CITATION: Grey Standard Condominium Corporation No. 50 v. Grey Standard Condominium Corporation No. 46, 2013 ONSC 1145
BARRIE COURT FILE NO.: CV-12-0874
DATE: 20130220

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
GREY STANDARD CONDOMINIUM CORPORATION NO. 50	S. Hodis, for the Applicant
Applicant	
– and –	D.A. Schatzker, for the Respondent
GREY STANDARD CONDOMINIUM CORPORATION NO. 46	
Respondent	
	HEARD: by Written Submissions

REASONS FOR DECISION ON COSTS

DiTOMASO J.

[1] My written Reasons for Decision were released on January 7, 2013.

[2] The parties agreed that costs would be determined by way of written submissions. I have received and reviewed those submissions.

BACKGROUND

[3] The parties are condominium corporations located at Blue Mountain Resort and Village near Collingwood, Ontario. The cooling towers for air conditioning equipment are located on the premises of the Respondent Grey Standard Condominium Corporation No. 46 ("No. 46") but they also provide services to the Applicant Grey Standard Condominium Corporation No. 50 ("No. 50").

[4] The parties are involved in a long-standing dispute in relation to payment of the cost of utilities for the cooling towers. They could not resolve their dispute which culminated in

No. 46 threatening to shut off the air conditioning which serviced No. 50 around the time of the August 2012 holiday week-end.

[5] As a result of No. 46's threats to shut off the air conditioning, No. 50 commenced this Application. The matter was originally before Eberhard J. on August 8, 2012. An order was obtained restraining No. 46 from disrupting any cooling services to No. 50 that emanated from the cooling towers. The balance of the Application, including costs, was adjourned to be dealt with by me on December 21, 2012.

[6] After hearing argument, I found:

(1) No. 46 was not entitled to continue with its action commenced in the Superior Court when the Shared Facilities Agreement ("SFA") and the *Condominium Act*, 1998 provided that the matter proceed by way of mediation and arbitration, and,

(2) No. 46 should not be restrained from demanding payment or threatening to file a Lien for payment of utility costs it considers owed to them by No. 50 prior to the issue being dealt with by way of mediation and arbitration.

(3) The sole and remaining issue to be determined is whether No. 50 is entitled to full indemnity costs.

POSITIONS OF THE PARTIES

Position of No. 50

[7] No. 50 submits that it is entitled to full indemnity costs in the amount of $33,399.99 for fees and $664.08 for disbursements. No. 50 submits it is entitled to full indemnity costs leading up to the injunction order of Eberhard J. and full indemnity or substantial indemnity costs thereafter in respect of the Application to stay before me.

[8] No. 50 submits that it was compelled to bring the Application in the first place as No. 46 had threatened to shut off air conditioning to No. 50 and adjacent Condominium Corporation No. 51 on a holiday week-end in the summer. No. 50 was compelled to prepare the Application seeking injunctive relief over a holiday week-end only to have No. 46 consent to injunctive relief on the return of the Application. No. 50 submits that the conduct of No. 46 was unreasonable and unnecessary. Therefore, No. 50 claims costs on a full indemnity scale which should not be visited upon the innocent unit holders of No. 50.

Position of No. 46

[9] No. 46 submits there should be no costs regarding that portion of the proceedings leading to the injunctive relief order by Eberhard J. The underlying merits of the dispute have not yet been adjudicated. Further, there should be no costs awarded relative to the stay of proceedings portion of the Application. In this respect success was divided. No. 50 did not obtain the broader injunctive relief sought. No. 46's conduct was not unreasonable as

it had attempted on numerous occasions to mediate. No. 46 submits that it was justified in bringing the action on a number of grounds including to prevent the limitation period from expiring.

ANALYSIS

Costs Generally

[10] No. 50 was the successful party in respect of costs leading up to the order of Eberhard J. dated August 8, 2012 and was substantially successful in the stay proceedings before me. I do not agree for the following reasons that No. 50 should not be entitled to any costs regarding the Application up to this point in time and that those costs ought to abide the outcome of the ultimate issue in respect of this case.

[11] To the contrary, I find that costs are a discrete and discretionary matter that can be dealt with now. The award of costs should not abide the outcome of the mediation or arbitration between the parties. This court has the jurisdiction to make a costs award at this time and it is most appropriate for this court to do so.

Costs of Proceedings Prior to the Order of Eberhard J. dated August 8, 2012

[12] I find that No. 50 is entitled to costs on a full indemnity scale for costs incurred to obtain the order of Eberhard J.

[13] The courts have often awarded substantial or full indemnity costs against an offending party on the basis that it would be unfair for innocent neighbors to pay the costs which occurred as a result of the consequences of the Respondent's own actions especially in a case where a party is seeking compliance with the *Condominium Act*, 1998 or governing document such as a Shared Facilities Agreement as in this case. (See *Muskoka Condominium Corporation No. 39 v. Kreutzweiser* 2010 ONSC 2463 (CanLii) and the endorsement of Healey J. in *Nipissing Condominium Corporation No. 4 v. Simard* dated September 1, 2010.)

[14] I find that the injunction sought and obtained by No. 50 was necessary and very important to No. 50 as No. 46 had threatened to shut off the supply of air conditioning to No. 50 in the middle of the summer and at the height of the tourist season. This would have rendered No. 50's units unrentable and would have caused the owners of No. 50 an economic loss and loss of reputation as well as exposing them to potential law suits for damages. No. 46's actions would have also affected No. 51 as that Condominium Corporation also obtained its air conditioning from the same cooling tower.

[15] No. 50 had no choice but to proceed with the Application since No. 46 did not retreat from its threats. No. 50 incurred the costs of preparing for the Application over the long week-end in order for materials to be filed and served on Tuesday for the Application returnable on Wednesday which was the day before No. 46's deadline to shut off the air conditioning.

[16] The parties had been engaged in a course of action which dealt with the Shared Facilities Agreement and the outstanding issue of payment of utilities. No. 46 deviated from those discussions and negotiations which included amendment of the Shared Facilities Agreement only to embark upon threats to shut off the air conditioning over a holiday week-end and subsequently, the commencement of an action in the Superior Court of Justice in Toronto.

[17] There is no doubt that No. 46 forced No. 50 to incur the costs of preparing an emergency injunction Application over the long week-end when No. 46 could easily have given instructions to withdraw the threat on the Friday as it did on the Tuesday morning. By Tuesday morning, it was too late as No. 50 had already incurred the expense of preparing an Application. The only cost savings that could be had by this point in time was the cost of a hearing which was avoided on Wednesday as a result of a consent order.

[18] When addressing the reasonable expectations of the parties, I find it reasonable for No. 46 to assume that it risked the cost consequences on a full indemnity scale if it continued to proceed with its threat forcing No. 50 to commence an Application. I find it was given ample warning to withdraw the threats and ample warning that if No. 46 did not do so, No. 50 would be bringing the necessary Application seeking injunctive relief.

[19] Although the cases cited involve the dispute between a unit holder and a condominium corporation, I agree that the same principle should be applied in the context of shared facilities where multiple condominium corporations co-exist as neighbours for the purposes of sharing facilities similar to the situation of owners in a single condominium corporation. I find it would be unfair for No. 50 (and its unit owners) as an innocent neighbour to bear the consequence of the costs incurred as a result of the unnecessary and unreasonable actions taken by No. 46. The innocent owners of No. 50 should not have to bear the costs which were solely incurred because of the position taken by No. 46. I find that No. 50 should be entitled to full indemnity costs up to and including the order of Eberhard J. I fix those costs on a full indemnity scale in the amount of $14,238.01 for fees. I find that the hours spent and the hourly rates involved in the legal services provided in this regard are fair and reasonable. I also award the sum of $664.08 regarding disbursements which I also find fair and reasonable.

Costs of Proceedings After the Order of Eberhard J. dated August 8, 2012

[20] No. 50 seeks costs on a full indemnity or substantial indemnity basis for costs after the Order of Eberhard J. which would include costs of the hearing before me. No. 50 was substantially successful in respect of relief sought before me on December 21, 2012. I have taken into account that No. 50 was not entirely successful. That having been said, the more important issue to be decided was decided in No. 50's favour. In this regard, I found that No. 46's action in Toronto was stayed. No. 46 was ordered to follow the dispute resolution process as set out in the Shared Facilities Agreement and s.132 of the *Condominium Act*, 1998 as amended. While I was not satisfied that an order should issue restraining No. 46 from demanding payment for utility costs in relation to the cooling towers from No. 40 or filing a Lien until the dispute resolution process as set out in the

Shared Facilities Agreement and the *Condominium Act*, 1998 was complete, I had good reason to believe that No. 46 would not take these steps. If No. 46 chose to do so, no doubt, No. 50 would return to court and would be in a better position to seek that relief then.

[21] No. 46 knew or ought to have known that the method by which it ought to have proceeded involved mediation and arbitration and not a court action. This was addressed by No. 46's first counsel in letter dated January 23, 2012. Numerous opportunities were given to No. 46 to transfer its dispute using the mediation route. No. 46 made a conscious decision to proceed through the courts. In the end, for the reasons given, No. 46's action was stayed. No. 46's actions once again forced No. 50 to incur unnecessary costs. The innocent owners of No. 50 should not have to bear the costs of No. 46's decision to proceed with its court action. I find that No. 50 is entitled to costs after the Order of Eberhard J. in the amount of $17,245.79. These costs are fixed on a substantial indemnity scale having taken into account some minor measure of mixed success. Once again, I have no reservations about the hours spent or hourly rate in respect of services provided by counsel for No. 50. They are both fair and reasonable.

CONCLUSION

[22] In the overall, I would award costs to No. 50 against No. 46 in the total amount of $32,147.88 all inclusive payable by No. 46 to No. 50 within 30 days.

DiTOMASO J.

Released: February 20, 2013