Exhibit 10 is a copy of a document headed "Salomon" with a handwritten date of April 23/2009 on it with typed Start and End dates of 1/11/2011 on it. The subject line of the note states, "agree to sell unit parking #36 to Gary, ... for \$20,000. A down deposit of \$5000 is expected in 2 weeks as per conversation with Garry [sic] on April 23, 09 ..." The end of the note states, "He is closing on July 2009". The court could not establish when or under what circumstances this document was prepared and who it was prepared by given that it was produced late in the trial and had a handwritten, not a computer generated, date on it. Nezry testified that "I made that note but it pops up in my system in 2011." He mentioned that the note popped up on his computer close in time to the first court appearance in this case and speculated that it might be a more recent reminder to himself of past events or that it might have been made on April 23 (the day he spoke to Gary).

23 On April 28, 2009 Gary e-mailed his real estate lawyer, Philip Ulrich (Ulrich). He told him that Nezry was trying to rent him parking spot number 36 and that the handicapped parking spot was "all of a sudden taken" (Exhibit 1, Tab 10).

24 On May 8, 2009, Ulrich faxed a letter to Taft (Exhibit 1, tab 12) confirming that they had now been advised that the handicapped parking spot for purchase at \$20,000 was not available and putting them on notice that without confirmation that the Frimans could purchase the handicapped spot, then his clients would be backing out of the purchase of unit 203. Ulrich sent another fax to Taft and to Troster on May 19, 2009 (Exhibit 1, tab 14) requesting an exchange of the unit 203 parking unit for a handicapped parking unit in accordance with the Declaration and requesting a non-handicapped parking spot to purchase for the Friman's daughter.

25 On May 22, 2009, Andi suspended the listing agreement for Thornway. There had not been any offers on the property..

26 On May 22, 2009, Ulrich wrote to, Dan Ronen (Ronen), the real estate lawyer acting on the sale of unit 203 (Exhibit 1, tab 16). Ulrich asked him to see if his client would accept the sum of \$10,000 in exchange for a release from the agreement to purchase unit 203. The reason given for seeking the release was that the purchaser was not making any headway on obtaining a handicapped parking spot. He also mentioned the poor health of his client.

27 On May 25, 2009, Steven Troster (Troster), the lawyer for YRSCC 1062 and Toledo, e-mailed Ulrich requesting that he send him a copy of Gary's disabled parking permit (Exhibit 1, tab 17).

28 On May 26, 2009, at 6:09 p.m. Ulrich faxed a copy of Gary's Ontario Accessibility Parking Permit to Troster (Exhibit 1, tab 18).

29 On May 28, 2009 at 10:20 a.m. Ulrich sent a fax to Ronen to tell him that they had not had any further word on a handicapped spot and asked what would be necessary to secure a release from the purchase of unit 203 (Exhibit 1, tab 20).

30 On May 28, 2009 at 1:43 pm. Troster sent a fax to Ulrich informing him that the handicapped parking spots at YRSCC 1062 were occupied by disabled drivers (Exhibit 1, tab 19). He stated that a parking unit could be purchased for \$20,000. The court notes that this is the first mention by YRSCC 1062 or its representatives that the 2 handicapped designated parking spots at YRSCC 1062 were occupied. Troster did not provide any proof of their occupancy or provide details. As well, Troster did not specify which parking unit could be purchased.

31 On July 15, 2009, the vendor of unit 203 provided a release from the purchase of unit 203 in exchange for the sum of \$15,000. The vendor of unit 203 had wanted to keep the entire \$20,000 deposit, however, through negotiations they settled on an arrangement whereby the vendor would keep \$15,000 of the \$20,000 and return \$5000 to the Frimans. The court notes that by negotiating a settlement with the vendor the Frimans somewhat mitigated their damages concerning the deposit.

32 The court notes that the closing date for unit 203 would have been July 31, 2009 (the closing date).

33 In December of 2009 the Frimans both contracted c-difficile and were hospitalized in different hospitals.

34 In early 2010 the Frimans purchased a condominium in Richmond Hill. They then relisted Thornway for sale. Thornway was sold in March of 2010 for \$433,000.

35 In the middle of 2011, YRSCC 1062 had their turn-over meeting for the condominium.

ISSUES

36 The issues in this case are as follows:

1. Did Nezry, YRSCC 1062, and Toledo make a representation to Gary, before Andi entered into an agreement to purchase unit 203 (the agreement), that he would be able to have a handicapped parking spot? If this representation was made did the Frimans rely on it to their economic detriment?
2. Did Nezry, YRSCC 1062, and Toledo make a representation to Gary after Andi signed the agreement that he could have a handicapped parking spot? If this representation was made did the Frimans rely on it to their economic detriment?
3. Did Nezry, YRSCC 1062, and Toledo, at any time, misrepresent the status of the handicapped parking spots to the Frimans and if so did they rely on any such misrepresentation to their economic detriment?
4. Did Nezry, YRSCC 1062, and Toledo have a duty under the *Condominium Act, 1998*, S.O. 1998, c.19, YRSCC 1062's declaration, its bylaws and rules, to provide Gary, a person living with multiple handicaps, with a handicapped parking spot or with an agreement, coinciding with the closing date, to allow him to switch the parking spot from unit 203 for a handicapped parking spot?
5. Did Nezry, YRSCC 1062, and Toledo discriminate against Gary contrary to the provisions of the *Ontario Human Rights Code*, RSO 1990, c. H.19?

The court also considered whether the Frimans mitigated any damages they suffered and whether or not they themselves contributed to any economic loss that they may have suffered.

EVIDENCE AND FINDINGS

37 The first issue is whether a representation concerning a handicapped parking spot was made to Gary before the purchase of unit 203.

38 Gary testified that at his meeting with Nezry to view 3 new units for sale by Toledo that he told Nezry that they had not yet made up their minds but that if they purchased then he would need a handicapped parking spot. He testified that Nezry told him that there'd be no problem. Nezry testified that after he showed Gary the Toledo units he showed him their corresponding parking spots and also told Gary that he had another parking spot closer to the elevator lobby door. The court finds that an oral representation was made to Gary by Nezry on behalf of YRSCC 1062 and Toledo as owner of unit 36, that Gary would be able to obtain a different parking spot from the spots assigned to each unit and that the new spot would be closer to the elevator lobby door. The Frimans had been willing to agree to a condition, in the agreement of purchase and sale for unit 203, that they obtain a parking spot within 50 feet of the elevator lobby door. The information from Nezry that there would be no problem in arranging a handicapped spot and his representation to them that spots could be switched for ones closer to the elevator, were important representations to the Frimans and the court finds that the Frimans relied upon those representations.

39 The court finds that the Frimans were given an oral representation that they could obtain a

closer parking spot. The Frimans, however, would like the court to believe that prior to purchasing unit 203 they relied upon a written representation that stated that they could have a handicapped parking spot and that this is why they decided to sign the agreement without any clauses concerning the obtaining of a handicapped parking spot. However, the fact is that the e-mail from Taft to Gary relaying that he could purchase a handicapped parking spot was sent to Gary on April 13, 2009. The agreement to purchase unit 203 was finalized 6 days earlier on April 7, 2009. The Friman's could not have relied on this e-mail when they signed the agreement of purchase and sale as it did not yet exist. Gary's real estate lawyer, Ulrich, sent the letter found at Tab 12, Exhibit 1, dated May 8, 2009, to Toledo stating that after Gary was told he could purchase a parking spot by Addeo he committed to the purchase and that he relied upon Taft's e-mail. Addeo however first advised Gary 6 days after the purchase of unit 203 that a handicapped spot could be purchased. On cross-examination Gary was asked why he went ahead with the form of agreement of purchase and sale without the condition concerning the securing of a handicapped parking spot. Gary replied that at that point we had gotten a letter that we could get the handicapped spot. This, however, was not true as the e-mail stating that a handicapped spot could be purchased came to him after unit 203 had been purchased. Nonetheless the court finds that there was an oral representation made prior to closing that was relied upon by the Frimans.

40 The situation concerning the status of and availability of handicapped parking spots and representations and misrepresentations made to the Frimans by the defendants after their purchase does involve a written representation. The court finds that the defendants did make representations and misrepresentations to the plaintiffs concerning the availability of a handicapped parking spot and that the plaintiffs relied upon such representations and misrepresentations to their economic detriment.

41 The condominium's declaration (Exhibit 2, tab 1) states, in section 4.3(f)(i), that if a disabled driver purchases a residential unit and a parking unit which is not designated for the handicapped, the owner or occupier of a handicapped parking unit shall (if not handicapped), upon notice from the Corporation and at the request of the disabled driver, exchange the right to occupy the Handicapped Parking Unit with the disabled driver for the parking unit which was purchased by the disabled driver, said exchange of the right to occupy said space to continue for the full period of the disabled driver's residence in the building.

42 On April 8, 2009, the day after they purchased unit 203, the Frimans moved ahead with organizing parking spots. They knew that they needed a handicapped parking spot for Gary and they wanted an additional spot for their daughter who lives with them.

43 Gary asked Salsberg, on April 8, 2009, to contact Addeo to inquire about obtaining a handicapped parking spot. At this time the Frimans had not yet received the status certificate (which is dated April 17, 2009). Addeo passed on the request to Nezry.

44 Nezry informed Addeo that the purchaser would be able to purchase the only handicap spot

available at a cost of \$20,000 plus GST. Nezry did not say that they could purchase a spot close to the elevator. He said that they could purchase a 'handicapped spot'. The court considers the common meaning of these words to mean that he could purchase a spot designated as a handicapped parking spot. Nezry however testified that he was not referring to one of the designated handicapped parking spots but to one close to the door that would be suitable for Gary. The court heard that the spot Nezry was referring to was spot number 36 which was closer to the lobby door than the spot that came with unit 203.

45 Initially it appeared that Gary was more interested in renting an additional parking spot than in purchasing one.

46 On April 13 as set out at tab 7 of exhibit 1, Gary e-mailed Onose to state that he would need to rent a parking spot for his daughter as he could not afford to purchase one from the builder as he no longer worked.

47 Gary testified that he had been given the building superintendent's name and contact information from Onose and that he met with the superintendent, namely, Yuri Shapiro (Shapiro) to look at some available spots so that he could determine if they were suitable. He said that he asked Shapiro if there were any spots for rent and was told that there were no such spots for rent. When Shapiro testified he said that he had told Gary that he knows nothing about parking and that he just cleans the building. Specifically he said, "This is not my department, my department is to clean the building, you ask management about parking spots." Their versions of the meeting differ between what Gary says and what Yuri says though the court notes that Shapiro is still employed at YRSCC 1062.

48 Gary testified that he and Shapiro had been in the parking garage together and that Gary had not seen any yellow stickers on the handicapped parking spots to indicate that they were taken.

49 YRSCC 1062 never disclosed any leases or handicapped permits to prove that handicapped parking permit holders were using the designated parking spots. The defendants could easily have confirmed whether or not handicapped people were leasing the spots and therefore clarified for Gary that those spots were not available. Even during this litigation they could have provided that information, preferably attached to their defence or served 14 or more days before settlement conference as permitted under the *Small Claims Court Rules*. On the second day of trial counsel for the defendants (who was not counsel originally hired by the defendants) did say that he had in his possession handicapped parking permits for the persons using the handicapped spots. The court did not allow these to be filed at this very late stage in the case. In any event, the court notes that there were no leases in place for the 2 handicapped parking units. If an owner enters into a lease concerning their parking spot, they need to provide the **condominium corporation** with a copy of the lease in accordance with section 4.5 of the Declaration. All of the defendants testified that there were no leases on file for the **condominium corporation**. The status certificate that Andi received (Exhibit 1, tab 29), in clause 24, says that the corporation has no notices of any leases.

50 There appears to have been confusion at YRSCC 1062 as to the state of the handicapped parking spots. Gary testified that Addeo and Shapiro had indicated to him that they thought that the handicapped spots were available. At Exhibit 2, tab 7 is an e-mail from Nezry to Addeo telling her that we don't know when we will be selling the handicapped unit therefore we can't rent it out. He could have told her that handicapped people were already using the spots but did not do so.

51 Gary testified that in a phone conversation with Nezry, sometime between April 17 and May 25 (the phone call), he was told by Nezry that the handicapped spots were unavailable and other spots were no longer available including the spot he had seen with Shapiro. Gary e-mailed his lawyer Ulrich on April 28 (tab 10 of exhibit 1) to say that "He is trying to rent me spot 36 and says the handicap spot is all of a sudden taken". Gary said, "All we're getting is you can't buy a handicap spot, you can't buy this, you can't buy that." The court however notes that Gary used the words 'He is trying to rent me spot 36' in his e-mail to his lawyer. Nezry however, was adamant that there were never any words spoken about renting as the board did not rent spots.

52 On April 23 the Frimans agreed to the removal of the condition in the agreement concerning the production of a status certificate. They had received a status certificate dated April 17. With the removal of this last condition the agreement became unconditional. The parking spot issue, however, did not seem to be getting resolved. Unit 203 had a parking spot but it was too far from the door for Gary. Efforts to switch the spot for a handicapped one had been unsuccessful and there were no spots for rent. The Frimans had been told in writing that they could purchase a handicapped spot for \$20,000 plus GST. Although the spot available for purchase was referred to as a handicapped spot, the Frimans later found out that this spot was not in fact a handicapped parking spot. Paying \$20,000 for a spot was not the most appealing option for the Frimans, however, Gary testified that he and Andi had discussed the matter and that if they had to buy a spot then they had to buy a spot. Gary was asked on cross examination whether he had told the **condominium corporation** that he would buy a spot for \$20,000 with a deposit of \$5000 down within the next couple of weeks. Gary testified "Yes sir" to this. Exhibit 10, the note from Nezry with the handwritten date on it sets out those terms but as discussed earlier, its origins are vague.

53 Gary testified that after the phone call with Nezry there were no parking spots for sale. Nezry was asked on cross examination whether before May 7 he told Gary that he was not going to sell him the parking spot. Nezry answered that, "Yes I did I was not going to sell it".

54 The purchase of a parking spot arises again closer to the aborted closing date when Ulrich tries to pin down details of a sale. Troster, however, never confirmed that there was a spot suitable to accommodate (i.e. a handicapped parking spot or a spot close to the elevator) Gary. The final letter from Troster states that there is a spot that he can purchase. The details of the location of this spot were not provided.

55 The court finds that YRSCC 1062 and Toledo misrepresented the situation concerning the handicapped parking spots in the building to the Frimans. They told the Frimans that they could

purchase a handicapped parking spot. Then they told the Frimans that the handicapped parking spots were taken. They disclosed in the declaration that there were no leases for any units, including parking units. A lease is required for the use of a parking spot by someone other than its owner. The **condominium corporation** and Toledo could have switched the spot that came with unit 203 for one of the handicapped spots or in the alternative with one of the unassigned spots closer to the door. Gary testified that during the phone conversation with Nezry he was told that they were not going to sell him any parking spots. Nezry himself testified that he was not going to sell him any spots. When Ulrich became involved Troster did not say that they would exchange or sell the Frimans a handicapped spot and when they finally said they would sell him a spot they only referred to 'a spot' providing no details of this spot for the Frimans to evaluate if it would meet their needs. Being told that there was no handicapped spot available and no spot at all to buy put the Frimans in the awkward situation of having contracted to buy unit 203 but now having no where to park that would allow Gary to get into the building. At the very least this created a stressful and confusing situation for the Frimans.

56 There were, however, other issues going on in the Friman's life that the court finds also affected their ultimate decision to back out of the deal to purchase unit 203. The court finds that the failure of the **condominium corporation** to accommodate Gary's need to change the unit 203 parking spot for one of the handicapped spots or to at least switch it with another spot closer to the door is one factor that caused the plaintiffs to back out of the transaction. As well the withdrawal of the offer to purchase another spot so that his daughter could have a spot also caused the Frimans uncertainty and stress and was a factor in their decision not to close the unit 203 deal. But there were other unrelated factors involved. Gary testified that they took their townhouse off the market as it was stressful not having offers on that and trying to buy while trying to sell. Andi's epilepsy was negatively affected by the stress. Neither plaintiff was well and the court finds that their health also influenced their decision to back out of the purchase.

57 The court also cannot ignore the fact that the Friman's townhouse did not sell before they had agreed to buy unit 203. Gary testified that there was no mortgage on this property and that he had arranged for bridge financing so that he could close the condominium deal without having sold Thornway. Gary testified that any time the plaintiffs moved they arranged bridge financing as it took them longer, with their disabilities, than the average person, to move from one property to another one. Mr. Friman was given the chance to provide the court with documents to confirm bridge financing for unit 203 but was unable to do so. Ulrich wrote (Exhibit 1, tab 20) that his clients cannot afford to carry 2 homes. The court finds that the Frimans did not close on unit 203 for 3 reasons - a failure to secure a suitable parking spot to accommodate Gary's health issues, the failure to sell Thornway, and their health issues.

58 The fourth issue before the court was whether the defendants had a duty under the *Condominium Act*, its declaration, bylaws, and rules to provide Gary with a handicapped parking spot or with an agreement coinciding with his closing date to allow him to obtain a handicapped parking spot upon closing. The court also had to look at whether Nezry, as a director, breached his

duty to ensure that the corporation complied with the Act and with its own declaration, rules and bylaws. The court finds that Nezry and YRSCC 1062 failed to meet their duties under the Act and did not follow the Act, the declaration, rules and bylaws in this matter.

59 Under section 27.1 of the *Condominium Act* the Board of directors has an obligation to manage the affairs of the **condominium corporation**. Under s. 17 the corporation has a duty to manage the common elements. The standard of care of officers and directors is to act honestly and in good faith and to exercise the care, diligence and skill of a reasonably prudent person. Under s. 17.3 there is a duty to take all reasonable steps to ensure that owners, lessees, agents and employees comply with the Act, declaration, bylaws and rules .

60 A key duty of the **condominium corporation** is the requirement under s. 55(1) of the *Act* to keep adequate records including those made under s. 83(3) which covers the recording of leases. As well s. 76(1)(o) imposes a requirement that the status certificate provide the number of units the corporation has received notice of that have entered into leases during the last fiscal year. In this case the status certificate stated that there had been no notices of leases registered during the last fiscal year. Section 83 says that an owner is to give the **condominium corporation** 30 days notice if there is a lease. Nezry testified that the handicapped spots were used by handicapped persons. Shapiro also related that he had seen some handicapped persons using the spots.

61 Turning now to the Declaration, section 4.3 deals with parking units. Subsection 4.3(d) states that any or all parking units may at any time be leased. The **condominium corporation** had the authority to allow any parking spots to be leased. Parking spots can be leased separately or in combination with other units.

62 Units 41 and 42 were designated in advance as handicapped spots. Under s. 4.3(f)(i) of the declaration, the Frimans had the right to have the unit 203 parking spot switched with one of the designated handicapped parking spots.

63 Section 4.5(a) of the declaration mirrors s. 83(1) of the *Condominium Act* to state that if a unit is to be leased the corporation must be given details of the lease before it is entered into. The declaration states that any parking unit for sale, transfer or assignment or other conveyance in contravention of the declaration is null and void and of no force and effect. Any arrangement entered into concerning the handicapped spots in this case would have no effect as it did not meet the provisions of the declaration.

64 Turning to the Bylaws, Bylaw I, Article 3, section 3.1(f) states that the corporation is required to keep copies of agreements and leases. By-law 2, states that all motor vehicles operated by owners must register with the manager. Each owner shall provide the manager with the license number of all motor vehicles driven by residents of that unit.

65 Clearly under the Act, the declaration, bylaws and rules, YRSCC 1062 and its directors are under a duty to keep records of the parking unit leases and also of the motor vehicles using each

spot. If this had been done it would have been very easy for the **condominium corporation** and the Frimans to know who was using the handicapped spots as every motor vehicle was to have been registered. As well the declaration would have set out the leases that were in effect.

66 Nezry admitted in his testimony that the **condominium corporation** did not have copies of leases for parking units. Nezry admitted that he had never read the declaration and that he had relied on the property manager to read it and notify them of any problems. Nezry also testified that he thought that the rules were not applicable until after the turn-over meeting.

67 In this case the status certificate said that there were no leases. The purchasers are entitled to rely on the certificate. The **condominium corporation** cannot say that you can't have the handicapped spots as they are being used by handicapped persons when in fact there are no registered leases and its own declaration states that agreements to lease are not valid if they did not follow the condo declaration.

68 The court finds that Nezry and the **condominium corporation** should have followed the declaration and when asked to do so by Gary should have switched the parking unit that was assigned to unit 203 for one of the handicapped spots. Gary should not have been provided with a reply that stated that his only option was to buy a handicapped parking spot for \$20,000 plus GST; an offer that was subsequently withdrawn in any event.

69 It was raised at trial whether a purchaser with a disability who has not closed yet has the right to exercise the provisions of the declaration to secure a handicapped parking spot. The court finds that a purchaser does have the right to exercise the option to switch their parking spot for a handicapped spot in accordance with the provisions of the declaration. The purchaser's use of the handicapped spot would commence on their closing date. The declaration in s. 4.3(f)(i) uses the word 'purchases'. In this case unit 203 had been purchased and was on track to close as all conditions in the agreement had been waived. Purchasers under agreements make a variety of arrangements prior to closing that come into effect upon closing. They arrange to have financing to complete the purchase, they set up insurance and are able to provide proof of such insurance prior to closing, and they set up utility accounts in their names. In relation to arranging a condominium parking spot, s. 83(1) of the *Condominium Act* and s. 4.5(1) of the Declaration state that lease details must be given in advance. Gary required a handicapped parking spot from the moment he moved in. To meet his physical needs and to abide by the Act and the Declaration he needed to arrange the transfer or lease of one of the handicapped parking spots prior to moving into the condominium. The actual possession of the parking spot could have been scheduled to commence after the time of closing.

70 The plaintiffs allege that the defendants in this matter have violated the *Ontario Human Rights Code* (OHRC) in their treatment of Gary, a disabled person, within the definition of the OHRC. The fact that the **condominium corporation** did not take steps to either switch the unit 203 spot for a handicapped spot or one closer to the door was discriminatory treatment that caused the plaintiffs

stress and was a factor in the decision to not close on unit 203. The Ontario small claims court is now authorized under the OHRC to determine whether a defendant has breached the OHRC if the plaintiff is litigating in the small claims court on a related non OHRC matter.

71 As mentioned throughout this judgment, the court found that there were other factors that influenced the Frimans in their decision to back out of the purchase of unit 203 including health issues (in his May 8, 2009 letter Ulrich notes that Andi due to the stress of the situation, is having an increase in seizures such that they are about to sell their home and now may not be able to do so). The court also notes, that there were no offers at any time to buy their townhouse during the time of their purchase of unit 203. As well they wanted to rent an additional parking spot, not buy one, and had said that they could not afford what the builder wanted to charge for a spot so they were being put out financially to buy a spot for their daughter even if they were able to switch their spot for an accessible spot they still needed to buy another spot for their daughter which would be an additional expense for them. If having an accessible spot was of primary importance to the Frimans then they would have had an easier time rescinding the deal if they had inserted a clause into the agreement making it conditional on obtaining a handicapped parking spot. However in their favour the declaration clearly provided for accommodation by way of a parking spot switch for a handicapped purchaser and this switch could have taken place on closing. Under the *Ontario Human Rights Code* there is a duty to accommodate a person with a disability. It may be in some condominiums that due to a lack of handicapped parking spaces this accommodation cannot be met. The *Accessibility for Ontarians with Disabilities Act, 2005 (AODA)* is now in place and applies to condominium corporations as service providers. All condominium corporations should put in place a fair plan for accommodation of the parking needs of handicapped residents, purchasers and residents that become handicapped. At the time that the Frimans purchased unit 203, the AODA was not yet applicable to private sector service providers. Condominium corporations provide a variety of services to its residents and also to the public. Services provided to the public may include tours of the building to sell units and also services such as the provision of visitor's parking permits. A variety of services are usually provided to tenants such as locker rentals and services in connection with recreational facilities. Condominium corporations should also consider the sometimes transient nature of handicapped parking permits and the use of handicapped parking spots. The declaration in this case says that the resident who obtains use of the handicapped parking spot can use it for as long as the disabled person is a resident. In some cases, however, people are granted temporary disability parking permits and once recovered no longer qualify for such parking. In the present case, Andi, does not drive. If the Frimans obtained a handicapped parking spot and Gary passed away Andi would not qualify to have the handicapped parking spot as she does not drive and does not have a handicapped parking permit. It would make sense to have the handicapped parking spot assigned to another disabled driver. There should be a system in place with a waiting list for someone disabled to be able to obtain use of a vacated handicapped spot.

72 In conclusion the court finds the defendants Toledo and YRSCC 1062 jointly and severally liable to the plaintiffs for misrepresentation concerning the handicapped parking spots. The court finds the defendant YRSCC 1062 liable for its failure to accommodate Gary under the *Ontario*

Human Rights Code. The court finds YRSCC 1062 and Nezry (in his capacity as a director) jointly and severally liable for damages for their failure to abide by the provisions of the *Condominium Act*, the declaration, bylaws and rules of the condominium.

73 The plaintiffs lost \$15,000 of their deposit when they backed out of the purchase of unit 203. The court finds that they backed out of the deal for 3 reasons as stated earlier. The sum of \$5000 of this loss can be attributed to their failure, due to misrepresentations and lack of action by Toledo and YRSCC 1062, to obtain a parking spot that would accommodate Gary's disabilities. The other 2 reasons for not closing were the Friman's health issues and the fact that their townhouse had not sold. All 3 reasons are given equal weight. As Toledo owned the parking spots that should have been used to accommodate Gary and employed their representative Nezry who made the misrepresentations to the Frimans about the handicapped parking spots they shall be jointly and severally liable with YRSCC 1062 for the sum of \$5000. On the issue of the breach of the *Ontario Human Rights Code* in respect of the accommodation of Gary's disabilities the plaintiff Harvey Gary Friman shall have judgment against YRSCC 1062 in the amount of \$1500. For failing to abide by the *Condominium Act*, the declaration, the rules and the bylaws Nezry (in his capacity as a director) and the YRSCC 1062 are jointly and severally liable to pay the sum of \$1000 to the plaintiffs. All of the defendants are jointly and severally liable to pay the plaintiffs \$450 for disbursements incurred to file the claim, file a motion to move the trial to Richmond Hill, to set the matter down for trial, for service and the issuance of summons to witnesses and for preparation of the claim. All of the defendants are also jointly and severally liable for costs of \$2500, however, if there were offers made under Rule 14 that may affect these costs then counsel may submit these written offers and their corresponding affidavits of service for consideration by the court within the next 30 days and costs may then be adjusted by the court if applicable. Prejudgment interest of .5% shall be applied under the *Courts of Justice Act* commencing July 15, 2009 and post judgment interest of 3% per annum shall commence today.

D.M.P. GONSALVES DEPUTY J.

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