St. Catharines Court File No. 48264/06

SUPERIOR COURT OF JUSTICE – ONTARIO

RE:	*NIAGARA NORTH CONDOMINIUM CORPORATION NO. 125* (applicant) *v. JOANNE KINSLOW* (respondent)
BEFORE:	The Honourable Mr. Justice J.W. Quinn
APPEARANCES:	Erik Savas, for the applicant
	T. Kirby, for the respondent
HEARD:	at St. Catharines, August 30, 2007
DATE:	November 6, 2007

ENDORSEMENT

Introduction

[1] Historically, pets and condominium corporations have been frequent adversaries in Ontario courts where they have generated more than 40 reported decisions. I now add to that menagerie.

[2] The applicant, Niagara North Condominium Corporation No. 125 ("Corporation"), contends that the respondent is unlawfully keeping two cats in her condominium unit and it seeks their removal.

[3] The application is brought pursuant to subsection 134(1) of the *Condominium Act,* R.S.O. 1990, c. C.26, as amended ("*Condominium Act*"). Compliance relief is requested.

Background (facts and law)

[4] The Corporation was created in 1997. It is a high-rise, residential condominium complex, in the City of St. Catharines, with 135 units and approximately 250 residents.

declarations

[5] "Registration of a declaration pursuant to the *Condominium Act* creates a condominium corporation, which is a corporation without share capital whose members are its unit owners from time to time. Its affairs are managed by a board of directors. The declaration is similar to articles of incorporation of a business corporation and is the constitution of the condominium corporation": see *Peel Condominium Corp. No. 449 v. Hogg,* [1997] O.J. No. 623 (Ont. Ct. (Gen. Div.)) at para. 7.

[6] "The declaration . . . including the rules, are . . . vital to the integrity of the title acquired by the unit owner": see *Re Carleton Condominium Corp. No. 279 and Rochon et al.* (1987), 59 O.R. (2d) 545 at 552 (C.A.).

[7] Subsection 7(2) of the *Condominium Act* sets out what a declaration *shall* contain. It is not relevant to this application.

[8] Subsection 7(4) outlines what a declaration *may* contain. I will refer to the part that is pertinent for my purposes (emphasis added):

> 7(4) In addition to the material mentioned in subsection (2) and in any other section in this Act, a declaration may contain,
>
> . . . . . .
>
> (b) *conditions or restrictions with respect to the occupation and use of the units or common elements*;

Clause 7(4)(b) would cover the keeping of pets by occupants.

the no-pets Declaration

[9] In accordance with s. 2 of the *Condominium Act*, the Corporation registered a declaration ("Declaration") in 1997.

[10] The Declaration provides, in section 7, Article II, a blanket prohibition against the keeping of all pets:

> 7. **Pets** – No animal, livestock, fowl, fish, reptile or insect (a "Pet") shall be permitted or kept in the building. Any owner shall, within two (2) weeks of receipt of a written notice from the Board or the Manager requesting the removal of any such animal, permanently remove such animal from the property. No breeding of animals for sale shall be carried on, in or around any Unit.

rules

[11] Subsection 58(1) of the *Condominium Act* allows a condominium corporation to enact rules respecting units (emphasis added):

> 58(1) The board [of directors of a condominium corporation] may make, amend or repeal rules respecting the use of common elements and units to,
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> (a) *promote the safety, security or welfare of the owners and of the property* and assets of the corporation; or
>
> (b) *prevent unreasonable interference with the use and enjoyment of the common elements, the units* or the assets of the corporation.

[12] Importantly, subsection 58(2) stipulates that the rules must be reasonable:[1]

> (2) The rules shall be reasonable and consistent with this Act, the declaration and the by-laws.

the no-pets Rule

[13] The rules of the Corporation include Rule No. 12, prohibiting pets:

> 12. No pets shall be permitted in the building.

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[1] Section 7, which, as I mentioned earlier, deals with declarations, does not have a comparable provision.

the tenancy agreement

[14] On May 1, 2002, the respondent entered into a tenancy agreement with the owner of unit 1009 in the condominium complex. She has occupied that unit on a continuous basis since then. The tenancy agreement is silent as to pets and has no bearing on this application.

summary of Corporation's rules provided to respondent

[15] Upon taking up occupancy of unit 1009, the respondent was provided with a summary of the Corporation's rules. Item No. 6 in the summary states:

> 6. PETS – no pet shall be permitted in the building.

[16] The validity of the summary stands no higher than the rules summarized.

letters to respondent

[17] In January 2006, the Corporation received information that the respondent was housing two cats in her unit. The Corporation sent a letter to the owner of unit 1009, with a copy to the respondent, advising that the cats were to be removed by February 3rd and that an inspection would be conducted on February 6th. The inspection revealed one black cat. The Corporation wrote directly to the respondent, giving her until February 23rd to remove the cats, with another inspection to occur on February 24th. Two black cats were seen during this second inspection.

[18] The solicitors for the Corporation sent a letter to the respondent on April 13th, allowing her until May 5th to expel the cats, failing which legal proceedings would be commenced. The respondent did not reply. A further

letter and inspection followed in August and, again, one black cat was observed in the unit. (It is undisputed that the respondent has two cats.)

affidavit of respondent

[19] In paragraph 2 of her affidavit,[2] filed in opposition to the application, the respondent admits that, before she moved into her unit, she was made aware of the no-pets policy and "got rid of" the one cat she owned at that time:

> 2. Before I moved in I was made aware of the no cat policy of the building and got rid of my cat.

However, upon noticing that "many people" in the condominium complex, including the superintendent, "had cats and other pets," the respondent acquired two cats. (It is likely that the pets observed by the respondent pre-dated the registration of the Declaration in 1997 and, as such, were exempted or "grandfathered" by the board of directors of the Corporation.)

[20] According to the respondent, she suffers from a brain injury and is also bi-polar. No supporting medical evidence was tendered and so I do not know the extent of these conditions. She receives benefits from the Ontario Disability Support Program, is on a limited income and her unit is "geared to income." Her affidavit continues:

> 7. . . . I could not survive financially if I did not live in subsidized housing. I am unable to move since the waiting list for transfers in the Niagara Region is very long. It would be years before I could be transferred.

[21] Her affidavit goes on to say that she has never received any complaints from other neighbours regarding the cats, and it concludes:

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2 Paragraph 2 of the respondent's affidavit figures prominently in the disposition of this application and will be referred to several times below.

> 9. As a result of my disability I am very easily upset and agitated. I am very suspicious of people in general. I live alone. My cats are my family and they give me great comfort. They are important to my emotional well-being.

Again, there is no supporting medical evidence.

occupant required to comply with declaration and rules

[22] Subsection 119(1) of the *Condominium Act* requires the occupier of a unit to comply with the declaration and the rules of a condominium corporation. It states, in part:

> 119(1) . . . an occupier of a unit . . . shall comply with this Act, the declaration, the by-laws[3] and the rules.

[23] Compliance with the rules of a condominium corporation is also addressed in subsection 58(10):

> 58(10) All persons bound by the rules shall comply with them and the rules may be enforced in the same manner as the by-laws.

rules must be clearly unreasonable to justify non-compliance

[24] I have already pointed out that subsection 58(2) of the *Condominium Act* stipulates that "rules shall be reasonable."

[25] "In an application under [subsection 134(1)], a court should not substitute its own opinion about the propriety of a rule enacted by a condominium board unless the rule is clearly unreasonable . . . In the absence of such unreasonableness, deference should be paid to rules deemed appropriate by a board . . .": see *York Condominium Corp. No. 382 v. Dvorchik,* [1997] O.J. No. 378 (C.A.) at para. 5.[4]

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3 No by-laws were introduced into evidence.

4 This statement from *Dvorchik* really does not add to subsection 58(2).

right to require compliance with declaration and rules

[26] In accordance with subsection 119(3) of the *Condominium Act*, a condominium corporation,

> 119(3) . . . [has] the right to require . . . the occupiers of units to comply with this Act, the declaration, the by-laws and the rules.

duty to ensure compliance with declaration and rules

[27] Subsection 17(3) goes further and imposes a duty upon a condominium corporation "to take all reasonable steps" to ensure compliance with a declaration and the rules.

authority for application

[28] As I said at the outset, this application is brought in accordance with subsection 134(1) of the *Condominium Act*, the operative part of which reads:

> 134(1) Subject to subsection (2),[5] . . . a [condominium] corporation . . . may make an application to the Superior Court of Justice for an order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules . . .

relief is discretionary

[29] Subsection 134(3) renders the relief sought in an application of this nature discretionary (emphasis added):

> 134(3) On an application, the court *may*, subject to subsection (4),[6]
>
> (a) grant the order applied for;
>
> . . . . . .
>
> (c) grant such other relief as is fair and equitable in the circumstances.

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[5] Subsection 134(2), dealing with mediation and arbitration processes, is not applicable at bar.

[6] Subsection (4) addresses situations where the court is granting an order terminating the lease of a residential unit.

Of course, it is trite of me to add that this discretion must be exercised judicially.

Discussion

abuse of process

[30] On behalf of the respondent, it is submitted that the present application is an abuse of process because "the exact same facts are before the court" as in my earlier decision in *215 Glenridge Ave. Ltd. Partnership v. Waddington* (2005), 75 O.R. (3d) 46 (S.C.J.). *Waddington* dealt with the same condominium complex and the respondent, like the respondent here, occupied a unit with her two cats. The applicant in *Waddington* was the unit owner.

[31] There is ample judicial authority applying the doctrine of abuse of process to prevent the litigating of a claim that has been previously determined. However, care must be taken to ensure that the requisite degree of similarity exists between the two claims. Are the facts the same? Is the issue the same? And, were the arguments advanced in both the same? If the answer to any one of these questions is "No," it is not likely that unfairness or injustice would result by allowing the second claim to proceed.

[32] There are important factual distinctions between *Waddington* and the application now before the court. They are found in paragraph 2 of the respondent's affidavit. Paragraph 2 contains material facts that were not present in *Waddington,* thereby rendering inapplicable the doctrine of abuse of process.

Human Rights Code

[33] On behalf of the respondent, it is further submitted that to enforce the no-pets Declaration would contravene her rights under subsection 2(1) of the *Human Rights Code,* R.S.O. 1990, c. H.19, as amended, which provides that "[e]very person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of . . . disability . . ."

[34] ". . . the *Human Rights Code* precludes enforcement of [a] declaration if it would result in the discrimination of [the occupier] . . . because of her specific handicap": see *Waterloo North Condominium Corp. No. 198 v. Donner* (1997), 36 O.R. (3d) 243 at 248 (Ont. Ct. (Gen. Div.)).

[35] However, for me to find the discrimination necessary to defeat the Declaration, the no-pets provision must have the effect of preventing the respondent from living in her unit (as in *Waterloo North Condominium Corp. No. 198 v. Donner, supra,* where it was held that barring an occupant's "hearing-ear dog" from being kept in a condominium unit would prohibit the occupant from residing in her unit, because the dog was necessary for her to function independently). That is not the situation here. There is no evidence that the respondent is unable to live without her cats. Certainly, they are a comfort to her and, no doubt, her preference is to live with them rather than without them, but the evidence does not support a finding that she is so physically, emotionally or otherwise medically dependent upon them that she cannot live without them. Indeed, the opposite has been shown: in her affidavit, at paragraph 2 set out above, she deposes that, before she moved into the condominium complex, she "got rid of" the one cat she had then, because she was made aware that pets were not allowed. In other words, at that time she was both willing and able to occupy

her unit without a pet; today she may be unwilling, but she still is able, to do so.

the no-pets Rule

[36] Rules passed by a condominium corporation must be reasonable. In this case, the no-pets Rule is unreasonable. Subsection 58(1) of the *Condominium Act* does not authorize a condominium corporation to make a blanket rule banning all pets. Only if pets compromise "the safety, security or welfare of the [unit] owners and of the property and assets of the [condominium] corporation" (clause 58(1)(a)) or if they constitute an "unreasonable interference with the use and enjoyment of the common elements, the units or the assets of the [condominium] corporation" (clause 58(1)(b)), may the board of directors ban or prohibit their presence. There is no evidence that the cats of the respondent run afoul of clauses (a) or (b) of subsection 58(1). And, it cannot be said that the presence of all pets inherently constitutes a breach of those clauses.

[37] Consequently, I find that a violation of the no-pets Rule has not been established. This brings me to the Declaration.

the no-pets Declaration

[38] The blanket no-pets Declaration is not a reasonable one (its current wording would ban the presence of a solitary goldfish in the condominium complex). Yet, this fact alone does not make the Declaration invalid because of the presumption favouring validity.[7] The presumption (which is rebuttable) arises largely because the *Condominium Act* contemplates the

[7] It was not explained to me why a condominium corporation would have both a rule and a provision in a declaration identically worded, thereby creating the possibility that the provision is enforceable as a declaration but not as a rule.

different treatment of rules and declarations: reasonableness being expressly required for the former (see subsection 58(2)) but not for the latter. Thus, a declaration that is unreasonable can still be valid – as long as it is not unfair in the circumstances (with unfairness being gauged in accordance with the law and not the sensibilities of a particular respondent).

[39] It is not correct to argue that, because every unit owner in a condominium complex purchased with knowledge of a declaration, validity must follow. The power under clause 7(4)(b) of the *Condominium Act* is not unfettered: for example, "conditions or restrictions with respect to the occupation and use" of units that are illegal (such as those that violate the *Human Rights Code*[8]) or are contrary to public policy or are unfair (as mentioned above), would not be enforceable.

[40] Although, in deciding how my discretion should be exercised, I have considered and weighed all of the surrounding circumstances, I have been particularly influenced by paragraph 2 of the respondent's affidavit.

[41] My discretion must be exercised judicially. Would it be fair to require compliance with the no-pets Declaration – fair to the respondent and to the other occupants and unit owners? Enforcing the no-pets Declaration would not have the effect of preventing the respondent from continuing in occupation of her unit. This is evident from paragraph 2 of her affidavit. As such, in law, I see no unfairness to the respondent were I to require compliance with the no-pets Declaration; absent that unfairness, it would be an improper exercise of my discretion to do otherwise.

[42] Because the respondent has not shown that her cats are a necessity, there is no legitimate basis upon which to decline the exercise of my discretion in favour of the Corporation. The respondent has demonstrated a

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[8] As in *Waterloo North Condominium Corp. No. 198 v. Donner, supra.*

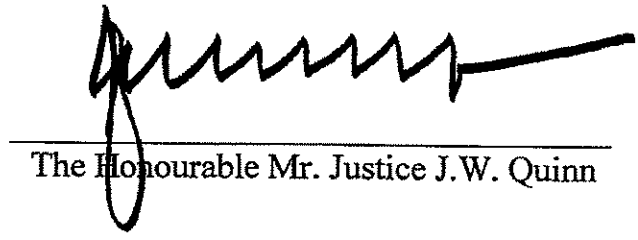
preference, not a need, for her cats. The rights and expectations of the unit owners should not be compromised by the mere preference of an occupant.

[43] The cats must go.

Conclusion

[44] For the reasons given, I exercise my discretion in favour of the Corporation and allow the application. Orders shall issue in accordance with paragraphs 1, 2 and 3 of the notice of application, except that the respondent shall have 90 days to remove her cats, rather than 30 days as sought by the Corporation.

[45] I hope that costs will not be an issue. If they are, I will entertain oral submissions from counsel.



The Honourable Mr. Justice J.W. Quinn

RELEASED: November 6, 2007