

COURT OF APPEAL FOR ONTARIO

CITATION: Gordon v. York Region Condominium Corporation No. 818, 2014

ONCA 549

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Hoy A.C.J.O., Gillese and Lauwers JJ.A.

BETWEEN

Stanley Gordon

Applicant (Appellant)

and

York Region Condominium Corporation No. 818, Ed Rotman, Ahsan Zaiyouna,
Harold Davis, Eugene Katz and Manfred Kapp

Respondents (Respondents)

Michael J. Campbell, for the appellant

Benjamin J. Rutherford, for the respondents

Heard: July 15, 2014

On appeal from the judgment of Justice J. R. McCarthy of the Superior Court of Justice, dated August 21, 2013.

ENDORSEMENT

[1] The appellant, Stanley Gordon, appeals the August 21, 2013 judgment of the application judge, which (i) set aside the November 21, 2011 decision of the board of directors of York Region Condominium Corporation No. 818 (the “Condo”) disqualifying him as a director pursuant to the Condo’s By-law No. 9 for

violations of the Directors' Code of Ethics during his term of office; and (ii) made provision for the conduct of a fresh ethics review by the board of the appellant.

[2] The application judge concluded that while By-law No. 9 permitted the board to disqualify a director who violated the Directors' Code of Ethics, the manner in which the Board had done so violated principles of natural justice and procedural fairness. Among other things, the appellant was not given reasonable notice of the ethical review. The board's decision could accordingly not stand.

[3] However, the application judge was not prepared to order re-instatement of the appellant as a director at that time: the vacancy left by his disqualification had been filled. While there was a significant evidentiary record before the application judge detailing the appellant's alleged ethical violations, the application judge declined to make findings as to whether the appellant had violated the Directors' Code of Ethics. He ordered that the board was at liberty to conduct a fresh ethics review of the appellant within 90 days, failing which the appellant could move for re-instatement as a director or for such other remedy as he may request. The application judge directed that the one director, whom he had found was looking to have the appellant removed from the board, not participate in the fresh ethics review. The application judge remained seized in the event that either party wished to seek further directions from the court following the ethics review or the expiration of the time period set out for the ethics review.

[4] Counsel advise that a fresh ethics review was conducted, as ordered by the application judge, and that the appellant was disqualified on that review.

[5] The appellant advances three arguments on appeal, the first two relating to the validity of By-Law No. 9, and the third the appropriateness of the remedy.

[6] First, he argues that the provisions of By-law No. 9 permitting the board to determine whether a director has violated the Directors' Code of Ethics are contrary to s. 56(6) of the *Condominium Act, 1998*, S.O. 1998, c. 19, (the "Act"), which requires that by-laws be reasonable. Therefore, the appellant argues, the directors could not properly have made By-Law No. 9 under s. 56(1)(a) of the Act, and it should accordingly be declared invalid. Second, and in the alternative, he argues that such provisions are inconsistent with the democratic principles of condominium governance reflected in the Act as a whole, and in that manner contrary to a second requirement of s. 56(6) of the Act, namely that by-laws be consistent with the Act. Third, he argues that the application judge in any event erred by not immediately re-instating him. The appellant seeks an order declaring the provisions of By-law No. 9 unreasonable or inconsistent with the Act and therefore invalid and re-instating him as a director.

[7] The respondent Condo argues that the application judge correctly concluded that By-law No. 9 permitted the board to disqualify the appellant for violations of the Directors' Code of Ethics, and that his decision not to

immediately reinstate the appellant was an appropriate exercise of the application judge's discretion. The respondent also argues that the issue of the appellant's reinstatement is moot: the appellant's term as a director would have ended in or about June, 2014.

[8] For the reasons that follow, we conclude that the application judge correctly found that By-law No. 9 is valid and permits the board to disqualify a director for violations of the Directors' Code of Ethics, that there is no basis for this court to interfere with the application judge's discretionary decision to defer reinstatement of the appellant, and that the issue of reinstatement is, as the respondent argues, in any event now moot. We note that under the respondent's by-laws, the appellant is at liberty to stand for re-election. And under those by-laws, violations of the Directors' Code of Ethics during his prior term, in the absence of a criminal conviction, are not a basis for disqualifying him if re-elected. We accordingly dismiss this appeal.

Is By-Law No. 9 Valid?

(a) Relevant provisions of the Act and By-law No. 9

[9] The relevant provisions of the Act are as follows:

33.(1) Subject to subsection 51(8), a director, other than a director on the first board, may be removed before the expiration of the director's term of office by a vote of the owners at a meeting duly called for the purpose where the owners of more than 50 per cent of all of the units in the corporation vote in favour of removal.

...

56. (1) The board may, by resolution, make, amend, or repeal by-laws, not contrary to this Act or to the declaration,

(a) to govern the number, qualification, nomination, election, resignation, removal, term or office and remuneration of the directors, subject to subsection (2)¹;

...

(6) The by-laws shall be reasonable and consistent with this Act and the declaration.

...

[10] Article 6.03 (c)(x) of By-law No. 9 provides for the disqualification and deemed resignation of directors:

c) A director shall cease to be qualified to be a director of the Corporation and shall be deemed to have resigned from the Board of Directors of the Corporation, if the director:

...

(x) violates the "Directors' Code of Ethics" on three (3) occasions over the course of the director's term, unless determined otherwise by a court.

For the purposes of this section, a violation of the Directors' Code of Ethics will be established if:

(a) another director on the board notifies the Corporation, in writing, of the violation (the "Code of Ethics Violation"), upon which the matter shall be added as the first

¹ Section 56(2) relates to remuneration of directors and is not relevant on this appeal.

agenda item to the very next meeting of the board and shall be identified in the agenda as the “Ethics Review”. The procedure to be used for the Ethics Review shall be the same procedure used by the board to decide all Corporation matters except, to ensure fairness, the director named in the Code of Ethics Violation shall be allowed to address the board at the meeting, but shall not vote nor be present when the board votes on the matter; and,

(b) the majority of the remaining directors on the board, present at the meeting during the Ethics Review, determine that a Code of Ethics Violation has occurred. The decision rendered at the conclusion of the Ethics Review shall be duly minuted in the Corporation's records. If it is determined at the end of the Ethics Review that a Code of Ethics Violation has occurred and constitutes the subject director's third (3rd) violation, then prior to concluding the Ethics Review, the subject director shall provide, in writing, his/her immediate resignation from the board, failing which it shall be deemed to have been provided and duly noted within the minutes as such.

[11] The appellant signed the “Directors’ Code of Ethics”.

(b) Are the provisions of By-law No. 9 permitting the board to determine whether or not a director has violated the Directors’ Code of Ethics unreasonable?

[12] The appellant argues that it is not reasonable for a board of directors to determine whether or not a fellow board member has violated the Directors’ Code of Ethics. He says that such a determination should be made by an independent third party.

[13] While there are other procedures that could have been adopted to determine whether or not a director has violated the Directors' Code of Ethics, we are not persuaded that permitting a board to make that determination is unreasonable.

(c) Are the provisions of By-law No. 9 permitting the board to disqualify a director for violations of the Directors' Code of Ethics inconsistent with the Act because they offend democratic principles of governance enshrined in the Act?

[14] We note that, on appeal, the appellant concedes that s. 33(1) is not exhaustive and does not limit the ability of the board to make by-laws governing the qualification, resignation and removal of directors pursuant to s. 56(1)(a). He does not argue that the provisions at issue are contrary to a specific section of the Act. Rather, he refers to principles of democratic governance which he says are established by the Act, as a whole.

[15] In our view there is simply no merit to the appellant's argument that the provisions of By-law No. 9 at issue are inconsistent with the democratic principles of the Act and therefore invalid.

[16] Section 56(1) specifically contemplates the enactment of by-laws dealing with qualification, resignation and removal of directors. By-law No. 9 was passed by a vote of the owners of a majority of the units in the Condo, including the appellant, and the directors who were accorded the power under By-law No. 9 to

determine whether one of their members had violated the Directors' Code of Ethics were elected by the unit-holders. To the extent that the Act enshrines democratic principles, they have been respected.

Did the application judge err by not immediately re-instating the appellant?

Is this issue moot?

[17] The appellant's application was commenced under s. 134(3) of the Act, which reads:

134. (3) On an application, the court may, subject to subsection (4)²,

(a) grant the order applied for;

(b) require the persons named in the order to pay,

(i) the damages incurred by the applicant as a result of the acts of non-compliance, and

(ii) the costs incurred by the applicant in obtaining the order; or

(c) *grant such other relief as is fair and equitable in the circumstances.* [Emphasis added.]

[18] As the application judge observed, the vacancy created by the appellant's disqualification had been filled. Reinstating the appellant would have required an order against someone who was not before the court. The remedy crafted by the application judge left open the possibility of re-instatement in the near future,

² Section 134(4) relates to the termination of a lease, and is not relevant here.

presumably when notice to the person potentially affected would have been given. The application judge also remained seized, to facilitate the process he had ordered.

[19] In our view, there is no basis on which to interfere with the application judge's exercise of discretion under s. 134(3). On the contrary, it appears to be eminently "fair and equitable" in the circumstances.

[20] Further, we agree that the issue of reinstatement is now moot. As noted above, the appellant's term of office has now expired. And, as also noted above, the appellant is at liberty to stand for re-election.

Disposition

[21] This appeal is accordingly dismissed with costs to the Condo fixed at \$8,500, inclusive of disbursements and HST.

"Alexandra Hoy A.C.J.O."
"E.E. Gillese J.A."
"P. Lauwers J.A."