

Case Name:

Sauve v. Paglione

Between

Eugene Allen Sauve, Moving Party (Plaintiff), and
Franco Paglione, Donelda Haycock, Peter Boer, Steven
Topley, Craig Woodford & Middlesex Condominium
Corporation, Responding Parties (Defendants)

[2006] O.J. No. 3523

Court File No. 1242/06

**Ontario Superior Court of Justice
Small Claims Court - London, Ontario
J.D. Searle Deputy J.**

Heard: September 1, 2006.

Judgment: September 7, 2006.

(25 paras.)

Counsel:

Counsel for the moving party: self represented

Counsel for the responding party: Michael Biderman, agent

REASONS FOR ORDER

¶ 1 **J.D. SEARLE DEPUTY J.:**— The plaintiff is the owner of a unit in the corporate defendant's condominium located in the city of London in the county of Middlesex. The individual defendants are directors of the corporation. Some of those directors are also officers.

¶ 2 The threshold issue on this motion is whether the Small Claims Court has jurisdiction to grant the relief sought in this motion brought by the plaintiff.

¶ 3 In the "Type of Claim" portion of his Claim form commencing this action the plaintiff seeks:

Damages under the Condominium Act 1998, Ontario, known as the Act s. 55(8), (9) and (10)

¶ 4 The opening paragraph reads:

This Plaintiff's Claim is submitted to obtain from the Defendants the right of access of an owner to the records of the owners who have notified the corporation in writing of the owner's name and address for service on file with Middlesex Condominium Corporation No. 161 and used to send notices to owners.

In this motion the plaintiff seeks orders:

1. To prohibit the responding parties from expending Corporation funds to finance their defense in these actions until the tribunal has determined if anyone, or all, the responding parties are disqualified from doing so under the Condominium Act 1998, Ontario, known as the Act, s. 38(2), EXHIBIT 4. To further order that any corporate funds expended by any board member prior to this ruling be returned to the corporation until the Court has ruled on the question.
2. To direct the responding parties to deliver to the plaintiff the names of owners and addresses of service held in Corporation records that the Act specifies the plaintiff may use in subsections 34(5), 43(2) and 46(5).

¶ 5 A perusal of the forty-six paragraph Claim suggests the plaintiff's case can be summarized as follows: on December 7, 2005, the board notified the unit owners it had passed a set of Rules. The plaintiff was so notified but does not like the Rules or some of them. Those Rules are in force beginning thirty days after the notice unless the board receives a requisition for a meeting of owners to discuss the proposed Rules. Such a requisition must be in writing and signed by owners who own at least "15 per cent of the units ...". The plaintiff wished to organize such a requisition but was having difficulty doing so without access to the list of owners on record with the corporation. The corporation refused, citing privacy laws, to give the plaintiff access to the list of owners on record. The corporation is required to keep such a record. With certain exceptions set out in s. 55(4) of the Act a unit owner such as the plaintiff is entitled to examine the records of the corporation. The record the plaintiff seeks to examine does not fall within the exceptions.

¶ 6 Further, s. 55(8) provides that unless the corporation has a "reasonable excuse" for not permitting an owner such as the plaintiff to examine or copy the corporation's records the corporation shall pay that owner \$500.00 upon receiving a written request for same. By s. 55(9) "[t]he owner may recover the \$500.00 from the corporation by an action in the Small Claims Court." Unless the corporation has a "reasonable excuse" for denying the right to examine or copy records under s. 55 ss. (10) thereof "the Small Claims Court may order the corporation to produce the records for examination."

¶ 7 That ends the court's summary of the plaintiff's Claim.

¶ 8 The materials filed on the motion, especially by the plaintiff, are extensive and total an estimated 150 to 200 sheets. Those materials contain, among other things, an affidavit with fifty exhibits and his written argument consisting of eight pages single-spaced. The materials have been meticulously prepared by an apparent layperson. The court reserved and has examined all the materials. Some of them are relevant to this motion, some might be relevant at the trial and some, particularly the vast tracts dealing with the recently-passed condominium rules, would be relevant only if and when a meeting of unit owners occurs.

¶ 9 It must be said that the statute law proffered by both sides is not in satisfactory form: the plaintiff's version is reproduced from a text which is now somewhat dated. The defendants' version is reproduced from an unidentified handbook and references to the "Ontario Court (General Division)" suggest the material dates from 1996 or earlier. The court deemed it necessary, in order to create these reasons and make the orders below, to locate and rely upon a version of the Condominium Act current to August 26, 2006.

¶ 10 The plaintiff's written argument begins with a request that "all parties stipulate" that the corporate defendant "be stricken from the list of defendants." On the hearing of the motion the court did not hear any consent from the defendants' representative. The plaintiff's materials, including the first

item of relief sought on this motion, make it abundantly clear that he is trying to separate the directors from the corporation and make them personally liable for the expense of defending this action. The relief sought in this action is clearly statutory and found in ss. 55(8) and (10) of the Condominium Act. That relief is clearly available only against the condominium corporation. If the corporation ceases to be a defendant the plaintiff's Claim is highly vulnerable to being struck.

¶ 11 In the course of written and oral argument and in the supporting materials the parties, particularly the plaintiff, refer to numerous sections of the Act. The court has examined those sections and finds the following sections to be inapplicable or irrelevant to the issues on this motion: 34, 37, 38, 43 and 52.

¶ 12 The defendants appeared on this motion and made oral argument but filed no material other than dated excerpts of the Act. In their Defence to the plaintiff's Claim they plead that the Small Claims Court "does not have jurisdiction to hear this application." At least to date there is no "application" and the court takes that to be a reference to the action. The reference to lack of jurisdiction in this court is understood to be a reference in particular to s. 96 of the Courts of Justice Act R.S.O 1990, c. C.43 and amendments thereto and to s. 130 of the Condominium Act.

¶ 13 In this motion the plaintiff seeks firstly an order prohibiting the defendants from expending the corporation's funds in defending this action and an order that such funds already expended be returned to the corporation.

¶ 14 In his text *The Law of Equitable Remedies*, Irwin Law, 2000 Professor Berryman defines an injunction in his introduction to Chapter 2 as "an order granted by a court of competent jurisdiction that instructs a (legal) person to do, or refrain from doing, a particular thing." An injunction is an equitable remedy. What the plaintiff seeks in the two branches of the first part of this motion are interlocutory injunctions. That raises the issue of the jurisdiction of the Small Claims Court.

¶ 15 Section 96(3) of the Courts of Justice Act reads:

Only the Court of Appeal and the Superior Court of Ontario, exclusive of the Small Claims Court, may grant equitable relief, unless otherwise provided.

¶ 16 When the Small Claims Court was re-created several years ago it was re-created as "a branch of the Superior Court of Justice." As a result there was an apprehension the legislature intended to confer generally on the Small Claims Court power to grant equitable remedies. The legislature responded by inserting in ss. 3 the phrase "exclusive of the Small Claims Court".

¶ 17 No conference of the power on this court to grant the relief sought in the first part of this motion was brought to the court's attention and so the first part of the motion is dismissed.

¶ 18 The second part of the motion seeks an order directing the responding parties to deliver from the corporation's records the names and service addresses of the unit owners in the condominium. This too amounts to a request for injunctive relief but it is different.

¶ 19 In Professor Berryman's text, *supra*, he makes the blanket statement "there is no power in Ontario's Small Claims Court to issue an interlocutory injunction." However, in the subsequent case of 936464 Ontario Limited c.o.b as Plumbhouse Plumbing & Heating v. Mungo Bear Limited [2003] O.J. No. 3795 the Divisional Court in the person of Heeney J. heard an appeal from the Small Claims Court. In extensive and heavily-researched *obiter dicta* Justice Heeney discussed the words "unless otherwise

provided" found at the end of s. 96(3) and described them at paragraph 24 as being "of critical importance." Those words indicate to him there "is not a blanket prohibition against the Small Claims Court granting equitable relief, but instead a qualified one that will permit the exercise of that power if it is otherwise provided." As an example of how the legislature has "otherwise provided" Justice Heeney cited s. 23(1)(b) of the Courts of Justice Act which gives the Small Claims Court the jurisdiction to make an order for the delivery up of possession of personal property, an equitable remedy.

¶ 20 Section 55 of the Condominium Act reads in part:

If a corporation without reasonable excuse does not permit an owner or an agent of an owner to examine records or to copy them under this section, the Small Claims Court may order the corporation to produce the records for examination.

¶ 21 It is obvious the concluding words "order the corporation to produce the records for examination" are amenable to at least two interpretations: they could mean production to the trial judge for examination to enable the trial judge to properly adjudicate the issues or they could mean production to enable the owner to examine them.

¶ 22 In the order which is about to be made that question will be left to the trial judge but in the tentative view of this court on this motion, if the words mean examination by the owner they are an example of how the legislature has "otherwise provided."

¶ 23 The defendants contend Part IX of the condominium Act, particularly s. 130, mitigates against the power said to be granted to the Small Claims Court by s. 55. Section 130 permits the Superior Court of Justice, upon the application of certain persons, to appoint an inspector to, *inter alia*, "investigate the corporation's records mentioned in subsection 55(1)." In the view of this court the fact the legislature has granted the apparently full Superior Court jurisdiction for certain purposes does not derogate from the power granted to the Small Claims Court for the limited purpose set out in s. 55.

¶ 24 Even though this court is inclined to the view it has the power to order production of the records sought by the plaintiff it should not do so because the exercise of that power requires a finding that the refusal to permit the plaintiff to examine or copy the requested records was "without lawful excuse." That can only be done after evidence is given and tested and full argument is made. That requires a trial.

¶ 25 The motion is dismissed. Costs of the motion are reserved to the judge or deputy judge finally disposing of this proceeding.

J.D. SEARLE DEPUTY J.

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