

CITATION: Toronto Common Elements Condo. Corp. No. 2041 v. Toronto Standard
Condo. Corp. No. 2051, 2015 ONSC 4245
COURT FILE NO.: CV-13-493321
DATE: 20150630

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:)
)
TORONTO COMMON ELEMENTS) *Jonathan H. Fine*, for the Applicant
CONDOMINIUM CORPORATION 2041)
)
Applicant)
)
- and -)
)
ALL UNIT OWNERS OF TORONTO) *Christopher J. Jaglowitz*, for the
STANDARD CONDOMINIUM) Respondents
NO. 2051 AS LISTED IN SCHEDULE A)
TO THE NOTICE OF APPLICATION)
)
Respondents)

JUDGMENT

D.L. Corbett J.:

[1] This is a claim for unpaid common expenses, plus interest, from a common elements condominium corporation against 112 unit owners in a condominium corporation located on one portion of the lands in respect to which the common elements corporation was established. The claim is for \$127,500, of which \$50,400 is accrued interest.

[2] This dispute is really about two main issues: the quantum owed by TSCC for common elements expenses to November 2013, and the consequences, if any, of TCECC's failure to pursue its claims for common expenses prior to November 2013. The application presents a few discrete legal issues that bear on these issues. The balance of the dispute is minor and should be dealt with by mediation/arbitration under the *Condominium Act*.

[3] For the reasons that follow:

- (a) TCECC's claims for expenses and TSCC's claims to set-offs arising prior to November 1, 2011 are dismissed;
- (b) TCECC's claim for interest accruing up to November 1, 2013 is dismissed;
- (c) The balance of the issues on the application are to be pursued through the mediation/arbitration provisions of the *Condominium Act*, with an effective commencement date of those proceedings being the date this application was commenced for the purposes of interest accruing from November 1, 2013, and for the purpose of limitations issues;
- (d) The balance of the application is dismissed with costs to be agreed or fixed by this court as described below.

Overview

[4] The applicant ("TCECC") is the common elements corporation for 31 parcels of tied land ("POTLs"). Toronto Standard Condominium Corporation No. 2041 ("TSCC") is a high-rise building located on one of the 31 POTLs. It is comprised of 112 dwelling units. The other 30 POTLs are freehold townhomes.

[5] The named respondents are the unit owners of TSCC.

[6] Under its declaration, TCECC is to provide various services including snow clearing, landscaping, collection of refuse and visitor parking.¹ To pay for these services, TCECC has the duty to budget for, assess and collect common expenses from POTL owners and to deliver financial statements.²

[7] TCECC was created on December 16, 2009.

[8] TSCC was created on February 1, 2010.

[9] A budget for TCECC's first year of operation was prepared by the declarant before TCECC was created in 2009, as required by the *Condominium Act*. TCECC did not otherwise prepare budgets or seek payment of common expenses until October 2013, nearly four years later.

What Went Wrong Here?

¹ Declaration of CCECC, Application Record, tab 2A, ss. 3.5, 3.6, 4.2(c).

² Declaration of CCECC, Application Record, tab 2A, ss. 2.1, 2.2, 7.1(c); By-Law No. 1 of CCECC, Application Record, tab 2M, ss. 4.1, 5.5, 11.1 – 11.4.

[10] On the record before me, I am satisfied that events proceeded as follows up to the summer of 2013. TCECC was organized and directed by the declarant. The property was still being developed. TCECC did not get around to organizing its financial information. No common expenses were billed or collected. No financial statements were prepared. TCECC and the declarant seem to have had an arrangement under which TCECC performed common expense work and was deemed to have paid its proportionate share of common expenses in its capacity as owner of POTLs it had not yet sold.

[11] There is dispute about the extent of the services provided by TCECC and/or the declarant up to the summer of 2013. Certainly some services were provided. It also seems likely that TSCC also paid for some services that were the responsibility of TCECC. However, if those payments are considered common expenses, then TSCC would be required to pay its proportionate share of those expenses: that is, in effect, any set-off for common element expenses paid by TSCC would be only partial.

[12] The declarant realized that it had been paying the costs for common expenses that were properly TCECC expenses and shareable among all 31 POTLs. It then had TCECC's financial statements prepared and sought payment of past common expenses. TCECC did not have proper documentation for all its expenses, and the declarant prepared documents to reflect charges it felt reasonable for its own work to perform services payable as TCECC common expenses.

[13] TCECC sought to collect these common expenses going back to 2010, and also claimed interest at the rates prescribed in the *Condominium Act*, even though it had not billed for or documented these expenses prior to October, 2013.³

The Proper Parties

[14] The amount of the claim – including the large interest component – is slightly over \$1,000 per unit for TSCC's unit holders. The principal amount of the claim is under \$700 per unit. And yet TCECC has named and pursued each unit holder of TSCC individually and has prepared and registered liens against each of their units.

[15] TSCC admits to being liable as a principal for any amounts that may be found due to TCECC in respect to these claims. A judgment against TSCC is also a judgment against each owner of TSCC, in proportion to her share in TSCC.⁴

³ The financial statements for 2010, 2011 and 2012 were provided on October 31, 2013, and the statements are dated July 19, 2013: *Replacement Application Record*, tabs 2G, 2H and 2I.

⁴ *Condominium Act*, S.O. 1998, c.19, s.23(6).

[16] Under TSCC's Declaration, it has duties to perform and be bound by the terms of the common elements condominium declaration and by-laws, and to collect the common expenses from owners in respect to the POTL.⁵

[17] Technically it is possible for TCECC to assert its claims against each of the 112 owners individually – just as it is possible to name the individual partners of a partnership rather than just naming the firm. But what is the point? The claim is the same. Aside from the s.85 lien, the remedy is the same. But placing a s.85 lien against each of 112 units is expensive. I agree that this is “a powerful remedy”. But why use it here if not solely for the purpose of making the proceedings expensive and cumbersome?

[18] I agree with the respondents that the appropriate responding party is TSCC.

Limitations

Limitation Period is Two Years for the Claim in Debt

[19] This application was commenced in November 2013. Claims in this proceeding arising prior to November 2011 are outside the two year limitation period prescribed by the *Limitations Act*.⁶

[20] The applicant claims that it is entitled to a ten year limitation period pursuant to the *Real Property Limitations Act*. I do not agree. The applicant has a claim for money, not to an interest in real property. Thus this case is distinguishable from *Equitable Trustco v. 2062277 Ontario Inc.*, where the guarantee at issue was part of a registered mortgage, which is an interest in real property.

Lien Rights for Common Expense Claims Expire in Three Months

[21] Lien rights in respect to common expenses expire after three months.⁷

[22] TCECC argues that arrears in common elements expenses are “damages” to TCECC which may be awarded to it pursuant to s. 134 of the *Condominium Act*, and thence collected as current arrears subject to the statutory lien in s.85 of the *Act*. The effect of this logic would be to revive extinguished lien rights and was rejected by Low J. as not “fair and equitable” in *TSCC 1908 v. Stefc*.⁸ Subsequent to oral argument of this

⁵ Declaration of TSCC, s.11.1(a) and (f), Schedule E, item 10.

⁶ *Limitations Act*, S.O. 2002, c.24, Sch. B, s.4; Channa v. *Carlton Condominium Corporation No. 429*, 2011 ONSC 7260, para. 37.

⁷ *Condominium Act*, s.85.

⁸ *Toronto Standard Condominium Corporation No. 1908 v. Stefc*, 2013 ONSC 7709, paras. 53 and 54.

application, the Court of Appeal affirmed Low J.'s decision but held that s.134 cannot be used to convert arrears to damages and then back to fresh arrears:

There is nothing in the language of s.134 that evidences any intention on the part of the legislature to permit common expenses to be classified as damages so that they can be reclassified back to being common expenses. This circular statutory interpretation argument is simply not borne out by the wording of the section.⁹

The Court of Appeal's decision in *Stefco* is a complete answer to TCECC's argument on this point.

TSCC Did Not Acknowledge the Debt

[23] I do not accept TCECC's assertion that TSCC has acknowledged the debt for prior common elements expenses in an email from Mr Hoosein of September 3, 2013. First, the email does not comply with the requirements of s.13(1) of the *Limitations Act*: it is not signed and does not acknowledge any particular amount that is owing. Further and in any event, the email would not apply to claims that had expired already. Even if it was thought that the email could be a legal acknowledgment of debt, it was sent on September 3, 2013, and would not have the effect of reviving claims arising prior to September 3, 2011. Thus the status of the email is relevant only to two months of the claimed expenses and interest.

Summary

[24] The limitation period is two years. Expired lien rights cannot be resurrected by characterizing the claim for common expenses as a damages claim. TSCC did not acknowledge liability to pay the debt in September 2013. The claim was commenced in November 2013 and claims that arose more than two years prior to that time are barred. These principles apply with equal force to any claims for set-off asserted by TSCC.

Precondition for this Proceeding Is Not Satisfied

[25] This case is not really about non-payment of common expenses. It is about disputes over common expenses. Of course the owners must pay their share of common expenses. TSCC does not deny this, and is in a position to pay, but disputes liability for a host of reasons, all of which are properly addressed through the mediation and arbitration

⁹ *Toronto Standard Condominium Corporation No. 1908 v. Stefco Plumbing & Mechanical Contracting Inc.*, 2014 ONCA 696, para. 51.

provisions of the *Condominium Act*. That process should have been followed in this case.¹⁰

[26] Subsection 134(2) makes it a precondition for an application such as this one that the claimant “obtain compliance through ... the mediation and arbitration processes described in section 132” if those process “are available”.¹¹ Subsection 132(4) provides:

Every declaration shall be deemed to contain a provision that the corporation and the owners agree to submit a disagreement between the parties with respect to the declaration, by-laws or rules to mediation and arbitration in accordance with clauses (1)(a) and (b) respectively.

[27] This is, at heart, just such a dispute. The respondent challenges the applicant’s failure to discharge its duties in respect to common expenses, and its delay in pursuing them. These duties arise under the declaration and by-laws. The respondent claims that the applicant failed to provide the services for which the common expenses are sought, and seeks a set-off in respect to common expenses it has paid for itself. The respondent claims that the common expenses sought by the applicant were not arm’s length and are inflated. It seems clear that the respondent is correct about some of the expenses being not at arm’s length. It also seems clear that the respondent has paid for some items that should have been chargeable as common expenses, though the merits of a set-off claim in respect to those expenses are not clear given the respondents’ rateable responsibility for these expenses in any event.

[28] The primary dispute here is not over legal liability but the fair and reasonable adjustment of accounts. It is not primarily a dispute about the *Condominium Act*, but rather over the alleged failure of the applicant to discharge its obligations in connection with common expenses, as set out in detail in the declaration, by-laws and rules of TCECC. This is precisely the sort of mundane issue that ought to be sorted out in the less expensive and faster process of mediation/arbitration, rather than through litigation in the Superior Court.¹²

Interest

[29] It would be inequitable for the applicant to charge interest before it had made demand for the common expenses or complied with its obligations to prepare financial

¹⁰ TSCC submitted this dispute to mediation in accordance with s.132 of the *Condominium Act*: Exhibit “N” to the Hoossein Affidavit.

¹¹ *Condominium Act*, S.O. 1998, c.19, s.134(2).

¹² See *MTSCC No. 1143 v. Peng*, 2008 CanLII 1951 (Ont. SCJ), per Pattillo J.; *MTSCC No. 562 v. Froom*, 2006 CanLII 28087 (Ont. CA); *York Region CC No. 890 v. 1185010 Ont. Inc.*, [2007] OJ No. 4103 (SCJ).

statements and account for the common expenses. There should be no interest charged or payable prior to the date on which the statement of claim was issued. If it was thought necessary, I would dispense with any requirement to pay interest during this period pursuant to s.98 of the *Courts of Justice Act*.

[30] Arrears for the period 2011 to 2013 will be subject to interest accruing starting in November 2013, when the applicant commenced this application. The rate to be applied to these arrears will be in the discretion of the mediator/arbitrator, such discretion to be exercised on the usual factors, including, if necessary, relief from forfeiture to relive from a punitive rate of interest if the circumstances so warrant. By way of example, and without limiting or binding the mediator/arbitrator, to the extent that it may appear that the applicant has failed in its duties to document and account for common expenses, or has otherwise conducted itself in a manner that precipitated conflict over the quantum owed for these expenses, it may be appropriate to award interest at the *Courts of Justice Act* rather than at some higher rate.

Precondition for this Proceeding Is Not Satisfied

[31] This case is not really about non-payment of common expenses. It is about disputes over common expenses. Of course the owners must pay their share of common expenses. TSCC does not deny this, and is in a position to pay, but disputes liability for a host of reasons, all of which are properly addressed through the mediation and arbitration provisions of the *Condominium Act*. That process should have been followed in this case.

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¹³ *Condominium Act*, S.O. 1998, c.19, s.134(2).

claims that the common expenses sought by the applicant were not arm's length and are inflated. It seems clear that the respondent is correct about some of the expenses being not at arm's length. It also seems clear that the respondent has paid for some items that should have been chargeable as common expenses, though the merits of a set-off claim in respect to those expenses are not clear given the respondents' rateable responsibility for these expenses in any event.

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Order

[35] Order to go on the terms set out in paragraph 3, above. If the parties cannot agree on costs then the respondent shall provide its submissions by July 10, 2015 and the applicant shall provide its costs submissions by July 24, 2015. The parties may vary this schedule by agreement between counsel provided that all costs submissions are delivered to the court no later than September 11, 2015.

[36] As a final note, the parties should bear in mind that they are in a long term relationship and need to deal with each other fairly and reasonably. The approach taken to this dispute thus far seems inconsistent with this common sense observation.

[37] This decision says nothing about the availability or merits of potential claims by the applicant against its former directors and property managers or against the declarant.

D.L. Corbett J.

Released: 20150630

¹⁴ See *MTSCC No. 1143 v. Peng*, 2008 CanLII 1951 (Ont. SCJ), per Pattillo J.; *MTSCC No. 562 v. Froom*, 2006 CanLII 28087 (Ont. CA); *York Region CC No. 890 v. 1185010 Ont. Inc.*, [2007] OJ No. 4103 (SCJ).

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