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Case Name:

Halton Standard Condominium Corp. No. 627 v. Grandview Living Inc.

Between
Halton Standard Condominium Corporation No. 627, Applicant, and
Grandview Living Inc. and 2388710 Ontario Inc., Respondents

[2015] O.J. No. 7060

Court File No.: CV-15-54181

Ontario Superior Court of Justice
Hamilton, Ontario

K. Carpenter-Gunn J.

Heard: December 16, 2015.
Oral judgment: December 16, 2015.

(42 paras.)

Counsel:

E. Savas, Counsel for Halton Standard Condo.

J. Polyzogopoulos, Counsel for Grandview Living et. al.

RULING

1 K. CARPENTER-GUNN J. (orally):-- There are two applications before the Court: application number one was issued August 21, 2015, and that is court file 15-54181, and the applicant in that application is Halton Standard Condominium Corporation No. 627, and the respondents are Grandview Living Inc. and 2388710 Ontario Inc. There is also a second application before the Court that was issued on October 21, 2015, I will call that application two, wherein the same parties are involved but they are reversed in terms of who is the applicant and who is the respondent. At the outset of these two applications yesterday, the Court was given an amended application number one and an amended application number two. Counsel agree that any material filed on either application may be used on either application. The threshold issue on this matter is was an assignment and assumption agreement entered into between the applicant and the respondent, Grandview Living Inc., duly terminated pursuant to s.112 of the *Ontario Condominium Act, 1998.*

2 In the amended application number one, the applicant asks for a declaration that this agreement was duly terminated. On the other hand, the applicants in amended application number two, who are the respondents on amended application number one, asked for a declaration that a renewable energy agreement, dated as of October 24, 2013, the REA, has not been validly terminated by the respondent, the applicant in application number one, and therefore remains in full force and effect.

3 The applicants on application number two rely on s.97 of the *Ontario Condominium Act, 1998* in asserting that the REA has not been validly terminated. They assert in terminating the agreement the corporation had to comply with s.97 and s.112.

4 Grandview and the supplier assert that in terminating the agreement the corporation had to comply with s.97 of the *Act*, along with article 3, s.s.(d) and (e) of the corporation's declaration. S.97 of the *Act* governs additions, alterations and improvements to the common elements as well as changes to the assets of the corporation or the services it provides. Article 3, s.s.(d) and (e) of the corporation's declaration largely track or repeat the requirements of s.97. Essentially, s.97 requires a condominium corporation in certain circumstances to provide notice to the owners and obtain their approval where the condominium proposes changes to the common elements, the assets of the corporation or the services that it provides.

5 The respondents on application number one assert that the applicant was not entitled to terminate the renewable energy agreement without its board of directors first providing notice of the proposal to do so to the owners of the units in the building and putting such a decision to a vote of the owners. The respondent submits that the directors of the applicant failed to put the matter to a vote of owners and purported to terminate the agreement on their own, in breach of s.97 of the *Condominium Act, 1998.* The respondents also assert that the purported termination of the contract is oppressive and not in the best interests of the unit owners, and they also assert that the applicant has disclosed no budget or plan to purchase or replace the current geothermal system, nor provided assurances that geothermal heating and cooling services would remain uninterrupted.

6 In summary, the respondents request an order dismissing application number one and granting the relief sought in their application number two, declaring that the purported termination of the renewable energy agreement was invalid and for no force or effect and ordering the applicant to pay arrears of lease payments owing under that agreement.

7 The Court needs to look at the prevailing statute, the *Condominium Act, 1998*, as a whole to determine this issue. The Court will do so later in these reasons. The parties advise the Court that there is no case law specifically dealing with the interplay or interrelationship between s.97 and s.112 of the *Ontario Condominium Act, 1998.*

8 This proceeding is about the statutory entitlement of the corporation's duly elected turnover board to terminate an agreement for geothermal services entered into by the predecessor, developer appointed board with a non-arm's length service provider. Grandview and the supplier principally offer three arguments in contesting the termination of the agreement:

9 Firstly, they assert at least two of the three board members who purported to resolve to terminate the agreement had not been validly appointed to the board. The respondents' solicitor stated in his submissions, "The respondents are not pressing this issue." This is a prudent submission to the Court, given the fact that the record clearly shows that the board members were validly appointed.

10 The second argument put forward by the respondents on application number one is their main assertion, and that is, that in terminating the agreement the corporation not only had to comply with s.112 but also had to comply with s.97 of the *Act* and failed to do so.

11 The last complaint is that the board did not have good reason to terminate the agreement. Of note, the board did give reasons, even though under s.112 it technically does not state that they are obliged to do so. Grandview and the supplier do not assert that the corporation did not comply with the requirements of s.112. Rather, they assert s.97 should also have been complied with.

12 I am going to read portions of S.112 into the record. It says the following, and this is under a subheading, "Termination of Agreements," which then starts s.111 and then gets into s.112 which has a subtitle, "Other agreements."

> 112. (1) Subject to subsection (4), a corporation may, by resolution of the board within 12 months following the election of a new board at a meeting held in accordance with subsection 43(1), terminate an agreement mentioned in subsection (2) that the corporation has entered into with a person other than another corporation before the election of the new board.

13 And then it deals with a subheading, "Application," and this is sub (2).

> (2) Subsection (1) applies to the following agreements:

1. An agreement for the provision of goods or services on a continuing basis.

2. An agreement for the provision of facilities to the corporation on other than a non-profit basis.

3. A lease of all or part of the common elements for business purposes.

Non-application

(3) Subsection (1) does not apply to a telecommunications agreement within the meaning of section 22.

Notice

(4) To terminate an agreement, the board shall give at least 60 days notice in writing of the date of termination to the person with whom the corporation entered into the agreement.

14 In his submissions, Mr. Savas on behalf of the applicant on application number one, made some comments about this particular section, and as I have already articulated, there is no issue that the components of s.112 were adhered to. Mr. Savas points out to the Court that under the subheading, "Non-application," his submission is that they could have said something re s.97 of the *Act* within this portion but did not, and asks the Court to take that specific fact into consideration. He also provided the Court with definitions from two sources, as to the definition of "facilities" under s.112(2) and the submission of Mr. Savas is that the REA falls under the definition of "facilities" as set-out in s.112(2).

15 On April 2nd, 2014, Grandview, the developer, registered as a condominium under the Act, and we have exhibit 8 in the original application, number one that has the declaration for the condominium. John Matas and Sharief Zaman both were directors of Grandview at the time the condominium was registered, and these two along with John Matas's brother, Gordon, became the first board of the condominium. The numbered corporation named in these applications was incorporated in September 2013, and it was the supplier to hold the REA. Of note, John Matas and Sharief Zaman are directors of this entity and have been throughout. Both these individuals hold shares of Grandview and the supplier company through a company, that is a related entity.

16 In October 2013, Grandview and the developer entered into the REA, which is in issue. Between April 2, 2014 and the first closings on April 24, 2014, Grandview, the supplier company and the condominium corporation enter into an assignment and assumption agreement found at page 182 of the initial application record. Of note, there is no date on this document. Where the parties signed same, under this agreement the condominium corporation assumes all the obligations of Grandview under the REA. Grandview is an assignor under this agreement, and the condominium corporation is the assignee, with the numbered corporation as the supplier. The REA is between the supplier, the numbered corporation and Grandview and it is dated in October 2013. Interestingly, Sharief Zaman signs as CEO for "Dependable Energy Inc.," when he should have been signing for the numbered corporation supplier. The REA is a 50 year lease. It is a complicated document.

17 Article 7.2 is the disclosure requirements in the REA. Specifically under that section it says, "(a) The owner," and the owner was originally Grandview when the agreement was signed:

> Shall ensure that disclosure statements as required under the *Condominium Act* and related disclosure documentation (including the condominium declaration) prepared for the condominium development and provided to prospective purchases of condominium development and provided to prospective purchasers of condominium units situate on the lands include full and complete disclosure of the contents of this agreement (such disclosure to be in form and substance acceptable to the supplier, acting reasonably, sufficient for a prospective purchaser to be fully informed regarding the transaction contemplated by this agreement).

18 And under 7.2(b) it states:

> Within 30 days following the registration of the condominium declaration and description creating the condominium corporation in respect of a lands or buildings to cause the condominium corporation to assume the obligations of the owner under this agreement, and to cause the condominium corporation to execute and deliver such assumption documents in connection therewith, as a sup-

> plier may reasonably require including the delivery and assumption agreement duly executed by the owner and the condominium corporation.

19 So by virtue of this particular section, it requires disclosure of the REA to the purchasers of the unit.

20 The respondents' solicitor submits that the disclosure issue is a "red herring." The Court does not see it as such. Rather, the disclosure issue provides the context as to why the board members might have acted in the way they did. Importantly, the REA was never disclosed to the purchasers of the units. That is, it was not appended to the disclosure statement. The respondent relies on s.72(3)(n) of the *Act* with respect to that issue, and also submits to the Court that the individuals received information by virtue of what was provided in regards to the first year's budget.

21 Importantly, the *Condominium Act, 1998* is a piece of consumer protection legislation. It provides for a 10 day rescission period to walk away from a condominium deal. The respondents' counsel says the consumer protection is a two-way street. It is there to level the playing field but also is there to protect unit owners from renegade boards who make decisions that have huge ramifications.

22 S.72(1) of the *Condominium Act* states the following under the subheading, "Disclosure statement,"

> The declarant shall deliver to every person who purchases a unit or a proposed unit from the declarant a copy of the current disclosure statement made by the declarant for the corporation of which the unit or proposed unit forms part.

23 Under sub (2) under a subheading, "Purchaser not bound,"

> An agreement of purchase and sale of a unit or a proposed unit entered into by a declarant is not binding on the purchaser until the declarant has delivered to the purchaser a copy of the current disclosure statement.

24 And specifically under the "Contents" subheading dealing with what should be in a disclosure statement, it lists various items, including and probably most salient to these proceedings is (n),

> A brief description of the significant features of all agreements or proposed agreements mentioned in section 111, 112, 113 or 114 and of all agreements or proposed agreements between the corporation and another corporation.

25 That section is the specific one that I just eluded to a moment ago, that the respondent was relying on. Once Grandview transferred title to the majority of the units in the building, it was obliged under the *Condominium Act* to have its "turnover meeting" to elect a new board by the owners. This takes place June 17, 2014. The REA is disclosed to the board, and the new board is Debra Curran, John Matas and Gordon Matas. Mr. Savas submits it is unusual to have a developer running the new board. On the other hand, the respondents' lawyer says it is reasonable for a developer to stay until the units are sold. The Court agrees with Mr. Savas that the scheme of the act wants the consumers protected and wants the developers to move forward within a reasonable time.

26 On November 3, 2014, there was a special meeting of the owners to remove John Matas and Gordon Matas as directors. Mr. Savas submits that the respondents' solicitor says that there's no dispute that Gord Matas would resign October 17, 2014 and Ms. Simpson would be appointed. At the end of October 2014, John Matas says he will resign; that left Ms. Simpson and Ms. Curran on the board.

27 The Court agrees with paragraph 7 of Mr. Savas' factum as to the composition of the board, and in the Court's view, as has already been stated, the board was validly appointed.

28 I now turn to s.97 of the *Condominium Act*, specifically 97(3), (4), (5) and (6). Sub (3) deals with changes made on notice, and this is under a subheading entitled, "Changes to common elements and assets." and then a further subheading "Changes made on Notice". It says under sub (3),

> A corporation may make an addition, alteration or improvement to the common elements, a change in the assets of the corporation or a change in a service that the corporation provides to the owners if,
>
> (a) the corporation has sent a notice to the owners that,

(i) describes the proposed addition, alteration, improvement or change,

(ii) contains a statement of the estimated cost of the proposed addition, alteration, improvement or change indicating the manner in which the corporation proposes to pay the cost,

(iii) specifies that the owners have the right, in accordance with section 46 and within 30 days of receiving the notice, to requisition a meeting of owners, and

(iv) contains a copy of section 46 and this section; and

(b) one of the following conditions has been met:

1. The owners have not requisitioned a meeting in accordance with section 46 within 30 days of receiving a notice under clause (a).

2. The owners have requisitioned a meeting in accordance with section 46 within 30 days of receiving a notice under clause (a) but have not voted against the proposed addition, alteration, improvement or change at the meeting.

29 Sub (4) entitled, Approval of substantial change states:

Despite subsection (3), the corporation shall not make a substantial addition, alteration, improvement to the common elements, a substantial change in the assets of the corporation or a substantial change in a service that the corporation provides to the owners unless the owners who own at least 66 2/3 per cent of the units of the corporation vote in favour of approving it.

30 Meeting

(5) The vote shall be taken at a meeting duly called for the purpose of subsection (4).

31 Meaning of substantial change

(6) For the purposes of subsection (4), an addition, alteration, improvement or change is substantial if,

(a) its estimated cost, based on its total cost, regardless of whether part of the cost is incurred before or after the current fiscal year, exceeds the lesser of,

(i) 10 per cent of the annual budgeted common expenses for the current fiscal year, and

(ii) the prescribed amount, if any; or (b) the board elects to treat it as substantial."

32 The respondents' counsel describes this section of the *Act* as a "reign on the board." The issue on this matter is the interplay between s.112 and s.97 of the Act, specifically whether s.97 also applies in addition to s.112. The respondents submit that s.97 applies as to the decision to determinate the REA as it leads to substantial changes that trigger s.97. Based on the record before the Court, the Court agrees. The respondents' solicitor says that due diligence should have been done by the board. He submits a specific plan should have dealt with the alternatives and costs of same, and he states that this should have been circulated to the unit holders with a recommendation of the board and put to a vote. The respondents' solicitor submits and the Court agrees that it should have been done as under s.97. The respondents' solicitor submits it is too late but offers to the Court that might be "draconian" and that in the alternative he suggests that the Court may cure this situation by having a vote after the fact, as was done in the *York Condominium Corp. No. 244v. Matei* (December 13, 1999) Dock 99-CV- 172621 decision provided to the Court, a decision of Epstein, J. as she then was, which is at tab 2 of the responding book of authorities.

33 The Court agrees with the alternative position put forward by the respondents' solicitor in his factum at paragraph 33, which reads as follows:

> In the alternative, the termination of the REA within the one year time-limit should be subject to a ratification vote by two-thirds of the unit owners to be held forthwith, on proper and full notice. If a two-thirds majority of the unit owners does not ratify the termination of the REA, then the purported termination will be a nullity and the REA will be in full force and effect.

34 More will be said about this ratification vote in a few moments. The purpose of s.97 is to require a condominium corporation's board to obtain approval from the unit owners before it authorizes work that is outside the ordinary course of simply maintaining the condominium building. In this case the Court finds that what is being contemplated here falls outside the ordinary course of simply maintaining the condominium building. The language of s.97 is incorporated into the applicant's declaration registered against title to the property. The Court notes that s.112 permits the board of a condominium corporation to terminate certain contracts within one year of the turnover meeting. However, there is nothing in that section or in s.97 or any other part of the act that permits the board to ignore or override s.97 when the termination of the contract at issue would result in a substantial change within the meaning of s.97. The Court finds what is contemplated here is a substantial change. The Court agrees with the comments made by the respondents' solicitor at paragraph 26 and at paragraph 27 of their factum. Namely, that the termination of the REA and demand that the supplier remove its geothermal equipment is clearly a substantial change or alteration to the assets of the applicant where the services were provided to it within the meaning of s.97. The applicant will have to purchase the existing geothermal system from the supplier or purchase a new geothermal system, which by any measure will cost hundreds of thousands of dollars and will far exceed the 10% threshold for what constitutes a "substantial change" under s.97. The Court notes that the annual budget for the common expenses for the fiscal year ended March 31, 2016 is just under $375,000.

35 Here there was no notice of the proposal to terminate the REA to any unit owner, and there was no vote of the owners to terminate the REA. The respondents' counsel submits that what should happen here is that s.97 should be dealt with first and then s.112. The Court agrees with this interpretation of the statute as it applies to the specific facts of this case. In the Court's view on the facts of this case, it is not appropriate for the Court to look at s.112 in isolation, as Ms. Savas appears to be proposing to the Court. Rather, you have to view the various sections of the statute and how they relate to one another.

36 On the specific facts of this case, it is possible to comply with both section 97 and then s.112. I agree with the respondents' solicitor that you cannot read s.112 in a vacuum. In the Court's view, s.112 may be trumped by other sections of the *Act.* It is certainly possible to apply two different sections of the *Act* if they are not in conflict. The Court finds that that is the case here.

37 I was given the case of *Lexington on the Green Inc v. Toronto Standard Condominium Corp, No. 1930, 2010 ONCA 751* in the applicant's book of authorities on application number one, and in the Court's view it supports this proposition. The *Act* is dated. It is 1998 legislation. It has not been amended to deal with items such as geothermal heating and AC, and the Court agrees with the respondents' solicitor that just because there is no specific section dealing with that does not mean that only s.112 applies. In the Court's view, you have to look at what is specifically being terminated and the effect of same. Here, s.97 is the correct procedure as a first step. The applicant submits that the respondents are holding on to its units to vote. However, this submission flies in the face of the fact that 10 units are presently for sale. There is no evidence that the respondents are holding on to these units simply for voting purposes only. Given the Court's decision to have a ratification vote, it would be premature to deal with the s.135 oppression issue at this time.

38 The Court appreciated the excellent advocacy of both counsel and the helpful facta. After reviewing the record and considering the submissions, the Court can appreciate how the board members felt they were doing the best for the unit holders when they made the decision to terminate that they did. This is particularly so given the disclosure issues and the relationship between the parties that were signatories of the REA and the assignment and assumption agreement; that is, the board had good intensions. However, the board should have not simply looked at s.112 in isolation. As Mr. Savas stated, you need to look at the whole act and on the specific facts of this case, s.97 should have been engaged.

39 So in conclusion and looking specifically at the amended application number one and the amended application number two, the Court would propose, subject to any discussion that we may have at the end of these reasons, that with respect to application number one, that is the earlier application, the relief sought at paragraph 2 is dismissed. The relief sought at paragraph 3 is dismissed. The relief sought at paragraph 5 is granted. The balance of the relief sought is adjourned *sine die* to be brought back on 10 days' notice.

40 With respect to application number two, that is the later of the two applications, the relief sought at paragraph 1C is granted, subject to the following proviso:

> Until ratified by two-thirds of the unit holders in a meeting to be scheduled forthwith, on proper and full notice. If a two-thirds majority of unit holders does not ratify the termination of the REA, then the purported termination will be a nullity and the REA will be in full force and effect.

41 Relief sought at paragraph 2E is granted with the following provisos with respect to that specific relief: with respect to the s.97 meeting, the order to call a meeting should be done within 30 days of this decision. With respect to the information package requirements for that meeting, it is to be prepared by the property management and approved by both the board and the declarant to be done within 10 days. The notice is to be delivered to each owner in 30 days of this decision. And they should describe the proposed change, the cost, the method of payment, specific reasons for the change and alternate arrangements should be presented to the unit holders. Both side's applications and facta and Court decision will be provided. The Mann report, that is, the responding party on the initial application's engineering report, as well as the reports commissioned for the applicant, namely by Geo-Xergy and M&E, as well as excerpts from s.46, s.97, the full sections. There should be an agenda for the meeting. There should be a report on the litigation by the corporate counsel and the Grandview counsel. There should be a review of this order, a review of the application records and facta, a report by both sides; engineers, proposed alternate solutions, proposed funding plans, a discussion which is open for questions and what the motion proposed is, either to terminate, defer or an alternate solution adapted. With respect to the actual meeting, it should be called within 30 days of the notice by the board, and it should be a special meeting of the owners. There should be a review and approved agenda item. There should be a presentation of the status of litigation, again, done by counsel for the condominium and counsel for Grandview, and there should be a limit to that for each of one hour per side. They should have the engineering reports for both sides, and I have already articulated who they are but that includes the Geo-Xergy and M&E. The board members should propose alternates for discussion. There should be required involvement of the corporation's engineers on the consequences of the various options on the corporation's reserve fund plan. For example, lease or own. There should be an open discussion and questions. The board proposes the motion for the owner's vote and either ask for the motion to terminate the current REA, the motion to adapt one of the alternatives as presented at the meeting, or a motion to defer for further research or investigation, for a fixed period not to exceed 60 days. And there is a vote by the owners, and any voting owners must comply with the *Condominium Act* insofar as not being in arrears in the common element fees and must be in compliance with the *Condominium Act* and the declaration pertaining to same. The meeting shall be chaired by Jeffrey Morris. If Mr. Morris is unavailable, the meeting shall be chaired by another mediator agreed to by the parties. The cost of the mediator shall be borne by the corporation and Grandview/2388710 Ontario Inc. equally.

42 Turning back to the relief that is being sought in application number two, the relief sought at 2B-2 is dismissed. Re paragraphs 2A, (C), (F), 3, (B), (C), (D), (D.1) and (E), they are adjourned *sine die* to be brought back on 10 days' notice. With respect to paragraph 3E, prejudgment interest shall be calculated on the sum referred to in paragraph 3A, and that total sum shall be paid into court within 60 days. The basis for this portion of the order is found in the record before the Court, namely, that the applicants intend to bring set-off claims, that's the applicants in the first application. Such claims shall be made within 30 days and the money paid into court within 60 days. And I will add what I have just indicated, save and except, I am not going to put on the endorsement everything I have recited in court about the actual meeting that I have proposed. It will just be as stated in court but I will refer to the specific sections being dismissed, and not dismissed, and I will also put something in the endorsement that I am happy to deal with any further applications with respect to these two applications but I am not seized of same, and that any SCO justice may do so if I am not available to have it put back in front of me in a timely basis. So that would be my decision and reasons, subject to me putting something on each of the two application records.

...WHEREUPON THIS MATTER CONTINUES