TYPED ENDORSEMENT

Jan 05/06
Savas – Appl. **[for Niagara North CC #125]**
Hooper – R. **[for Heather Waddington]**

Last year the owner of the unit in question brought an application against the same Resp. requesting the exact same relief in this application. Justice Quinn denied the application. No appeal was taken. The Cond. Corpn. which knew all the particulars of the first application – in fact it's employee swore the affid. used in the appln. never asked to be joined in the action to be heard either in front of Quinn J. or at a subsequent appeal. The exact same facts + issues are before me as were in front of Quinn J. last year. Although technically this may not be res judicata, as the applicant is a different party, the issues are identical. In these circumstances proceeding with the appln. would be an abuse of process. The applicant wants an appeal of Quinn J's order without going through the appeal process. Appl. also asked that motion be adj so that this matter could be placed back before Quinn J. With respect, all that would do is ask Quinn J. to sit on appeal of his earlier decision. This is prejudicial to the Resp. Accordingly, the Appln is dismissed. The Resp. is entitled to costs fixed in the amount of $2,500.00, incl of GST & disb.

L. Walters J.

CITATION: Niagara North Condominium Corp. No. 125 v. Waddington,
2007 ONCA 184
DATE: 20070316
DOCKET: C44800

COURT OF APPEAL FOR ONTARIO

LASKIN, LaFORME and ARMSTRONG JJ.A.

B E T W E E N :	)	
	)	
NIAGARA NORTH CONDOMINIUM CORP. No. 125	)	**Derek A. Schmuck, for the appellant**
	)	
Applicant (Appellant)	)	
	)	
- and -	)	
	)	
HEATHER WADDINGTON	)	**Robert J. Hooper and Kelly Buffett, for the respondent**
	)	
Respondent (Respondent in Appeal)	)	
	)	**Heard: October 4, 2006**

Application under section 134 of the *Condominium Act*, R.S.O. 1990, c. C. 26.

On appeal from the judgment of Justice L. M. Walters of the Superior Court of Justice dated January 5, 2006.

ARMSTRONG J.A.:

[1] Ms. Heather Waddington is the owner of two cats. She is also the tenant of a condominium unit at 215 Glenridge Avenue in the City of St. Catharines. The owner of the condominium unit brought an application in the Superior Court of Justice to have Ms. Waddington's cats removed from the building. The application was dismissed by Justice J. W. Quinn of the Superior Court of Justice. The condominium owner did not appeal the dismissal of the application. However, Niagara North Condominium Corp. No. 125, the appellant, brought a subsequent application for the same relief. Justice L. Waters of the Superior Court of Justice dismissed the subsequent application as an abuse of process. The appellant now appeals the judgment of Walters J.

[2] For the reasons which follow, I would dismiss the appeal.

THE FACTS

[3] The appellant, Niagara North Condominium Corp. No. 125, is located at 215 Glenridge Avenue in the City of St. Catharines. The condominium complex contains 135 units. It was originally an apartment building which was converted to a condominium complex in June 1997.

[4] The respondent, Ms. Heather Waddington, is the tenant of unit 410. Unit 410 is owned by 669758 Ontario Ltd., the shares of which are owned by 215 Glenridge Avenue Ltd. Partnership. 215 Glenridge Avenue Ltd. Partnership is also referred to as the owner of unit 410 in these proceedings and no issue appears to be taken with that designation. Ms. Waddington entered into a lease with the owner of the unit on May 5, 2003. When she moved into unit 410, she brought her two cats with her. The cats continue to live in unit 410.

[5] Article 11, subsection 7 of the appellant's Declaration provides:

> 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 written notice from a Board or Manager requesting removal of any such animal, permanently remove such animal from the property.

[6] Rule 12 of the rules and regulations of the corporation provides:

> No pets shall be permitted in the building.

[7] The evidence before the court indicated that before the building was converted to a condominium complex the occupants of the building were permitted to have pets in their apartments. After the building was converted to a condominium complex, the persons who had pets in their apartments were permitted to keep them there until the pets either left or died.

[8] The property manager of the appellant sent a letter to Ms. Waddington on November 24, 2003 demanding that she remove her cats from the building by December 8, 2003. A second letter dated May 11, 2004 demanded that the cats be removed by May 25, 2004. A third letter dated July 23, 2004 advised that an inspection of the condominium unit would take place on August 7, 2004 "to confirm there are no pets living in the unit and you are complying with Article 11 subsection 7 of the Declaration". Finally, a letter dated October 26, 2004 addressed to Ms. Waddington from the property manager demanded that the cats be removed by November 15, 2004 and advised that an inspection would be carried out on November 16, 2004. The letter of October 26, 2004

also indicated that failure to comply with the demand to remove the cats would result in litigation commenced by the appellant condominium corporation. In particular, the letter said:

> If the pet(s) have not been permanently removed, this matter will be referred to the Corporation's solicitor to obtain a court order to have the pet(s) permanently removed from the property.

[9] Ms. Waddington did not remove her cats from unit 410.

[10] Litigation followed. However, it was the owner of the unit and not the appellant condominium corporation that commenced the proceedings. On January 4, 2005, 215 Glenridge Avenue Ltd. Partnership, commenced its application ("the first application") against Ms. Waddington for:

> (i) a declaratory order stating that Ms. Waddington is in breach of the Declaration of the Niagara North Condominium Corp. No. 125; and,
>
> (ii) a compliance order for the removal of the cats.

[11] The first application was supported by an affidavit of Richard Rosenman. Attached to his affidavit are the four letters sent by the property manager of the appellant to Ms. Waddington dated November 24, 2003; May 11, 2004; July 23, 2004; and October 26, 2004. An affidavit of Peter Greco, the property manager of the appellant, was also filed in support of the first application. Finally, an affidavit of Lynn Berthiaume, the building superintendent of the appellant, was filed in support of the first application.

[12] The first application proceeded before Justice J. W. Quinn of the Superior Court of Justice in St. Catharines on January 20, 2005. Judgment was reserved to February 18, 2005 when Justice Quinn released a six page endorsement in which he gave his reasons for dismissing the application.

[13] Quinn J. found that the provisions banning pets in the Declaration and the rules of the appellant condominium corporation failed to comply with the provisions of the *Condominium Act*, R.S.O. 1990, c. C. 26. In paragraphs 16, 17 and 18 of his reasons, Quinn J. said:

> [16] 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.
>
> [17] I also think that, if any part of a declaration conflicts with subsection 58(1) it is void and unenforceable. In other words, where, pursuant to clause 7(4)(b) of the *Condominium Act*, a declaration contains "conditions or restrictions with respect to the occupation and use of the units or common elements," a condominium corporation cannot go beyond that which is permitted in subsection 58(1).
>
> [18] Consequently, the declaration and rules of the Corporation are insufficient to prohibit the presence of the cats.

[14] The owner of unit 410 did not appeal the decision of Quinn J.

[15] On September 20, 2005, seven months after the decision of Quinn J. was released, the appellant issued a notice of application ("the second application") in the Superior Court against Ms. Waddington, in which it sought the same relief as had been sought by the owner of the condominium unit in the first application, i.e. the removal of the two cats from the condominium unit.

[16] The appellant filed an affidavit of its property manager, Peter Greco, in support of the second application. The Greco affidavit contained essentially the same evidence that had been placed before the judge in the first application, including the letters dated November 24, 2003; May 11, 2004; July 23, 2004; and October 26, 2004 addressed to Ms. Waddington demanding the removal of her two cats from the building.

[17] Ms. Waddington filed two affidavits in opposition to the second application. She deposed that she suffers from a brain injury and is disabled. She receives Ontario disability support and lives on a limited income. She deposed that she had never received any complaints about her cats. She attached a report to her affidavit from her psychologist who opined that Ms. Waddington's cats are an important focus in her life and that they make a significant contribution to her health and well-being. Her psychologist further said that she would suffer an unreasonable and unnecessary hardship if she were required to give up her cats. Ms. Waddington's family physician also

provided a report in which she said that, "her cats are a vital part of her life and I know that the loss of her treasured pets would set her back considerably".

[18] The second application was heard by Walters J. on January 5, 2006. She dismissed the second application. Her endorsement reads as follows:

> Last year the owner of the unit in question brought an application against the same Resp. requesting the exact same relief in this application. Justice Quinn denied the application. No appeal was taken. The Cond. Corpn. which knew all the particulars of the first application – in fact it's employee swore the affid. used in the appln. never asked to be joined in the action to be heard either in front of Quinn J. or at a subsequent appeal. The exact same facts + issues are before me as were in front of Quinn J. last year. Although technically this may not be *res judicata*, as the applicant is a different party, the issues are identical. In these circumstances proceeding with the appln. would be an abuse of process. The applicant wants an appeal of Quinn J.'s order without going through the appeal process.
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> Appl. also asked that motion be adj so that this matter could be placed back before Quinn J. With respect, all that would do is ask Quinn J. to sit on appeal of his earlier decision. This is prejudicial to the Resp. Accordingly, the Appln is dismissed.
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> The Resp. is entitled to costs fixed in the amount of $2,500, incl of GST & disb.

THE APPEAL

[19] The appellant alleges that the application judge made several errors including:

- she failed to apply the correct test for abuse of process;
- she failed to consider the relevant factors for the exercise of her discretion including:
  - the scheme of the *Condominium Act* and the merits;
  - the prejudice to the appellant and the owners of the units;

- the failure to join the appellant in the first application;
- the importance, relative ease and practicality of the appellant intervening in the first application;
- the inability of the appellant to appeal the decision in the first application; and
- the lack of opportunity for the appellant to make submissions in the first application.

ANALYSIS

Did the application judge err in failing to apply the correct test for abuse of process?

[20] The appellant submits that the application judge erred in law when she failed to articulate and apply the legal test for abuse of process. In particular, the appellant asserts that the application judge was required to ensure that her decision on the issue of whether the second application constituted an abuse of process resulted in fairness and justice to the parties.

[21] The application judge did not articulate a test for abuse of process. Abuse of process is a doctrine designed to provide a remedy in a variety of situations including a remedy for the unfairness of relitigating the same issue against the same party in circumstances where issue estoppel does not apply. Abuse of process is essentially a fairness doctrine. In *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, [2003] 3 S.C.R. 77, Arbour J. engaged in a thorough review of the doctrine. She cited with approval at para. 37 the dissenting judgment of Goudge J.A. in *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.) at paras. 55-56:

> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
>
> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be

> in essence an attempt to relitigate a claim which the court has already determined.

[22] Arbour J. in the *City of Toronto* also cited, with approval at para. 38, D.J. Lange, *The Doctrine of Res Judicata in Canada* (2000) at pp. 347-48 in support of the policy grounds which underlie abuse of process in these circumstances:

> The two policy grounds, namely, that there be an end to ligitation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by religitation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

[23] While the application judge's very brief endorsement does not provide a fulsome analysis of the issues to be decided by her, it is clear that she concluded that to permit the second application to proceed would be unfair and unjust given that the identical claim was disposed of in the first application and considering the appellant's apparent involvement in the initiation of the first application. While one might have preferred a more fulsome set of reasons from the application judge, I do not find her endorsement to be so bereft of analysis that it does not explain why she reached her conclusion. Her endorsement taken together with the application record provides this court with a basis to engage in meaningful appellate review.

Did the application judge err in failing to consider the statutory scheme of the *Condominium Act* and the merits of the case?

[24] The application judge did not consider the relevant sections of the *Condominium Act* and the merits of the case. Since she dealt with the application before her on the basis of abuse of process she did not go further. Indeed she expressly told counsel for the appellant that she did not intend to consider the merits.

[25] But, what if the decision in the first application was simply wrong in law?[1] Would that be a decisive factor in favour of the appellant? In other circumstances, an erroneous

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[1] The appellant relies upon a number of authorities which uphold "no pets" provisions in condominium declarations. See *York Condominium Corp. 382 v. Dvorchik*, [1997] O.J. No. 378 (S.C.); *Waterloo North Condominium Corp. No. 186 v. Weidner*, [2003] O.J. No. 2496 (S.C.); *Peel Condominium Corp. No. 78 v. Harthen* (1978), 20 O.R. (2d) 225 (Cty. Ct.); *Metropolitan Toronto Condominium Corp. No. 776 v. Gifford*, [1989] O.J. No. 1691 (Dist. Ct.); *York Region Condominium Corp. No. 585 v. Gilbert*, [1990] O.J. No. 130 (Dist. Ct.); *Peel Condominium Corp. No. 338 v. Young*, [1996] O.J. No. 1201 (Gen. Divs.); *Metropolitan Toronto Condominium Corp. No. 949 v. Irvin*, [1992] O.J. No. 1598 (Gen. Divs.).

decision on the merits in the initial proceeding might make a difference although we were not cited any authority in support of that proposition. In any event, in these circumstances, where the unit owner (the first applicant) and the appellant (the second applicant) were so inextricably connected to the identical claim against the same respondent, I think an erroneous decision, if there be one, is not a decisive factor. The unit owner could have exercised his right of appeal to the Court of Appeal but did not.

Did the application judge err in failing to consider the prejudice to the appellant and the owners?

[26] The appellant submits that the application judge failed to consider the prejudice to the appellant in not being able to enforce the no pets prohibition and the uncertainty caused in the building with respect to the housing of pets as a result of the decision in the first application. It seems to me that if there was any such prejudice, it was not of such a degree that would justify setting aside the application judge's exercise of discretion in this case.

Did the application judge err in failing to consider that the owner of the condominium unit and Ms. Waddington should have taken steps to join the appellant in the first application?

[27] The appellant submits that the application judge should have considered that neither the owner of the condominium unit nor Ms. Waddington took any steps to add the appellant as a party to the first application to ensure that the result would be binding on the appellant. The appellant cites rule 5.03(1) and rule 5.03(4) of the Rules of Civil Procedure, which deal with the joinder of necessary parties.

[28] In my view, there was no obligation on Ms. Waddington to move to add the appellant as a party to the application. In all probability, counsel for Ms. Waddington, if he put his mind to it, would have assumed that the appellant made a conscious decision not to join in the application. In any event, the fact that the appellant was not a party to the first application, was likely the subject of some discussion between it and the unit owner. If they concluded that the unit owner alone would proceed in order to avoid potential costs or other consequences so be it.

Did the application judge err in failing to consider the importance, relative ease and practicality of intervening?

[29] During a dialogue, at the hearing of the second application, between the application judge and counsel for the appellant, the application judge suggested that the appellant could have sought to be added as a party in the first application. The appellant submits that this would not have been practical. First, the appellant argues that on such a motion, the unit owner would likely have opposed the motion because the appellant would have sought its costs against the unit owner which are provided for in the

condominium declaration. This argument is pure speculation. Given the co-operation that existed between the unit holder and the appellant, I think this is an unlikely scenario. Second, the appellant argues that it would have had no reason to believe that there was any risk of the unit owner not succeeding in his claim and therefore presumably had no reason to seek to be added as a party. If that is so, then the appellant made a tactical decision and must accept the consequences.

Did the trial judge err in failing to understand that the appellant had no right of appeal from the decision in the first application?

[30] When the application judge's endorsement is read as a whole, I believe it is clear that she fully understood that the appellant could not appeal the decision in the first application. Her words: "the applicant wants an appeal of Quinn J.'s order without going through the appeal process" must be read in context. The gist of her reasoning is that the appellant in the second application was, in effect, attempting to appeal the first decision. Although there was considerable discussion between the application judge and counsel for the appellant concerning the possibility of the appellant becoming involved in an appeal on the first application, I do not accept that any of that discussion would lead this court to reverse her decision on abuse of process.

Did the application judge err in failing to consider that the appellant had no opportunity to make submissions to the court in the first application?

[31] The appellant argues that the application judge failed to consider the unfairness of the first application judge's decision in light of the fact that before Quinn J. determined the appellant's pet prohibitions to be unenforceable, he did not accord the appellant the opportunity to make submissions on the issue. I see no merit in this argument. As already observed, the appellant obviously made a conscious decision not to join in the first application as a party.

CONCLUSION

[32] I accept that the application judge was entitled, in the circumstances of this case, to invoke the doctrine of abuse of process. Here we have the relitigation of an identical claim against Ms. Waddington. Although the appellant was not a party to the first application, the appellant took the initiative in making the demands on Ms. Waddington to remove her cats and threatened litigation against her. When she did not comply with the demands to remove the cats, the unit owner was the named applicant in the first application. However, the appellant provided virtually all of the evidence in respect of the application. Although not a party in the formal sense, the appellant was an active participant in promoting the first application.

[33] The application judge's use of the doctrine of abuse of process terminated the second proceeding and prevented the unfairness to Ms. Waddington of being twice vexed by the same cause.

[34] In the result, I would dismiss the appeal. I would award the respondent her costs of the appeal on a partial indemnity basis fixed in the amount of $10,000 including disbursements and GST.

RELEASED:

"RPA"
"MAR 16 2007"

"Robert P. Armstrong J.A."
"I agree John Laskin J.A."
"I agree H.S. LaForme J.A."