

COURT FILE NO: 07-CV-341144PD3

DATE: 20080610

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: TORONTO STANDARD CONDOMINIUM CORPORATION No. 1510

Applicant

- and -

JOHN WAYNE MCCAULEY AND ANNE MCCAULEY

Respondent

BEFORE: The Honourable Madam Justice Darla A. Wilson

COUNSEL: *Alyssa Minsky,*
for the Applicant

George F. Vella,
for the Respondents

HEARD: June 6, 2008

WILSON D.A., J:

ENDORSEMENT

[1] This application was issued October 3, 2007 against the respondents, J.W. McCauley and Anne McCauley, who are owners of a unit in the condominium owned by the applicant. The application seeks a variety of relief: an order requiring the respondents to comply with the Condominium Act, 1998 ("the Act") and the Declaration, By-laws and Rules of the condominium; a declaration that Ms. McCauley violated sections 27(1) and 116 of the Act and must reimburse the applicant \$1,155.60; a declaration that Mr. McCauley violated sections 226 and 117 of the Act and must

reimburse the applicant the sum of \$6,300.00 in damages; and costs. The respondents vociferously oppose the application.

[2] At the outset, counsel for the respondents brought a motion to strike various paragraphs of the affidavits filed in support of the application on the basis that they did not comply with Rule 39.01(5) of the Rules of Civil Procedure. That provision requires that affidavits filed on applications **may contain statements of the deponent's information and belief with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit** (emphasis mine). I ruled on that motion at the outset and struck the following paragraphs on the basis that they dealt with facts that were contentious between the parties or the source of the information was not specified: affidavit of S. Mezelski, paragraphs 5A, 16, 17, 20, 21, 23 (apart from the first sentence); affidavit of J. Gallo, paragraphs 5, 7, 8, 11, 14, 16 (with the exception of the final sentence); affidavit of R. Khalid, paragraph 13.

Claims against Anne McCauley

[3] The applicant asserts that Ms. McCauley violated s 27.1 of the Act which states that a Board of Directors shall manage the affairs of the corporation. The basis for this argument is the allegation that in April of 2006, Ms. McCauley instructed the landscaper at the condominium concerning some plants and she did not have the authority of the Board to do so. Further, repayment of the sum of \$1,155.60 is sought from this respondent for an invoice rendered by the landscaper in June of 2006 for 6 summer planters.

[4] In her affidavit sworn March 4, 2008, Ms. McCauley denies giving instructions to the landscaper of the condominium in April of 2006 with respect to plantings and states that while on the House Committee in 2005 she was involved in the winter plantings at the condominium and provided instructions to the landscapers at that time. In support of her denial, Ms. McCauley deposes that she contacted the landscaper to have her attend at a Board meeting to confirm that she was not instructed by the respondent in April of 2006 concerning plants for the condominium but this offer was not acceded to by the Board.

[5] While counsel for the applicant argued that in cross-examination, Ms. McCauley acknowledged that she "possibly" could have spoken to the landscaper in the spring concerning the plantings, a review of the transcript makes it clear that the deponent was adamant that she did not instruct the landscapers in the spring of 2006 to do anything concerning the planters—her involvement had been with the winter plantings in 2005. Ms. McCauley testified that she spoke with the landscaper in the spring of 2006 about obtaining some plants for her own unit.

[6] The only evidence offered by the applicant on this issue is the bald statement of Shoshana Mezelski in her affidavit that Ms. McCauley contacted the applicant's landscaper and directed them to alter the floral arrangements at the condominium. Given that paragraphs 7 and 8 of Mr. Gallo's affidavit were struck, there is no evidence upon which a court could find that Ms. McCauley instructed the landscaper about the planters

in April of 2006. If that is the evidence from the landscaper, Ms. Yang, it is curious that there is no sworn evidence from that individual given the denial by the respondent.

[7] It is further alleged that Ms. McCauley violated the Act by making unauthorized use of the common elements in various ways: hanging a Christmas wreath on her door; leaving her shoes outside of the door to her unit; allowing a worker to leave his equipment outside the door to her unit; and entering the concierge area without first obtaining written permission. The evidence offered by the applicant on these events is wholly unsatisfactory. The affidavit of Ms. McCauley deposes that she left her shoes outside her unit for a short period of time once or twice in 2005; that a contractor she hired once left some equipment in the hallway for a very brief period of time and that when she became aware of it, she immediately instructed him to move it; that she hung a wreath from her door in 2004 and 2005 as other residents did, and there were no complaints at the time; that she stood in the door of the concierge area to check the positioning of the surveillance cameras. There is no evidence from the applicant that any of these "breaches" have occurred since January of 2006 and certainly there are no "breaches" at the present time. Indeed, the testimony of John Gallo, the property manager of the building, is that he was not aware of any "breaches" after January of 2006.

[8] With respect to the claims made against Ms. McCauley, the applicant has failed to garner the necessary evidence to support the allegations and the application must fail. Even if I were to accept the thin evidence offered by the applicant against Ms. McCauley, which I do not, I do not find that alleged conduct amounts to violations of the section 116 of the Act or constitutes unreasonable use of the common elements as contemplated by the Act. There is absolutely no evidence that the respondent engaged in behaviour that consistently contravened the Bylaws and Rules of the condominium or that she continues to engage in such behaviour at the present time.

[9] I turn now to the allegation against Mr. McCauley, which is that he breached sections 116 and 117 of the Act by carrying out an activity which caused damage to the property. This allegation is rooted in the suspicion that Mr. McCauley attended in the change room on the second floor on January 28, 2007 and dyed his hair, which caused damage to the tiles, floor, sink, walls and toilet doors. Counsel for the applicant conceded that at most, the evidence linking the respondent to this activity was circumstantial. There was no eyewitness to it and Mr. McCauley in his sworn affidavit denies dyeing his hair in the change room on that date or at any other time. He acknowledges that he used the exercise room, showered and left.

[10] The evidence offered by the applicant is contained in the affidavit of S. Mezelski and R. Khalid, which is contradictory. Ms. Mezelski deposes that she saw Mr. McCauley get off the elevator at the second floor with a bag in his hand and she "suspected" that he was going to use the change room to dye his hair. There is no evidence offered to support her "suspicions". She contacted the concierge, Mr. Khalid, to request that he check the change room for damage.

[11] In the notes that he kept in his log book, Mr. Khalid wrote at 3:35 that Ms. Mezelski contacted him to check the change room as she had seen a resident going in with hair dye in his hand. While his notes indicate that when he checked at that time, 3:35, there was hair dye stains in various places, his affidavit swears that at the time he did the inspection (3:35) everything was "in order". When he was asked to do a second inspection, he did so at 3:58 and the damage was evident. On cross examination, Mr. Khalid deposed that the information in his affidavit was incorrect.

[12] In addition, when Mr. Khalid attended at 3:35, he did not witness the respondent in attendance. Rather, he heard someone in the shower but he could not confirm who that was. The **only** evidence offered by the applicant on the actions of Mr. McCauley on January 28, 2007 is that of the concierge, Mr. Khalid, who by his own admission cannot state that he even saw Mr. McCauley in the change room at that time. Records were produced confirming that the respondent entered the change room at 3:28 that day. Accepting the evidence in the notes of Mr. Khalid as accurate, it would have been impossible for the respondent to have caused the damage as alleged.

[13] The allegations against Mr. McCauley are serious and yet, the evidence put forth to support them by the applicant is, at best, characterized as a suspicion. The Rules of Civil Procedure contemplate as a general rule, all proceedings shall be by action unless a statute or the Rules provide otherwise. Rule 14.05(3) sets out the circumstances where a proceeding may be brought by an application and I note that subsection (h) of that rule states that proceedings may be taken by way of application "where it is unlikely that there will be any material facts in dispute". In the application before me, the facts giving rise to the relief being sought are hotly disputed. It should have been clear to counsel for the applicant after delivery of the responding affidavits, or at the very latest after conducting the cross-examinations, that the application had virtually no chance of success. Given the disparity of the sworn evidence, the court on application is in no position to make findings of credibility, nor is that contemplated under Rule 14.

[14] Taking the evidence as a whole, I am not satisfied that the applicant has discharged the burden of proof on a balance of probabilities and consequently, this application must fail. The application is dismissed with costs to the respondents. If the parties cannot agree on costs, I will receive brief written submissions within 10 days after which I will fix the costs.

Wilson D.A., J.

Released: June 10, 2008