CITATION: Grigoriu v. Ottawa-Carleton Standard Condominium Corporation No. 706, 2014 ONSC 2885
COURT FILE NO.: CV-11-51096
DATE: 2014/05/09

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Tiberiu Grigoriu and Cristine Mihaela Bododea, Applicants

AND

Ottawa-Carleton Standard Condominium Corporation No. 706, Respondent

BEFORE: Madam Justice B.R. Warkentin

COUNSEL: D. Lynne Watt, for the Applicants

Christy J. Allen, for the Respondent

HEARD: April 28, 2014

APPLICATION UNDER section 135 of the *Condominium Act*, S.O. 1998, c. 19 and Rule 14.05(2) and (3)(d) of the *Rules of Civil Procedure*

ENDORSEMENT

1. In the spring of 2005, the applicants entered into an Agreement of Purchase and Sale with the developer of two condominium developments, Charlesfort, for the purchase of a residential unit at 300 Powell Avenue in Ottawa. On the same day they entered into an agreement to purchase a parking space and storage unit in the adjacent building at 290 Powell Avenue because there were no parking or large storage units available at 300 Powell. 290 Powell Avenue is the respondent; the Ottawa-Carleton Standard Condominium Corporation No. 76 (the "Corporation").

2. On June 8, 2005, the residential unit at 300 Powell was transferred from the developer to the applicants and on August 25, 2005, the parking space and storage unit were transferred from the developer to the applicants after special covenants were imposed on the applicants in order to restrict their access to the building at 290 Powell to only their parking space and storage unit.

3. There was nothing in the Declaration for the Corporation that prevented the applicants from purchasing the parking and storage space in 290 Powell.

4. There is no dispute among the parties that the applicants would not have purchased their residential unit at 300 Powell Avenue without a corresponding parking unit and storage unit.

There is also no dispute among the parties that there are no parking and storage units at 300 Powell that are now available for purchase by the applicants.

5. On March 25, 2010, the Declaration for the respondent Corporation was amended to add articles 4.01(3)(f) and (g) that specifically addressed parking units, storage units and terrace units. The new provisions at paragraph 4.01(e) and (f) prevent the use and ownership of parking units and storage units in 290 Powell by nonresidents of that building. In essence, the new provisions prohibit the sale or transfer of parking units and storage units in the building to non-owners of a residential unit at 290 Powell.

6. At the time of the amended Declaration, the applicants were the only owners of a parking space and storage unit in 290 Powell who are not also owners of a residential unit in that building.

7. The effect of the amended Declaration is that the applicants are *prima facie* prohibited from even using the parking unit or storage unit they own at 290 Powell; however, the Corporation has not enforced the use of that provision against them and has offered to grandfather their continued use of their parking and storage units for as long as they own their residential unit.

8. The applicants now wish to relocate; their residence at 300 Powell no longer having sufficient space for their growing family. The key issue in this dispute is the fact that the existing Declaration at the respondent Corporation prohibits the applicants from selling their parking and storage units with their residential unit at 300 Powell. According to the existing Declaration, their only option is to attempt to sell their residential unit without parking or storage and to sell their parking and storage units in 290 Powell to an existing owner of a residential unit in 290 Powell or to the respondent Corporation.

9. The applicants therefore allege that they are unfairly prejudiced or oppressed as a result of the amendment and have brought this Application.

10. The applicants seek an order under s. 135 of the *Condominium Act, 1998*, S.O. 1998, c.19 (the "*Act*"). They ask the Court to direct the Corporation to further amend its declaration in order to address the alleged oppression.

History of Amended Declaration

11. When the respondent Corporation initially sought an amendment to the declaration to restrict ownership of parking and storage units, they did so to prevent the sale of parking and storage units to nonresidents, in order to address concerns with respect to the security of the parking garage at 290 Powell. There had been several incidents of vandalism in the vicinity of the garage involving graffiti on the exterior of the parking garage and damage to entry doors and light fixtures. It was with this context in mind that the owners of condominium units in the respondent Corporation began expressing concerns to the Board of the Corporation regarding their security and the use of the parking garage by nonresidents. In 2010, when the amendment to the declaration was made, the Board and individual unit owners in the respondent Corporation

were aware that one parking unit and one locker unit was owned by the applicants and that the developer still owned a number of unsold parking units in 290 Powell.

12. The applicants opposed the amendment to the respondent Corporation's Declaration. Such a declaration requires consent by signature from 80 percent or more of the unit owners of a condominium. The amended Declaration was made on the basis of that percentage of consent signatures from unit owners at 290 Powell.

13. There have been ongoing negotiations between the applicants and the Board of Directors of the respondent Corporation with respect to a further amendment to the Declaration incorporating a specific exemption regarding the parking and storage units owned by the applicants. The Board of Directors of the respondent Corporation and the applicants agreed on the wording of that amendment, however the Board of Directors was unable to secure consent signatures of 80 percent of the members of the Condominium Corporation, thus rendering the agreement between the Board of the Corporation and the applicants of no force and effect.

14. This Application originally came before the Court in the summer of 2011. At that time the presiding Judge, Justice McMunagle, directed the applicants to attempt to sell their unit in order to ascertain evidence for the Court about the relative value of the unit.

15. Since November 2011, until August 2013, the applicants have had their residential unit on the market with two separate listings, one with parking and one without parking. In August, 2013, the Ontario Real Estate Board prohibited an owner from listing their property in two separate listings.

16. The applicants have never received an offer and there has been virtually no interest in the unit when it was marketed without parking. Conversely, there has been significant interest in the unit with parking and there have been offers for the unit with the parking, however those offers were conditional on the applicants obtaining the further amendment to the declaration, permitting a nonresident of 290 Powell to own a parking unit. As a result, they have been unable to sell their residence.

17. The applicants claim they purchased their residential condominium unit in one building with a parking and storage unit in an adjacent building in good faith for valuable consideration, with the reasonable expectation that they would be able to sell their residence and parking and storage units together as one package when they decided to move.

18. The applicants allege that, as a result of the amended Declaration, they are now precluded from selling their parking and storage units to a purchaser wishing to buy their residential unit. They claim this has affected their ability to sell their residential unit.

Issues

19. The issues before the Court are:

a) whether the existing Declaration as amended in March 2010 of the respondent Corporation is oppressive or unfairly prejudicial to the applicants and to their interests;

b) does this Court have the authority under s. 135 of the *Act* to order that a corporation amend its declaration; and if so,

c) is that the appropriate remedy in this case?

19. On an Application by an owner, a corporation, a declarant, or a mortgagee of a unit, if the Court determines that the conduct of an owner, a corporation, a declarant, or a mortgagee of a unit is, or threatens to be, oppressive or unfairly prejudicial to the applicant or their interests, the Court may make an order to rectify the matter. The judge hearing the matter may make any order the judge deems proper including (a) an order prohibiting the conduct referred to in the Application and (b) an order requiring the payment of compensation. (*Condominium Act, 1998*, s. 135)

20. The Supreme Court of Canada defined oppressive conduct in the corporate law context as conduct that is "burdensome, harsh and wrongful", "a visible departure from standards of fair dealing" and an "abuse of power". To be oppressive, the conduct of the Board of the Corporation must both (a) undermine the reasonable expectations of the parties and (b) be coercive, abusive, or unfairly disregard the interests of the applicants. (*BCE Inc. v. 1996 Debentureholders, 2008 SCC 69* at paras. 92-94)

21. In the context of condominiums, an oppression remedy was introduced when the *Condominium Act, 1998* was amended and came into force on May 5, 2001. The same tests for determining oppressive conduct have been applied to the actions of condominium corporations as to the corporate law in general.

22. In this case, both counsel for the applicants and counsel for the respondent agreed with respect to the law and the applicable test for the Court to find oppression.

23. They disagree however with respect to the available remedies under s. 135 of the *Act* in this circumstance.

24. The applicants acknowledge the respondent Corporation may have passed the amendment to the original Declaration without a specific intention to harm the applicants, but because the applicants were the only persons who owned a parking unit and storage unit in 290 Powell who were not owners of a residential unit, they are therefore the only owners who are unable to sell their parking unit and storage unit along with their residential unit.

25. The applicants claim therefore that they no longer have the same rights in their parking and storage units as all other unit owners at 290 Powell, being the right to access, use, lease or resell their parking and storage units located at 290 Powell to an owner or lessee of their residential unit at 300 Powell.

26. The applicants also claim that the remedy proposed by them of a further amendment to the Declaration of the respondent Corporation, the wording of which was agreed upon by the Corporation's Board but not a minimum of unit owners, does not harm or prejudice any unit owner at 290 Powell. They argue that the existing restrictive covenants registered on title to their parking and storage units protect the interests of the unit owners at 290 Powell with respect to the safety and security concerns that prompted the first amendment to the Declaration.

27. The applicants also argue that the legislative objective of s. 135 of the *Condominium Act, 1998* is to provide the Court with jurisdiction to protect condominium owners as well as corporations, declarants and mortgagees from unfair treatment. They further argue that the fundamental goal is to protect the parties' reasonable expectations and in doing so the *Act* provides the Court a broad remedial power to make any order deemed proper once it has been established that the conduct of the Corporation was oppressive or unfairly prejudicial to the applicants or unfairly disregarded their interests as unit owners at 290 Powell.

28. The respondent argues that the applicants' rights with respect to their parking and locker units are the same as all other owners of the respondent Corporation, and that in fact the allegations of oppression relate to their rights as owners of a residential unit at 300 Powell where they have lost value to that unit due to the Declaration at 290 Powell. The respondent Corporation also argued that the remedies available under s. 135 of the *Condominium Act, 1998* are not meant to address oppression or prejudice that may arise in relation to owners' interests beyond their interests in the condominium itself, and they argue that the original amendment to the Declaration is neither oppressive, unfairly prejudicial, nor does it unfairly disregard the interests of the applicants.

29. Additionally, the respondent Corporation argued that an order under s. 135 of the *Condominium Act, 1998* requiring the respondent Corporation to amend its Declaration would effectively disregard the fact that owners of the respondent Corporation have not consented to the proposed change to the Declaration. They argue that such an order would create an additional mechanism under the *Act* by which owners could amend a condominium's declaration.

30. The respondent Corporation then submitted that if the Court did find that the amended Declaration was oppressive to the applicants, the only remedy to which the applicants are entitled is a monetary remedy limited to the value of the parking and storage units at 290 Powell which they estimate to be in the range of $30,000.

Analysis

31. The evidence before the Court was that the unit at 300 Powell without parking and storage is virtually unsellable. Because of this, there was no evidence as to the differential

between the value of a residential unit at 300 Powell with parking and storage and the value of that same unit without parking and storage.

32. The applicants purchased their residential unit at 300 Powell with parking and storage at the neighbouring residence at 290 Powell in good faith, accepting the restrictions contained in the restrictive covenant with respect to the parking and storage at 290 Powell that are registered against their title to those units.

33. The applicants are the only individuals affected by the amended Declaration.

34. There was no evidence before the Court that the residential owners at 290 Powell, when refusing to consent to a further amendment to their Declaration to exempt the applicants and future owners of their unit at 300 Powell from the Declaration restricting ownership of parking and storage units to residents of 290 Powell, were informed that they might be found by a court to have treated the applicants unfairly and that they as owners might be subject to substantial monetary damages as a result of that conduct.

35. There is no doubt that the applicants would not have purchased their residential unit without the parking and storage units nor would they have purchased their residential unit at 300 Powell if they had been advised they would not be able to sell their parking and storage units with their residential unit.

36. I accept the argument of the applicant that the effect of the amended Declaration on the applicants is oppressive and unfairly disregards their interests, and that the restriction against them from selling their parking and storage units to a future purchaser of their residential unit is a restriction not imposed on any other owner of a residential unit in 290 Powell.

37. The conduct of the Board and the Corporation in amending the Declaration had the effect of undermining the reasonable expectations of the applicants and unfairly disregarded their interests.

38. The evidence clearly showed that the applicants are severely prejudiced because they are unable to sell their residential unit without a parking space given the location of their residence, being some distance from the economic centres in Ottawa, necessitating a resident to have a car as well as a parking space for that vehicle.

39. The applicants have attempted to sell their condominium without parking and/or conditionally on the resolution of the parking issue since 2011. They have been unable to sell their residential unit for the past three years while various other residential units in both buildings have been placed on the market and sold.

40. In the circumstances therefore, I find that the amended Declaration was oppressive to the applicants and the only reasonable resolution is a further amendment to the Declaration on the wording as previously agreed upon by the Board and the applicants and attached to the applicants' revised factum at Schedule D. I therefore make that order.

41. The parties may address the issue of costs in writing within 15 days if they are not able to resolve that issue. Their submissions shall not be more than 4 pages in addition to their bills of costs and offers to settle, if any.

Madam Justice B.R. Warkentin

Released: May 9, 2014

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