

2011 CarswellOnt 3570, 2011 ONSC 2928

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Metropolitan Toronto **Condominium Corp.** No. 856 v. All Unit Owners & Mortgagees of Metropolitan Toronto **Condominium Corp.** No. 856

Metropolitan Toronto **Condominium Corporation** No. 856, Applicant and All Unit Owners and Mortgagees of Metropolitan Toronto **Condominium Corporation** No. 856, Respondents

Ontario Superior Court of Justice

S. Chapnik J.

Heard: May 3, 2011

Judgment: May 12, 2011

Docket: CV-10-415390

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Counsel: Carol A. Dirks, for Applicant

Charles Senchire, Corneil Maharqi, Ignazio Porru, Sharanazar Lahashm, Gurcharan Sond, for Respondents

Subject: Property

Real property.

**Cases considered by S. Chapnik J.:**

*Fortunato v. Atrens* [\(2007\)](#), [2007 CarswellOnt 9008](#) (Ont. S.C.J. [Commercial List]) — referred to

*McFlow Capital Corp. v. Simcoe Condominium Corp. No. 27* [\(2009\)](#), [2009 CarswellOnt 3174](#) (Ont. S.C.J.) — considered

*McFlow Capital Corp. v. Simcoe Condominium Corp. No. 27* [\(2010\)](#), [99 R.P.R. \(4th\) 108](#), [2010 ONSC 6260](#), [2010 CarswellOnt 8638](#) (Ont. S.C.J.) — referred to

*McFlow Capital Corp. v. Simcoe Condominium Corp. No. 27* [\(2011\)](#), [2011 ONSC 475](#), [2011 CarswellOnt 317](#) (Ont. Div. Ct.) — referred to

*Skyline Executive Properties Inc. v. Metropolitan Toronto Condominium Corp. No. 1385*

[\(2002\), 17 R.P.R. \(4th\) 152, 2002 CarswellOnt 5670](#) (Ont. S.C.J.) — referred to

**S. Chapnik J.:**

## **Overview**

1 The applicant, Metropolitan Toronto **Condominium Corporation** No. 856 ("MTCC 856" or "the corporation") brings this application for an order appointing Joseph Vero as Administrator of MTCC 856 pursuant to s. 131 of the *Condominium Act*, S.O. 1998, c. 19 ("the *Act*"). The respondents, the unit owners and mortgagees of MTCC 856, oppose the application.

2 On February 8, 2001, Madam Justice Pollak made an interim order appointing Mr. Vero as interim Administrator for the corporation until the hearing, which took place on May 3, 2011. The order included specified powers and authority for Mr. Vero. It also provided that his costs not exceed twenty (20) hours, subject to "any unforeseen circumstances," at an hourly rate of \$100 plus disbursements and applicable taxes.

3 At the hearing before me held on May 3, 2011, I made an order continuing the interim order appointing Mr. Vero as interim Administrator for the property for the purpose of dealing with safety matters at the same rate of remuneration for his services to a maximum of ten (10) hours, subject to any unforeseen circumstances. I further order that the current Board of Directors not enter into any new contracts related to the property, in the interim. That order was to continue until the release of this judgment.

4 The property comprises a highrise condominium building with a total of 150 residential units. It is approximately 22 years old, and both parties agree it has been mismanaged over the years resulting in lack of repair, maintenance and financial planning. Indeed, both parties agree that MTCC 856 is currently in a crisis situation. As of June 2010, it had an operating deficit of \$360,000 of which approximately \$100,000 was for unpaid water charges. Uncollected common expenses from owners totaled over \$46,000. The statutory reserve fund has been considerably under-funded.

## **The Position of the Parties**

5 On May 27, 2010, a new Board of Directors was elected. They have taken active steps to deal with the corporation's deficit position. The new Board members allege, however, that they have been verbally abused, harassed or intimidated by the respondents in their efforts to carry out this mandate. As noted, both parties contend that the current situation is intolerable and that the new Board cannot continue as it is currently constituted.

6 However, both parties present divergent proposals to the court regarding how to deal with this impasse. The applicant contends, first, that the only reasonable prospect of bringing the affairs of the corporation in order is the appointment of an Administrator. This appointment is in the best

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interests of all of the owners. Second, the applicant proposes Mr. Vero as the Administrator on the basis that he is an independent and experienced Administrator in such matters. Also, he has shown himself, as interim Administrator for the property, to be effective in identifying and responding to the immediate issues which are, or could, jeopardize the health and well-being of the general public.

7 The respondents, on the other hand, say that the present Board of Directors has turned insensitive to the genuine concerns of the owners, is intimidating and, as a result, no longer enjoys the trust and confidence of the owners or of the majority of them.

8 The respondents ask that the court terminate the services of the present Board and order the election of a new Board of Directors to run the corporation in a proper manner. It is the respondents' submission that the application for the appointment of an Administrator is unjustified and shows a lack of respect on the part of the Board for the very owners who elected them. The respondents, therefore, request firstly that the application be dismissed.

9 In the alternative, they present an alternate Administrator for the property, Mr. Robert J. Buckler. On an affidavit sworn April 27, 2011, Mr. Buckler indicates he has seen the property and met with a group of concerned unit owners of MTCC 856. He is prepared to act as a court-appointed Administrator for the subject property. He has set out both his qualifications in that affidavit as well as a Preliminary Action Plan for the property. His requested fees are \$85 per hour, plus travel expenses and HST.

### **The Law**

10 The court may make an order appointing an administrator pursuant to s. 131 of the *Act* by applying the test: is it in the best interests of the owners having regard to the scheme and intent of the *Act*?[\[FN1\]](#) Some of the factors to be considered when deciding whether to appoint an administrator were reviewed recently by Madam Justice Forestall:[\[FN2\]](#)

1. whether a demonstrated substantial inability to manage the Corporation has been established;
2. whether substantial misconduct or mismanagement or both in relation to the affairs of the corporation has been demonstrated;
3. whether there is a struggle within the corporation among competing groups such as to impede or prevent proper governance of the Corporation; and
4. whether only the appointment of an administrator has any reasonable prospect of bringing to order the affairs of the Corporation.

11 Once an administrator has been appointed, a party may bring an application to have

him/her removed and replaced with another individual. The test for the replacement of an administrator is the same as that for the appointment of an administrator. [\[FN3\]](#)

## Findings

12 Having read all of the materials filed, and after hearing and considering the submissions from both the applicant and the respondents, I make the following findings:

- (a) There is a strong, even sometimes bordering on violent, struggle within the corporation among competing groups such as to impede or prevent the proper governance of the corporation.
- (b) In my view, only the appointment of an independent Administrator has any reasonable prospect of bringing the affairs of the corporation to order.
- (c) It would, therefore, be in the best interests of the corporation and all of the owners that an Administrator be appointed by the Court to operate and direct the affairs of the corporation until further court order;
- (d) As noted above, the respondents, who say they represent the majority of the owners, (and who, in any event, represent a substantial number of them), ask for a different Administrator than Mr. Vero to be appointed. In the words of the respondents' representative, Charles Senchire "we sense some connivance between the Board, management and the Administrator."

Mr. Vero is eminently qualified to take on this position and there is no credible evidence that he has done anything but an admirable job in the interim. However, Mr. Bruckler is also well-qualified to assume this task. He is familiar with the property and has put forward what appears to be a reasonable, well thought-out Preliminary Action Plan. At paragraph 5 of his affidavit, he states:

I will be transparent to owners and consult and solicit owners' input regarding important decisions, however the decisions I ultimately make will be impartial and independent, and will be in the best interests of MTCC 856.

- (e) In opposing the appointment of Mr. Bruckler, the applicant expressed concerns about Mr. Butler's competence and impartiality (specifically, as noted in the affidavit of Debra Wagner, regarding his service as court-appointed Administrator for another property, his lack of experience and, as noted in Mr. Vero's May 3, 2011 affidavit, the issue of insurance coverage), I have no reason to seriously doubt Mr. Butler's competence and I take as given his expressions of impartiality. In addition, I am of the view that re-appointing Mr. Vero in this highly divisive atmosphere would be counter-productive, and thus not in the best interests of the owners.

## Conclusion

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13 Accordingly, I appoint Robert J. Buckler as an Administrator for the property municipally known as MTCC 856, effective immediately and for a period of six months. However, given the significant challenges in regard to the property, both of a political and financial nature, I order Mr. Buckler to present a Report to the court, on an interim basis, at the three-month mark, for approval. He will be remunerated for his services at the agreed rate of \$85 per hour plus travel expenses and HST.

14 Order to issue allowing the applicant's application to appoint an Administrator to operate and manage the affairs of the corporation in place of the elected Board of Directors. The appointment of Robert J. Buckler shall be for a period of six months, subject to the filing and approval of an interim report after three months.

15 As to Mr. Buckler's powers and authority, I grant them in accordance with paragraph 1(a) of the Notice of Application, with the exception of sub-sections (viii), (ix) and (xvi) — permitting legal counsel and auditors to be retained by him, If necessary, this may be reconsidered by the court at a later date.

16 The order shall also include an order in the form of paragraph 1(b) and (c), as amended in accordance with these reasons, as well as paragraph (e) of the Notice of Application.

17 I thank the parties for their assistance in this matter. There shall be no order as to costs.

[FN1](#) See *McFlow Capital Corp. v. Simcoe Condominium Corp. No. 27*, [2010 ONSC 6260](#) (Ont. S.C.J.) at para. 16, leave to appeal to the Divisional Court dismissed [2011 ONSC 475](#), [2011 CarswellOnt 317](#) (Ont. Div. Ct.) [*McFlow* 2011]; *Fortunato v. Atrens*, [\[2007\] O.J. No. 5773](#) (Ont. S.C.J. [Commercial List]) at para. 8.

[FN2](#) *McFlow Capital Corp. v. Simcoe Condominium Corp. No. 27*, [\[2009\] O.J. No. 2325](#) (Ont. S.C.J.) at para. 22 citing *Skyline Executive Properties Inc. v. Metropolitan Toronto Condominium Corp. No. 1385 (2002)*, [17 R.P.R. \(4th\) 152](#) (Ont. S.C.J.). There have been further proceedings in the *McFlow* case: see *ibid.*

[FN3](#) *McFlow* 2011, *ibid.* at para. 5.

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