Case Name:

Peel Condominium Corp. No. 33 v. Johnson

Between
Peel Condominium Corporation No. 33, and
Desmina Johnson

[2005] O.J. No. 2875
Court File No. CV-05-004700-00

Ontario Superior Court of Justice
D.F. Baltman J.

Heard: June 28, 2005.
Judgment: June 30, 2005.
(9 paras.)

Counsel:

George F. Vella, for the Applicant

David P. Brannan, for the Respondent

ENDORSEMENT

¶ 1 **D.F. BALTMAN J.** (endorsement):— This Application involves a dispute between Peel Condominium Corporation No. 33 (Peel) and one of its unit owners, Desmina Johnson. More specifically, it arises from Peel's insistence that Ms. Johnson paint her door brown rather than white. The door is now safely brown in colour but Peel wants me to appoint an Arbitrator to arbitrate the costs it incurred in getting Ms. Johnson to capitulate on the point.

¶ 2 The problem began when Ms. Johnson replaced the front door of her townhouse condominium, as it was in disrepair. When the new door arrived, it was white. Peel demanded that Ms. Johnson agree to have it painted brown in accordance with its responsibility under the Condominium Declaration to maintain the common elements. Peel had previously stipulated that all the doors in the condominium units be painted brown.

¶ 3 Ms. Johnson initially declined to have her door repainted, stating that as other owners had white doors so could she. Ms. Johnson was irate because she had had to replace the door out of her own pocket, and Peel had failed to repair other alleged defects in her unit.

¶ 4 On January 28, 2005, Peel wrote to Ms. Johnson proposing mediation. As Ms. Johnson failed to

respond, on March 2, 2005, Peel purported to commence arbitration proceedings by delivering an Arbitration Submission to Ms. Johnson under section 132 of the Condominium Act, 1998 (the Act), nominating Murray Miskin as the Arbitrator. Ms. Johnson then agreed to have the door repainted. However, rather than closing the door on the matter (so to speak), Peel insisted that Ms. Johnson repay the costs of $225.00 that it had incurred in producing and serving the Arbitration Submission. When Ms. Johnson declined, Peel proceeded with this Application before the Superior Court to appoint an Arbitrator to adjudicate the costs it had incurred pursuing mediation and arbitration.

¶ 5 Peel's position is that when the Condominium Corporation seeks compliance with the Act, it must first attempt to mediate and arbitrate before it may apply for a court Order. It relies upon ss. 134 and 132 of the Act, the relevant portions of which provide:

> 134(1) Subject to subsection (2), an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of a leasehold condominium corporation or a mortgagee of a unit 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 or an agreement between two or more corporations for the mutual use, provision or maintenance or the cost-sharing of facilities or services of any of the parties to the agreement. 1998, c. 19, s. 134(1); 2000, c. 26, Sched. B, s. 7(7).
>
> Pre-condition for application
>
> (2) If the mediation and arbitration processes described in section 132 are available, a person is not entitled to apply for an order under subsection (1) until the person has failed to obtain compliance through using those processes. 1998, c. 19, s. 134(2).
>
> 132(1) Every agreement mentioned in subsection (2) shall be deemed to contain a provision to submit a disagreement between the parties with respect to the agreement to,
>
> (a) mediation by a person selected by the parties unless the parties have previously submitted the disagreement to mediation; and
>
> (b) unless a mediator has obtained a settlement between the parties with respect to the disagreement, arbitration under the Arbitration Act, 1991,
>
> (i) 60 days after the parties submit the disagreement to mediation, if the parties have not selected a mediator under clause (a), or
>
> (ii) 30 days after the mediator selected under clause (a) delivers a notice stating that the mediation has failed. 1998, c. 19, s. 132(1).
>
> Application
>
> (2) Subsection (1) applies to the following agreements:
>
> 1. An agreement between a declarant and a corporation.
>
> 2. An agreement between two or more corporations.

3. An agreement described in clause 98(1)(b) between a corporation and an owner.

4. An agreement between a corporation and a person for the management of the property. 1998, c. 19, s. 132(2).

[emphasis added]

¶ 6 Peel maintains that the combined wording of ss. 132 and 134 required it to attempt mediation/arbitration before it could apply to the Court for compliance. Ms. Johnson, through her counsel, responds that the compulsory mediation/arbitration provisions do not apply here because there is no "agreement" between Peel and Ms. Johnson, as required by section 132(2). She argues that the only plausibly relevant subsection, s. 132(2)3, does not apply to this situation because there was no clause 98 (1)(b) agreement in effect between the parties.

¶ 7 Clause 98 agreements are agreements between a condominium owner and the Corporation made pursuant to the Regulations under the Act, regarding "an addition, alteration or improvement to the common elements." In his correspondence of June 20, 2005, to Ms. Johnson's counsel, Peel's counsel confirms that no such agreement exists here:

> Your client is required to obtain a Section 98 agreement before she alters the common elements. She failed to do so.

¶ 8 I agree with Ms. Johnson that as no such agreement exists here, section 132(2) does not apply. There is therefore no obligation upon Peel to seek mediation or arbitration before bringing an Application for compliance. The case of Carleton Condominium Corp. No. 291 v. Weeks [2003] O.J. No. 1204 (Ont. S.C.), to which Peel referred me, did not consider this issue directly and, therefore, is not helpful in this case. If Peel felt compelled to pursue Ms. Johnson for its costs even after the door was repainted, its proper remedy was to apply directly to the court for an Order enforcing compliance with the Act under s. 134(1). It has not done so, and Peels' counsel made it clear during argument that he was not seeking any Order from me regarding costs incurred in getting the door repainted, but instead wanted me to appoint an arbitrator to determine that issue.

¶ 9 The Application is therefore denied. Counsel may make written submissions on costs, no more than 3 pages each (1.5 spacing, proper margins), excluding attachments. Ms. Johnson shall submit by July 7, 2005 and Peel shall respond by July 11, 2005. If a reply is necessary, Ms. Johnson shall do so by July 13, 2005.

D.F. BALTMAN J.

QL UPDATE: 20050719
cp/e/qw/qlmxd