

CITATION: Peel Condominium Corp. v. Pereira, 2013 ONSC 7340
COURT FILE NO.: CV-13-1986-00
DATE: 2013/11/28

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Peel Condominium Corporation No. 98

Applicant

- and -

Rui Pereira

Respondent

) Michael Gwynne, for the Applicant

) C. Anthony Carroll, for the
) Respondent

) **HEARD:** November 4, 2013

ENDORSEMENT

M. J. Donohue J.

Issue

[1] Section 117 of the *Condominium Act, 1998*, S.O. 1998, c. 19, provides that “no person shall permit a condition to exist or carry on an activity in a unit or

in the common elements if the condition or the activity is likely to damage the property or cause injury to an individual.”

[2] The applicant, Peel Condominium Corporation No. 98 (the “Corporation”), submits that Mr. Pereira has breached this provision of the *Condominium Act, 1998* and seeks the following orders:

- a) that Mr. Pereira shall sell and vacate his unit within six months;
- b) that Mr. Pereira be prohibited from conducting himself in a manner which is, or threatens to be, oppressive or unfairly prejudicial to the Corporation, the unit owners and residents; and
- c) that Mr. Pereira remove any animal or pet from his unit with ten days.

Complaints

[3] Much of the evidence proffered is by Gary Atkin, property manager for the Corporation since 1988, in addition to affidavits by other residents, a landscaper and the current superintendent, Joe Schoenberger.

[4] Where information is stated to be from other parties whose sworn affidavits are not before this court, I have not relied on this information as it is not admissible under the hearsay objection.

[5] Mr. Pereira has been the registered owner of unit 907 since 2001.

[6] The Corporation submits that since July 2003, Mr. Pereira has repeatedly violated s. 117 of the *Condominium Act, 1998*, which prohibits conduct that is “likely to damage the property or cause injury to an individual”.

[7] There have been a number of concerns and it assists to look at each complaint made in turn.

Repairing a Vehicle in the Garage

[8] July 3, 2003: Mr. Pereira was sent a letter by Gary Atkin, stating that it had come to his attention that Mr. Pereira was conducting car repairs in the underground garage. He was asked to cease this practice.

[9] Mr. Pereira denies he did such repairs.

[10] There was no follow-up or further evidence in support of this claim such that it would be a cause of action by the Corporation under s. 117 of the *Condominium Act, 1998*.

Storing Items in Parking Stall

[11] August 21, 2003: Mr. Pereira was sent a letter by Mr. Atkin, stating that he was asked to remove, within four days, a tire, a piece of cardboard and a bicycle holder, from his parking stall.

[12] Mr. Pereira states that he may have had a tire there and would have removed it as requested. He does not recall leaving a piece of cardboard in the stall. His evidence is that his bicycle holder that attaches to his car was not stored in the stall.

[13] There was no follow-up or further evidence on this complaint such that it appears to have resolved.

Attaching Personal Items to Common Elements

[14] September 29, 2003: Mr. Pereira was sent a letter by Mr. Atkin, stating that he must remove his bicycle rack from the pillar in his parking stall.

[15] There was no follow-up or further evidence on this complaint such that it appears to have resolved as well. Mr. Pereira's evidence was that the bicycle rack was usually affixed to his car.

[16] The context is therefore three complaints, in a three month period in 2003, where it appears they were resolved.

[17] Nothing further is noted for a period of three years.

Noise Complaint

[18] February 7, 2006: Mr. Pereira was sent a letter by Mr. Atkin, stating that there were a number of complaints of the level of noise coming from his unit on Sunday, February 5, 2006.

[19] Mr. Pereira's evidence is that he lived alone at that time and did not make excessive noise.

[20] This appears to be an isolated incident with no follow-up or further noise complaints.

[21] Nothing further is noted for a period of four years.

Defamatory Posts on Websites

[22] No evidence was provided to support this allegation apart from lawyers' letters warning Mr. Pereira against defamatory statements regarding the applicant. These letters were sent January 21 and 22, 2008.

Thrown Cat Feces and Litter from Balcony

[23] On November 15, 2010 a landscaper, Tim Henderson, was struck on the head with cat feces.

[24] His supervisor, Gilles Bissonette, looked up and saw cat litter and water coming from the third balcony. He also stated he had observed this to occur on

four different occasions. Although the affidavit was sworn on August 28, 2013, there is no detail as to whether the four occasions occurred in 2010 or in some later time.

[25] Photographs of cat litter on the grounds were included in the material.

[26] January 10, 2011: Mr. Pereira was sent a letter, by the solicitor for the Corporation, to cease this activity. A further letter was sent May 19, 2011 and again on August 23, 2011.

[27] Mr. Schoenberger stated that on January 17, 2011, he witnessed a mixture of litter and feces being ejected from the respondent's balcony. He had seen this previously from Mr. Pereira's balcony.

[28] The last letter to Mr. Pereira, notifying him of this complaint, was sent a year later, on June 19, 2012.

[29] Mr. Schoenberger testified that he discovered litter and feces on the ground in front of his unit on December 5, 2012 and again on December 16, 2012. In his affidavit sworn May 2, 2013, he states, "I further confirm that this has been an ongoing issue for the past year". There are however no particulars.

[30] Mr. Pereira's evidence is that he did not eject such matter from his balcony. He says his cat has never been out of his unit.

[31] None of the affidavits were cross-examined upon. The affidavit evidence of Mr. Schoenberger is that the litter comes from the respondent's balcony.

[32] Mr. Bruce Henderson, resident, deposed that on September 19, 2010, he witnessed liquid and solid material being ejected from the drain shoot of unit 907. He stated that he had observed this in the past as well. The substance appeared to him to be a mixture of cat litter and animal feces.

[33] Mr. James Daley, resident, deposed that on January 17, 2012, he observed similar material being ejected from the balcony of unit 907. He stated it had been an on-going issue for the past year. His affidavit was sworn May 2, 2013.

[34] The actual observation of the landscaper, Mr. Bissonette, of the litter and water being thrown from the balcony, corroborates Mr. Schoenberger's, Mr. Henderson's and Mr. Daley's accounts. Mr. Bissonette is not a resident of the property and I find his evidence credible.

[35] I find that Mr. Pereira was throwing litter and feces from his balcony despite repeated requests that he not do so.

Non-Payment of \$169.50

[36] Mr. Pereira was asked to pay \$169.50 in charges from cleaning up the litter from the superintendent's patio.

[37] This was first sent in a letter by Mr. Atkin on February 13, 2012.

[38] A further demand was set out in the letter of June 19, 2012.

[39] The evidence indicates that this payment remains outstanding.

Mesh Screen on Balcony

[40] August 23, 2011: Mr. Pereira was sent a letter by the solicitor of the Corporation to remove a wire mesh screen or enclosure on his balcony forthwith.

[41] August 14, 2012: There is correspondence between the Corporation's counsel and Mr. Pereira's counsel that the screen balcony cover violates the *Condominium Act, 1998*, such that it was one of several reasons the Corporation was pursuing litigation.

[42] July 25, 2013: Mr. Atkin sent photos of the screen to Mr. Pereira's counsel and requested that it be removed promptly.

[43] The evidence of Mr. Atkin is, and it is not disputed by the respondent, that after July 25, 2013, the mesh screen on the balcony was finally removed.

This is two years after the first notice requesting compliance was sent and two months after this application was served.

Assault on Mr. Moores, Former Superintendent

[44] October 11, 2011, involved an incident on the elevator between Mr. Pereira and the former superintendent. It is not disputed by Mr. Pereira. He deposed in his affidavit that he and Mr. Moores had a history of “run ins over the previous several years which I believe arose out of the issues raised by the group of disenchanting unit owners.”

[45] Criminal charges of assault were laid against Mr. Pereira as a result of this incident. The charges were withdrawn after Mr. Pereira entered into a Peace Bond.

[46] Mr. Pereira wrote a letter of apology to Mr. Moores for what occurred. He wrote, “I take full responsibility for the events of that day and can assure you that this will never happen again. I have taken positive steps to deal with my own personal issues including seeking formal help.”

Theft of Lobby Bench

[47] November 29, 2011, involved an incident where Mr. Pereira moved a bench from the lobby to the tenant's work shop in the garage. This action was observed on video surveillance.

[48] It is not disputed that he was charged with theft but the charge was stayed.

[49] Mr. Pereira wrote a Letter of Reflection to the Ministry of the Attorney General taking full responsibility for moving the bench without consulting the building's board of directors in advance. He stated that in future he would deal with the appropriate authorities directly before taking any action.

[50] The Corporation's materials repeatedly referred to this incident as proof of theft.

Chiller Room Abuse

[51] May 17, 2012: Mr. Schoenberger deposes that he was in the chiller room discussing the air conditioning system with Nelson Alves, an owner. He states that Mr. Pereira entered the room and began yelling at him. Mr. Schoenberger could not make out the words due to the chiller noise. He said, Mr. Pereira left the room and then returned picking up a 20 foot ladder and throwing it in his

direction. It did not hit him. Mr. Pereira left the room but returned shortly after and took the ladder and left.

[52] Mr. Pereira's evidence is that he did go to the chiller room that day. Just prior, he deposes that he observed someone had urinated on his car. He was upset and "determined that the only person in the area was Joseph Schoenberger who was in the chiller room." Due to the noise he said he could not hear what Mr. Schoenberger said to him and does not believe Mr. Schoenberger could have heard what he said. Mr. Pereira states that, "in frustration I picked up a stepladder which was on the floor and dropped it back down on the floor." He denies throwing it in the direction of Mr. Schoenberger.

Verbal Assaults

[53] On March 19, 2013, Mr. Schoenberger deposed that while speaking with a building cleaner, Mr. Pereira exited the elevator and yelled at him as Mr. Pereira left the building. He called him a "f----ing cocksucker" and an "asshole".

[54] Mr. Schoenberger stated it made him fearful for his safety.

[55] Mr. Pereira's denies this and refers back to an incident in November 2011 when he states, Mr. Schoenberger disabled Mr. Pereira's fob and refused

to answer the phone or let him into the building. Mr. Schoenberger denies this occurred.

[56] On May 20 or 21, 2013, Ms. Sharon Flanagan, resident, deposed that she was in the lobby with Mr. Moores, the former superintendent, when Mr. Pereira approached them. She says that Mr. Pereira was yelling, "You're dead", first at Mr. Moores and then at her. She said he called her offensive names and waved his finger in her face before leaving the building.

[57] Ms. Flanagan states that in a short time, Mr. Pereira returned, parked at the front door and again yelled, "You're dead."

[58] Mr. Pereira simply denies these allegations and notes that Ms. Flanagan wrote an email to Mr. Atkin, asking if he has enough "fodder" for the legal action. The context of that remark is her note that "even as I write this I am shaking" and "however, this being said, if my words will help remove him from this bldg. and hopefully lock him up, and against Norman's advice (he fears for my safety), I'll do it. This man is most definitely dangerous and he will, one day, carry through with at least one if not many of his threats."

[59] Mr. Atkin, property manager, deposes that he suffered a number of verbal assaults by the respondent. On July 9, 2013, Mr. Atkin states that Mr.

Pereira verbally assaulted him in the building lobby yelling that he was a “f---ing asshole”, “cock sucker”, and “mother f---ker.”

[60] Mr. Pereira denies the allegation by Mr. Atkin and says that as he passed Mr. Atkin the man stated, “I am going to get you out of the building you asshole.”

[61] Also that day, resident, Rudy Davignon, deposed that as he parked his vehicle he was verbally assaulted by Mr. Pereira, using profanities.

[62] Mr. Pereira’s evidence is that Mr. Davignon saw him that day and said, “I am going to get you the f--- out of here.”

[63] Adriana Devin, owner, testified that on the evening of July 9, 2013, as she was leaving until 911 to go home to unit 912, she thought she saw Mr. Atkin and called to say hello. It turned out to be Mr. Pereira. Her evidence is that Mr. Pereira said, “It’s not f---ing Gary, you stupid f---ing cunt.” He added, “come and suck me off you f---ing cunt.” He then slammed his door causing everyone’s doors to rattle.

[64] Lynda Magnus, owner of unit 911, was at her door as Ms. Devin left and her evidence corroborates that of Ms. Devin. William Broderick, also resident of unit 911, overheard the profanities and the sound of a door being slammed.

[65] Mr. Pereira's evidence on this event is that there was an exchange with Ms. Devin. His description is that she realized he was not Mr. Atkin and then said, "Oh, it's only the f---ing asshole." He says he responded to her but does not state what he said. His evidence is that it was Ms. Devin that went in and slammed her door.

[66] George Goulart, assistant superintendent, deposed to an incident on September 10, 2013, the last hearing date scheduled for this matter. He observed Mr. Pereira exiting the elevator in the lobby where Mr. Schoenberger was standing and heard a spitting sound. Mr. Schoenberger deposed that Mr. Pereira stopped in the lobby and spit in his direction before heading to the underground.

[67] Mr. Pereira denies he did this.

Findings

[68] I am satisfied on a balance of probabilities that Mr. Pereira has behaved in an inappropriate and abusive manner, as described above, including the repeated use of threatening and offensive language.

Condominium Act, 1998

[69] Section 119 subsections (1) and (3) provide;

119(1) A corporation, the directors, officers and employees of a corporation, a declarant, the lessor of a leasehold condominium corporation, an owner, an occupier of a unit and a person having an encumbrance against a unit and its appurtenant common interest shall comply with this Act, the declaration, the by-laws and the rules.

119(3) A corporation, an owner and every person having a registered mortgage against a unit and its appurtenant common interest have the right to require the owners and the occupiers of units to comply with this Act, the declaration, the by-laws and the rules.

[70] Section 135(2) provides;

On an application, if the court determines that the conduct of an owner, a corporation, a declarant or a mortgage of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant, it may make an order to rectify the matter.

[71] Section 135(3) provides;

On an application, the judge may make any order the judge deems proper including; (a) an order prohibiting the conduct referred to in the application; and (b) an order requiring the payment of compensation.

Breach

[72] I am satisfied that on a balance of probabilities Mr. Pereira is in breach of sections 119(1) and 117 of the *Condominium Act, 1998* by:

(a) ejecting cat litter feces and water from his balcony at various times since 2010;

(b) failing to comply with the request to remove the balcony screen for two years, and only after this application was commenced; and

(c) repeatedly abusing employees and residents of the building verbally and physically in a manner that is threatening or intimidating to them.

[73] The issue then becomes what remedy is most suitable in the situation.

Case Law and Analysis

[74] Both parties referred me to the decision of Code J. in *Metropolitan Toronto Condominium Corporation No. 747 v. Korolekh*, 2010 ONSC 4448, 322 D.L.R. (4th) 443. The court was persuaded that an order requiring Ms. Korolekh to sell her unit and vacate within three months was justified in the unusual circumstances of that case. In particular, Ms. Korolekh's behaviour included, physical violence; use of a large aggressive dog to frighten and intimidate; extraordinary verbal abuse; interference with enjoyment of property; and actual damage to property. Ms. Korolekh was not chastened by warnings and took no opportunity to comply with her statutory duties.

[75] The facts in this case fall far short of this extraordinary behaviour. In a number of complaints made against Mr. Pereira, he ultimately complied.

[76] The breaches by Mr. Pereira that have continued are nonetheless serious and constitute breaches of the *Condominium Act, 1998*, the declaration and rules of the Corporation; therefore, they constitute actions by Mr. Pereira which are oppressive or unfairly prejudicial to the applicant and unfairly disregard the interests of the Corporation and the unit holders.

[77] The court in *Korolekh* referred to the decision of Perell J. in *York Condominium Corporation No. 136 v. Roth*, 2006 CanLII 29286 (Ont. S.C.). In that case, the Corporation also sought an order that the owner sell his unit. The basis for their request was Mr. Roth's unmanageable and antisocial behaviour.

[78] Perell J. described an order of forced sale to be "extraordinary relief" and "draconian". He wrote at para. 21,

In all the circumstances and, in part, because it would, in my opinion, not be just to require Mr. Roth to sell his home without providing him with an opportunity to show that he can abide by the rules that govern in his community, I believe the appropriate order is to direct him to control his behaviour, especially his manner of communicating with the officers and employees of the Condominium Corporation, so as to comply with the Act, declarations, by-laws and rules of the Condominium Corporation in default of which the Condominium Corporation may apply to the court: (a) pursuant to rule 60.11 for a contempt order; (b) pursuant to s.134 of the *Condominium Act, 1998* for such a further order to enforce compliance as the Court deems just; or (c) to both rule 60.11 and s. 134 of the *Condominium Act, 1998*.

[79] In this case, while the actions of Mr. Pereira are extremely serious and troubling, I too find that a lesser order requiring compliance would suffice.

[80] This court orders the following:

- a) Mr. Pereira shall pay the outstanding charge of \$169.50 within 30 days.
- b) Mr. Pereira shall not throw any objects or permit any objects (including water, except rain water) to be emitted from his balcony.
- c) Mr. Pereira shall comply with all provisions of the *Condominium Act, 1998*, and the declaration, by-laws and rules of the Corporation, including any restriction on the condition and use of his balcony and parking stall.
- d) Mr. Pereira shall refrain from verbally or physically assaulting or intimidating, threatening to assault or intimidation of any resident or person in or on the Condominium premises, including towards other residents, the superintendent, maintenance and repair workers, guests and anyone else lawfully entitled to be on the Condominium premises.
- e) Mr. Pereira shall refrain from any disruptive behaviour which would breach the rights of the residents and occupants of the Condominium premises to quiet enjoyment and use of their units and the Condominium premises.

f) Should Mr. Pereira breach the terms of this order, any further proceedings by the Corporation or other unit holders shall be entitled to repeat and rely on the incidents and actions of Mr. Pereira described herein, as evidence of a course of continuing obstructive and damaging behaviour of Mr. Pereira, which unfairly disregards the interests of the Corporation or other unit owners, in connection with any further relief sought against Mr. Pereira, including an order requiring Mr. Pereira to sell his condominium unit and move from the building.

g) I reserve on the issue of costs of this application. Both parties should address whether costs should be on a substantial indemnity basis.

[81] I asked the Corporation to serve written submissions on costs with 14 days by December 11, 2013. The respondent Mr. Pereira may make reply submissions by December 18, 2013.

M. J. Donohue J.

Released: November 28, 2013

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