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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **Rosetta Mancuso v. York Condominium Corporation No. 216**

BEFORE: G.R. Strathy J.

COUNSEL: *Rosetta Mancuso,* in person

Benjamin J. Rutherford, for the Defendant

DATE HEARD: February 20, 2008

ENDORSEMENT

[1] Rosetta Mancuso is the owner of a residential unit in York Condominium Corporation No. 216 (the "Corporation") in Toronto. The Corporation entered into a "bulk" contract with Rogers Cablesystems Limited ("Rogers") for the supply of basic cable television services to all unit owners and charged the cost to each owner as a common expense. Ms. Mancuso objected to paying for this service and withheld payment of this part of the common expenses. The Corporation liened her unit. The issue on these cross-motions for summary judgment is whether she can be compelled to pay for the television service charges as a common expense of the condominium.

Background

[2] The Corporation is a non-profit condominium corporation created under what was then the *Condominium Act*, R.S.O. 1970, c. 77, as amended, for the purpose of managing a 710-unit residential condominium located at 260 Seneca Hill Drive in Toronto.

[3] Ms. Mancuso owns suite 1411, which she purchased in 1985. She is a non-resident owner and rents out her unit.

[4] Since 1996, the Corporation has contracted with Rogers for the supply of cable TV services which Rogers bills on a bulk basis to the Corporation. The Corporation then collects these charges as part of the common expenses payable by unit owners.

[5] For some years, Ms. Mancuso paid this portion of the common expenses without question. She swears in her affidavit that the issue came to her attention in 2003 when a prospective tenant questioned whether the expense could be reduced because the tenant spent six

months of the year in Florida. Ms. Mancuso spoke to a representative of the Corporation's manager who said that the charge was a common expense and represented a cost saving to the unit owners. She claims that she lost the prospective tenant, who found an apartment in a building that did not charge cable fees.

[6] Ms. Mancuso says that the issue arose again in 2005 when a tenant, who spoke little English and watched little television, asked whether the rent could be reduced by eliminating the cable charge. Ms. Mancuso investigated the issue and came to the conclusion that the Corporation had no authority to charge cable TV service as a common expense. In March, 2006, she stopped paying this portion of the common expenses.

[7] The Corporation continued to invoice Ms. Mancuso for the cable TV charge as part of the common expenses. Correspondence took place between Ms. Mancuso and the Corporation and its lawyers, setting out the parties' positions. In June, 2007, the Corporation commenced formal collection proceedings and a certificate of lien was registered on the title to Ms. Mancuso's unit. Ms. Mancuso has attempted to make partial payments of the common expenses, but the condominium manager refused to accept anything short of the full amount needed to discharge the lien.

[8] In July, 2007, Ms. Mancuso commenced an action, under the Simplified Procedure Rule of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 76 and she brought this motion for summary judgment under that Rule. The Corporation brought a cross-motion for summary judgment, asking that the action be dismissed.

The Issue

[9] The issue is whether the Corporation has the authority to allocate the cable TV charges under its bulk contract with Rogers as a common expense to the unit owners.

Test on Motion for Summary Judgment

[10] Rule 76.07(9) provides that I am to grant summary judgment unless (a) I am unable to decide the issues in the action without cross-examination or (b) it would be otherwise unjust to decide the issues on the motion: *Masini USA Inc. v. Simsol Jewellry Wholesale Ltd.* (2003), 67 O.R. (3d) 229 (S.C.J.).

[11] In *McGill v. Broadview Foundation* (2001), 6 C.P.C. (5th) 109 (Ont. C.A.), the Court of Appeal commented on the circumstances in which a motion judge should refer the matter to trial under rule 76.07(9)(b):

> The purpose of rule 76.07 is to allow the parties to bring forward a relatively inexpensive application for summary judgment. Evidence to be considered includes the affidavits of the parties, any supporting material that can properly be placed before the court and the affidavits of witnesses. Summary judgment can only be granted when all of the evidence reviewed in total upon applying the principles of justice and fairness demonstrates a clear case wherein the motions judge may enter judgment. In circumstances

> where the case is not clear or where it dictates that justice and fairness would suggest otherwise, it is appropriate for the judge to refer the matter to trial.

[12] This statement was referred to by the Court of Appeal in *Bendix Foreign Exchange Corp. v. Integrated Payment Systems Canada Inc.*, [2005] O.J. No. 2241, rev'g. [2004] O.J. No. 4455 (S.C.J.), noting, at para. 8, that it had been applied in many decisions of the Superior Court.

[13] I have jurisdiction to grant summary judgment where the only issue before me involves a question of law: *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (C.A.) at para. 33. In *Ferri v. Ontario (Attorney General)*, [2007] O.J. No. 397 (C.A.), the Court of Appeal stated, at para. 68: "It is well settled that on a motion for summary judgment, the role of the motion judge is limited to deciding whether a genuine issue exists as to material facts requiring a trial. Although this involves taking a hard look at the evidence presented, a motion judge should not attempt to find facts, assess credibility or decide questions of law." I take this to mean, as Brown J. suggested in *Quinn v. Keiper et al.* (2007), 87 O.R. (3d) 184 at para. 41, that a judge on a motion for summary judgment can apply well-settled law to the disposition of the case, but that he or she should not embark on the exploration of uncharted legal waters.

[14] Thus, in *Bendix Foreign Exchange Corp. v. Integrated Payment Systems Canada Inc.*, referred to above, a motion judge under Rule 76 dealt with a question of whether stolen money orders were bills of exchange. The judge held that the money orders were not bills of exchange, the plaintiff could not claim to be a holder in due course, there was no legal basis for its claim, there were no issues of fact requiring cross-examination and it would not be unjust to grant the motion.

[15] The Court of Appeal reversed, set aside the summary judgment, and ordered that the action proceed to trial. At the Court of Appeal, counsel pointed out that there was little Canadian jurisprudence on the legal status of a money order in the world of commerce and that it would be of assistance to the public, the bar and the bench if the Court would take the opportunity to define the status of a money order. The Court stated that a judicial definition of a money order was best decided by a trial court with the benefit of a complete record including, potentially, expert evidence. Justice Borins, delivering the judgment of the Court of Appeal, stated at para 6:

> Although this is not a rule 21.01(1)(b) motion, matters of law which have not been fully settled or which have not had the benefit of contemporary judicial consideration ought not to be disposed of at the interlocutory stage of the proceedings: *Spasic Estate v. Imperial Tobacco Inc.* (2000), 188 D.L.R. (4th) 577 at para. 23 (Ont. C.A.).

[16] There are no factual issues and the amount in dispute is not large. The issue is not complicated and does not involve the application of novel legal principles. For the reasons that follow, I am satisfied that this is an appropriate case in which to grant summary judgment and I grant the defendant's cross motion and dismiss the plaintiff's claim.

Discussion

[17] The answer to the issue in this motion must be found in the *Condominium Act, 1998*, S.O. 1998, c. 19 (the *Act*), the constituting documents of the Corporation, including its declaration and by-laws, and in the case law concerning the duties and responsibilities of condominium corporations.

[18] Section 1(1) of the *Act* defines "common expenses" as "the expenses related to the performance of the objects and duties of a corporation and all expenses specified as common expenses in this Act or in a declaration." If the cable TV charges are properly recoverable as "common expenses" they must relate to the performance of the objects and duties of the Corporation or they must be specified as common expenses in the *Act* or the declaration.

[19] As Lane, J. pointed out in *York Condominium Corporation No. 482 v. Christiansen et al.* (2003), 64 O.R. (3d) 65 (S.C.J.), at para. 5, the "common expenses fund is the central financial mechanism of the corporation and the duty of contributing to it is the central mechanism to achieve financial fairness among the owners. If one owner fails to pay, the others must bear his burden; the expenses are not optional and they do not just go away."

[20] Notwithstanding the importance of common expenses, I do not accept the submission of counsel for the Corporation that "whenever the condominium corporation pays, the unit owners pay." The unit owner's obligation is to pay *proper* common expenses. If the Corporation enters into a contract that is not authorized by the *Act*, the declaration or the by-laws, the owner is well within her rights to refuse to pay. On the other hand, it is well-established that unit owners are required to pay for proper common expenses, regardless of whether or not they make use of or want a particular facility or service. The common expenses are not optional: *York Condominium Corporation No. 483 v. Christiansen et al., supra.*

[21] Counsel for the Corporation was not able to identify any provision of the *Act* that specifies cable TV charges as common expenses. Nor does the *Act* speak directly to the issue of a bulk agreement of this kind. Section 22 deals with "Telecommunications Agreements" but counsel for the Corporation says that this section is a "red herring" and I do not entirely disagree. Subsection 22(2)(c) contemplates a telecommunications agreement where all or part of the services are invoiced directly to the unit owners and one might infer from this that the *Act* also contemplates a telecommunications agreement where all or part of the services are invoiced to the corporation and thereafter recovered as a common expense, but this is by no means clear.

[22] Section 7(4)(a) of the *Act* provides that a declaration may contain "a statement specifying the common expenses of the corporation." Counsel was also unable to identify any provision of the Corporation's declaration that specifies these charges as common expenses. There is nothing in the Corporation's declaration dealing specifically with the issue of bulk contracts for the supply of cable TV services.

[23] The question, then, appears to be whether this expense is related to the performance of the objects or duties of the Corporation.

[24] Section 17(1) of the *Act* defines "objects" as follows:

> The objects of the corporation are to manage the property and assets, if any, of the corporation on behalf of the owners.

[25] In *Eglinton Place Inc. v. Ontario (Ministry of Consumer & Corporate Relations)* (2000), 47 O.R. (3d) 344 (S.C.J.), Mr. Justice Rivard held that the equivalent provision in the *Condominium Act*, R.S.O. 1990, c. C.26,

> ... should not be given a narrow interpretation. It should be read as an empowering section, conferring broad powers on the condominium corporation. This was the approach taken by the court in *Metropolitan Toronto Condominium Corporation No. 539 v. Chapters Inc.* (1999), 24 R.P.R. (3d) 319, [1999] O.J. No. 2806 (S.C.J.), where the court recognized and accepted that the Condominium Act is remedial legislation and should not be rigidly or narrowly construed.

Mr. Justice Rivard held that the condominium corporation did not require the consent of all unit owners in order to release an easement as it was managing the property and assets of the corporation.

[26] I do not think that cable television services fall within the meaning of the "property and assets" of the Corporation. Section 1 of the *Act* defines "property" as

> the land, including the buildings on it, and interests appurtenant to the land, as the land and interests are described in the description and includes all land and interests appurtenant to land that are added to the common elements.

[27] While the *Act* does not contain a definition of "assets," section 18(1) provides:

> Assets
>
> 18(1) The corporation may own, acquire, encumber and dispose of real and personal property only for purposes that are consistent with the objects and duties of the corporation.

Thus, although the *Act* does not definite "assets", s.18(1), which concerns the condominium corporation's powers over assets, only speaks to "real and personal property." The management of the property and assets of the condominium corporation would not appear to include the authority to enter into contracts relating to the supply of services to the individual units.

[28] If the expense is not related to the objects of the Corporation, is it related to its duties, either as set out in the *Act* or in the by-laws? Certain specific duties of a corporation are set out in the *Act*. Other duties may be set out in the declaration or the corporate by-laws.

[29] The *Act* prescribes duties that the corporation must fulfil. These fit into the following broad categories:

> (a) corporate matters (for example, ensuring a quorum is present at any meeting where business is to be transacted s.50(1)-(2));

(b) records and documents (for example, maintaining a record of owners entitled to vote s. 47(2), (5));
(c) financial management and audits;
(d) common expenses and reserve fund (for example, ensuring owners contribute to the common expenses s.84(1));
(e) managing common elements and corporate assets (for example, s.17(2));
(f) enforcement (for example, s. 17(3), 134(1)); and
(g) termination of sale of corporate assets (for example, executing the conveying and certificate where the property is sold s. 124(3)).

See: Loeb, Audrey, *Condominium Law and Administration* (Toronto, Thomson Canada Ltd., 1998) 12§2.

[30] There is nothing in the *Act* that would lead me to conclude that a bulk contract for the supply of cable TV services is related to the duties of a condominium corporation; however, section 56(1)(n) of the *Act* provides: "The board may, by resolution, make, amend or repeal bylaws, not contrary to this Act or to the declaration ... to specify duties of the Corporation in addition to the duties set out in this Act or the declaration."

[31] Counsel for the Corporation relies on Article IX of By-law No. 7, entitled "Assessment and Collection of Common Expenses", which provides, in part, as follows:

> Duty of the Board
>
> 1. All expenses, charges and costs of maintenance, repair or replacement of the common elements and the assets of the Corporation and *any other expenses, charges or costs which the Board may incur or expend pursuant to its duties* shall be assessed by the Board and levied against the Owners in the proportions in which they are required to contribute to the common expenses as set forth in the declaration. (emphasis added)

[32] Counsel also relies upon Article III of By-law No. 7, which provides in part:

> Duties of the Corporation
>
> 1. The duties of the Corporation shall include, but *shall not be limited to*, the following:
>
> a. the operation, care, upkeep, maintenance and repair of the common elements;
>
> b. the collection of contributions toward common expenses from the Owners;
>
> c. the arranging for the supply of utilities to the common elements and the units, unless separately metered, except where prevented from carrying out such duty by reason of any event beyond the reasonable control of the Corporation ... (emphasis added)

[33] The by-laws of the Corporation give it the standard corporate authority to enter into contracts and By-law No. 7 provides that its duties are *not limited* to the operation and maintenance of the common elements and the supply of utilities to the units. I am satisfied that the duties of the Corporation under By-law No. 7 can reasonably include entering into contracts for the supply of services, such as cable TV or internet, to the unit owners. While these services are not "utilities", they are sufficiently similar to utilities, in this day and age, that in my view they fall reasonably within the duties of the Corporation.

[34] There are three additional circumstances that are relevant to my conclusion. First, as I have previously noted, section 22 of the *Act* contemplates that the corporation may enter into a telecommunications agreement in which all or part of the charges are invoiced to the corporation. Second, it seems to be common for condominium corporations to enter into bulk contracts for cable TV services and the practice has been implicitly recognized in several cases: *Webb v. Metro Toronto Condominium Corp. No. 973*, [2004] O.J. No. 5973 (S.C.J.); *Rogers Cable Communications Inc. v. Carleton Condominium Corp. No. 53*, [2005] O.J. No. 921, (S.C.J.); *Rogers Cable Communications Inc. v. York Condominium Corp. No. 312*, [2005] O.J. No. 4099 (S.C.J.). While none of these cases discuss the corporation's underlying authority to collect bulk television service charges as a common expense, it does appear that such arrangements are commonplace – undoubtedly because the corporation is able to negotiate more favourable terms than an individual owner and because they are generally beneficial to the unit owners. Third, the Corporation's contract with Rogers has been in place for more than ten years. It seems to have been accepted by the plaintiff, as it apparently has by other unit owners, for most of those years and she may well have received the benefits of the arrangement in the past by attracting tenants and recovering the cost through higher rents. If Ms. Mancuso has an issue with the expense, it can be taken up at the Annual General Meeting when the Corporation's budget is discussed.

[35] The only other case in which this issue has been raised, oddly enough, is a decision of the Small Claims Court in Montreal, *Le Ritz Phase I Condominium v. Gitel Donath* (2006 QCCQ 14755, Action No. 500-32-083020-042). The Court did not have to determine the issue of whether the charges were common expenses because it found, at para 26, that "said expenses were made by the Syndicate in the common interest and in compliance with the powers conferred unto the Syndicate pursuant to the Declaration." I am satisfied, however, that on the interpretation of the Corporation's duties, as set out in its by-laws, it had the authority to enter into the contract with Rogers and to allocate the cost as a common expense.

Conclusion

[36] For the foregoing reasons, the defendant's cross-motion is granted and the plaintiff's action is dismissed, with costs. If the parties are unable to agree on costs, written submissions may be made to me within 15 days, such submissions to be confined to three pages, in addition to the Costs Outline.

G. R. Strathy, J.

DATE: May 5, 2008.