CITATION: Peel Standard Condominium Corporation No. 767 v. 2069591 Ontario Inc. (Costs), 2012 ONSC 5241
COURT FILE NO.: CV-10-406813
DATE: 20120925

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: PEEL STANDARD CONDOMINIUM CORPORATION NO. 767

Applicant

AND:

2069591 ONTARIO INC. and 2162202 ONTARIO INC. o/a FOOD CITY SUPERMARKET

Respondents

BEFORE: Mr. Justice Lederer

COUNSEL: *Syed Ali Ahmed*, for the Applicant

Larry D. Todd, for the Respondent, 2069591 Ontario Inc.

Dinesh Ramanathan, for the Respondent, 2162202 Ontario Inc.

COSTS ENDORSEMENT

[1] There were three parties to this application.

[2] The applicant condominium corporation was represented by Syed Ali Ahmed.

[3] The respondent, 2069591 Ontario Inc., the owner of Units 11 and 12 of the condominium was represented by D. Larry Todd.

[4] The respondent, 2162202 Ontario Inc., the tenant and the occupier of Units 11 and 12 was represented by Dinesh Ramanathan.

[5] For reasons that I am hard-pressed to explain, the title page of the decision released on June 6, 2012 makes no reference to the last of the three lawyers I have mentioned.

[6] The application was brought by the condominium corporation to enforce compliance with the *Condominium Act, 1998,* S.O. 1998, C. 19, the by-laws of the condominium corporation and

the declaration of the corporation (see: *Condominium Act, 1998,* s. 134(1)). In short, it was alleged that the occupant of Units 11 and 12 was in breach of rights exclusively held by another of the units to sell fresh meat and poultry. The application was successful. It was ordered that:

> 1. The respondent, 2162202 Ontario Inc. o/a Food City Supermarket, is required to comply with section 119(1) of the *Condominium Act, 1998* and Article III, 3.1(a) and (b) (viii) of the Declaration of Peel Standard Condominium Corporation No. 767 by ceasing and refraining from selling fresh meat and poultry, at retail, in Units 11 and 12 in contravention of the exclusive use rights of other units.
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> 2. The respondent, 2069591 Ontario Inc., is required to comply with section 119 (1) and (2) of the *Condominium Act, 1998* and to take all reasonable steps to ensure that it's tenant complies with Article III, 3.1 (a) and (b) (viii) of the Declaration of Peel Standard Condominium Corportion No. 767 by ceasing and refraining from selling fresh meat and poultry.

[7] In seeking costs, the applicant relies on the *Condominium Act, 1998*, s. 134(5), which states:

> If a corporation obtains an award of damages or costs in an order made against an owner or occupier of a unit, the damages or costs, *together with any additional actual costs to the corporation in obtaining the order*, shall be added to the common expenses for the unit and the corporation may specify a time for payment by the owner of the unit.
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> [Emphasis added]

[8] As counsel for 2062202 Ontario Inc. (the owner of Units 11 and 12) pointed out in his submissions as to costs, the section provides a mechanism to enforce payment of the costs it allows for. This was referred to in *Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc.* CanLII 13778 (ONCA):

> Not only does s. 134(5) give a condominium corporation a broad right of recovery for costs incurred in obtaining compliance orders, it also provides an effective enforcement mechanism for the collection of those costs. The section declares that the 'award of costs' and the 'additional actual costs' may both be added to the common expenses for the unit. If the amounts are not paid, the condominium corporation may register a lien against the unit. The lien is enforceable in the same way as a mortgage (s. 85(2), s. 86(6)). Section 86 of the Act gives a s. 85(1) lien priority over almost all other encumbrances including mortgages. Consequently, if the costs described in s. 134(5) are not paid, the condominium corporation can recover that amount through the sale of the unit.
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> (*Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc., supra*, at para. 39)

[9] The section goes further. Its background and impact was also discussed in *Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc.* In his reasons, Mr. Justice Doherty reviewed the policy rationale behind this statutory provision:

> The affidavit material filed by MTCC and Skyline reveals that during the consultative process leading up to the enactment of the present legislation in December 1998, various groups addressed what they saw as the need to provide for the recovery by condominium corporations of any costs associated with the obtaining and enforcing of compliance orders against unit owners. These groups submitted that since condominium corporations were duty-bound to enforce compliance with their declarations and rules for the benefit of all unit owners, they should not bear any of the costs associated with obtaining and enforcing court orders requiring such compliance. These groups argued that the offending unit owners should have to compensate the condominium corporation for all costs incurred in obtaining and enforcing compliance orders against those unit owners.
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> Section 134(5) went some way towards addressing the concerns expressed in these submissions. The section declares that the corporation may recover both 'an award of costs' and 'any additional actual costs'. Clearly, the language of s. 134(5) contemplates recovery by the condominium corporation of costs beyond those that are addressed in a court order so long as those costs were actually incurred by the condominium corporation and were incurred in obtaining the compliance order.
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> (*Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc., supra*, at paras. 37 and 38)

[10] Mr. Justice Doherty explained the impact of section 134(5):

> My review of the terms of s. 134(5) leads me to agree with counsel for MTCC's submission that the section was intended to shift the financial burden of obtaining compliance orders from the condominium corporation and ultimately, the innocent unit owners, to the unit owners whose conduct necessitated the obtaining of the order. Furthermore, the section was enacted to provide a means whereby the condominium corporation could, if necessary, recover those costs from the unit owner through the sale of the unit.

[11] I take this to mean that, in considering an award of costs where an order requiring compliance with the *Condominium Act, 1998*, the by-laws or declaration of a condominium corporation is made, the costs considerations extend beyond the normal scales to encompass all that may have been involved in obtaining the order. This is not to say that the claimant does not have to demonstrate the costs expended were reasonable. It simply expands the nature of legal costs to account for the costs that the applicant will properly be required to pay to his own lawyer:

> Reading the words of s. 134(5) as informed by the well-recognized distinction between costs that are awarded between parties and costs that are payable as between a party and its own lawyer makes the meaning clear to me. 'Additional actual costs' will refer to those legal costs properly owed by MTCC to its lawyers above and beyond the amounts awarded for costs by the court or in a court ordered assessment. Those 'additional legal costs' are properly added to the common expenses of the unit pursuant to s. 134(5) so long as they were incurred 'in obtaining the order'. As actual legal costs refers to those costs properly claimed by a lawyer against his or her own client, the principles governing the assessment of legal bills as between a lawyer and his or her client, should govern any dispute between MTCC and Skyline as to the propriety of any part of the legal bills relied on by MTCC in support of a claim for 'additional legal costs' under s. 134(5): see Mark M. Orkin, *The Law of Costs*, 2nd ed., looseleaf (Aurora, Ont: Canada Law Book Inc., 2004) at 602ff.
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> (*Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc., supra*, at para. 45 and see paragraph 8)

[12] On this basis, the applicant condominium corporation seeks costs of $32,663.86. Dockets were provided. There is no suggestion that the amount claimed represents anything other than costs expended "in obtaining the order". Moreover, while s. 134(5) of the *Condominium Act, 1998* allows for "additional actual costs" to extend to non-legal costs (see: *Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc., supra*, at para. 56), there is nothing to which the court was directed to suggest that the costs claimed respect anything other than legal costs.

[13] Nonetheless, counsel for 2069591 Ontario Inc. submitted that his client should not have to pay any costs. It consistently took the position that the exclusive use provision should be complied with. As counsel sees it, the fact that 2162202 Ontario Inc., the tenant and occupier of the Units 11 and 12, was not at any meeting directed to resolving the issue without resort to the courts is the fault of the applicant condominium corporation because it "organized all such meetings". To me, the problem with this is self-evident. It is the owner that has a direct relationship with the condominium corporation. As owner, it has the first responsibility to see that the requirements of the corporation are complied with. It cannot sidestep this responsibility because it acknowledged that its tenant was disregarding the exclusive use provisions or because it was the condominium corporation that tried to find an accommodation. The owner went on to submit that any costs that are awarded should be paid by the tenant.

[14] For its part, 2162202, the tenant and occupier of Units 11 and 12, also believes that the applicant condominium corporation should be left to pay its own costs. This springs from the proposition that the corporation was "negligent" when its representatives drafted a document referred to as a "Mediation Settlement...using unconditional language". While it is not clear, I believe this is based on the notion that it contributed to an understanding held by the owner and the tenant that there was a settlement when, in fact, no agreement existed. It says this in circumstances where it was not present at the meeting where it was suggested the settlement was

reached and where I have found it never confirmed its own agreement to the proposed arrangement. The tenant went on to submit that any costs that are awarded should be paid by the owner.

[15] The applicant made a settlement offer. It offered arbitration. This does not assist in considering the costs to be awarded. There is no way of knowing whether, or to what extent, an arbitration would have been successful.

[16] In the circumstances, I see no reason why the applicant should not be awarded costs as outlined in s. 134(5) of the *Condominium Act, 1998*. To do otherwise would be to ignore the policy direction behind this provision. Moreover, there is no reason to reduce the value of the costs sought. Given all that was undertaken, the amount is reasonable and reflects the cost of obtaining the order.

[17] The question that remains is how to distribute the liability for the costs that should be paid. In the normal course, one might expect that they would be awarded jointly and severally against both 2069591 Ontario Inc. as the owner and 2162202 Ontario Inc., as the tenant or occupier of the Units 11 and 12. The difficulty, if there is one, is that the enforcement provisions in the *Condominium Act, 1998,* both adding the costs to the common expenses (s. 134(5)) and the registration of a lien (s. 85(1)) are directed to the owner. I seek to make it clear that the tenant is to pay its share. Accordingly, I order the following:

1. Costs in the amount of $32,663.86 are to be paid to the applicant.

2. The owner is liable for the full amount but, upon payment, is entitled to collect up to ($32,663.86 divided by 2) $16,331.93 as costs from the tenant. The amount that can be collected is to be reduced by any amount the tenant pays directly to the applicant up to a total of $16,331.93.

LEDERER J.

Date: 20120925