

Case Name:

Metropolitan Toronto Condominium Corp. No. 949 v. Staib

APPLICATION UNDER the Condominium Act, 1998, S.O.
1998, c. 19, s. 134

Between

Metropolitan Toronto Condominium Corporation No. 949,
applicant, and
Nancy Staib, respondent

[2005] O.J. No. 5265

Court File No. 04-CV-278811 CM1

Ontario Superior Court of Justice

H.E. Sachs J.

April 28, 2005.

(5 paras.)

Real property law — Condominiums — Declarations — Unit holders — Duties of — Respondent moved into condominium unit with cat in 1994 and was aware 'no pets' provision in Declaration — She refused to remove cat when first asked to do so in 2004 because it was unadoptable because of age — Respondent was attached to cat and did not want to put it down — She also did not want to move from unit which was close to her place of employment — Application brought by applicant to enforce provision was dismissed — Respondent's position worsened because of applicant's non-enforcement — It would be an unreasonable exercise of the court's discretion to enforce the 'no pets' provision in this case.

Statutes, Regulations and Rules Cited:

Condominium Act, 1998, S.O. 1998, c. 19 s. 134

Counsel:

Christopher J. Jaglowitz and Mark H. Arnold for the Applicant

Benjamin J. Rutherford for the Respondent

ENDORSEMENT

¶ 1 **H.E. SACHS J.** (endorsement):— This is an application by a condominium corporation for an order that the Respondent be required to remove her cat from her condominium unit. The Declaration contains a "No Pets" provision. The Respondent moved in to her condominium in March of 1994. At the time, she had her cat. She was aware of the "No Pets" Provision when she moved in. However, she was never asked to remove her cat until 2004 -- 10 years later. By this time her cat was almost 12 years old and essentially, according to the record, unadoptable. She has no family to whom she can give her cat. Thus, her choice is to either move from the home she has been in for over 10 years and which is 15 minutes away from her place of employment or to put her cat (to which she is extremely attached) in a position where it will likely be put down. The Respondent argued that after 10 years the Applicant should be precluded from enforcing the "No Pets" provision in her case on the basis of acquiescence and laches. The Applicant argued that the Respondent could not rely on acquiescence and laches for a number of reasons, which can essentially be summarized as follows:

1. The Declaration contains a waiver provision that reads

The failure to take action to enforce ... this declaration ... irrespective of the

number of violations or breaches which may occur, shall not constitute a waiver of the right to do so thereafter, nor be deemed to abrogate or waive any such provision.

2. The Respondent has failed to establish that the Applicant knew she had a cat before 2004, and therefore cannot show that the Applicant acquiesced to her possession of the cat.
3. The Respondent's position was not worsened as a result of the Applicant's delay in enforcement and without detrimental reliance as a result of delay, the defence of laches cannot succeed.

¶ 2 1. With respect to the waiver provision, I cannot find that the existence of this provision is determinative of the issue before me. In this regard, I note that in *Hadbavny*, [2001] O.J. No. 4176, a decision by Mesbur J., she refused to grant similar relief in a similar situation where there was also a waiver provision.

¶ 3 2. I am satisfied from the record that the Applicant had a no-pets policy that they knew was not being enforced by their management and they took no steps to enforce their policy unless written complaint was received from other residents until November of 2003. It is also clear from the Affidavit of Kim Millan. The Applicant deposed that they first learned of the existence of the Respondent's cat when their maintenance people went in to her unit in 2004, yet the Respondent's evidence is uncontradicted that the maintenance people had been there throughout the 10 year period.

¶ 4 3. As a result of the Applicant's non-enforcement, the Respondent's position has worsened. As already evidenced - her pet, to whom she has just grown more attached, is now 12 years old and essentially unadoptable.

¶ 5 For those reasons, I am dismissing the application. In doing so, I am not finding that the "No Pets" provision in the Declaration is unreasonable. Indeed, I accept that it must be presumed to be so. I am just finding that it would be an unreasonable exercise of my discretion to enforce that provision in the Respondent's case. I do not believe this is a case for substantial indemnity costs. I am awarding the Respondent her partial indemnity costs, fixed in the amount of \$3,000.00.

H.E. SACHS J.

QL UPDATE: 20051214

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