CITATION: Toronto Standard Condominium Corporation No. 1549 v. Chan, 2011 ONSC 5547
COURT FILE NO.: CV-10-413849
DATE: 20110922

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Toronto Standard Condominium Corporation No. 1549 (Applicant) and Cathy Chan (Respondent)

BEFORE: Frank J.

COUNSEL: *Howard Krupat and Joseph Salmon*, for the Applicants
Steve Chan, for the Respondent

HEARD: August 4, and September 2, 2011

ENDORSEMENT

[1] The respondent, Cathy Chan, is the owner of a "live/work" unit in a condominium building on Wellington Avenue, in Toronto. Some years ago, she divided her unit into two, one portion being a "work" unit, the other a "live" unit, and leased each of the sub-units to a different tenant. She did this without obtaining the required approval from the condominium corporation's board of directors.

[2] When the condominium corporation notified Ms. Chan that it objected to her subdivision of her unit, Ms. Chan agreed to return the unit to its original state; but then she instead sought the board's retroactive approval for the changes she had made. The board denied her request. That was at the end of November 2009. Since then, Ms. Chan and the board have been in a dispute over whether she must comply with the board's demand that she restore her unit to its original state. It is this dispute that gives rise to this application.

[3] The applicant, to which I will refer in these reasons as "the condominium corporation", seeks an order pursuant to section 134 of the *Condominium Act*, S.O. 1998, c.19, requiring Ms. Chan to remove the partition walls and return her unit to accord with the builder's plans.

[4] For the reasons that follow, I find that the condominium corporation is entitled to the relief it seeks.

Governing provisions

[5] The parties are governed by the *Act* and the Declaration, rules and by-laws of the condominium corporation. They provide the following framework within which this application must be determined.

(a) Both the condominium corporation and owner are bound by the terms of the *Act*, the condominium corporation's Declaration, bylaws and rules of the condominium corporation. (see s. 119(1) of the *Act*)

(b) A condominium corporation has the right to require all owners to comply with the corporation's declarations, bylaws and rules and has a statutory obligation to take all reasonable steps to enforce them. (see s. 17 and s. 119(3) of the *Act*)

(c) No owner may use a unit in such a way as is likely to damage or injure any person or property or in any way that may result in the threat of cancellation of or increase in premium for the insurance coverage referred to in the condominium corporation's Declaration. (see s. 117 of the *Act* and s. 30(a) of the Declaration)

(d) The condominium corporation has the sole and unfettered discretion to consider requests for consent for any "structural change, renovation, alteration or addition whatsoever to an owner's unit" and no owner may make such change without the written consent of the Board. (see s. 30 (c) of the Declaration)

(e) No alteration, addition or improvement can be made to the common elements unless the Board has first approved it. (see s. 98 of the *Act*)

(f) The directors and officers of the condominium corporation must act honestly and in good faith. (see s. 37(1) of the *Act*)

Background

[6] Although there are factual disputes in the evidence, the parties agreed that I should hear and decide the matter on the basis of the record before me. They did so primarily out of a desire to limit the costs being incurred. While that is an admirable purpose, based on what I have heard regarding the costs, it is too little too late. The record includes the cross-examination of Ms. Chan on her three affidavits. She did not cross-examine the condominium corporation's representative, its current property manager, Ms. Valerie Smith, on any of her five affidavits. The number of affidavits speaks to the extent of the factual disputes.

[7] The construction work done by Ms. Chan in her unit became an issue between her and the condominium corporation in January 2009 when Ms. Smith sent Ms. Chan a letter on behalf of the condominium corporation requesting that Ms. Chan explain in what manner the unit was partitioned and whom it was that provided the approval for it. Ms. Smith stated that it was contrary to the Declaration to use the unit as a real estate office, the use to which Ms. Smith was told by Ms. Chan's new tenant that he intended to put it.

[8] This began exchanges of correspondence between the condominium corporation, Ms. Chan's lawyer, Steve Chan – counsel on this application - and the corporation's lawyers, Heenan Blaikie – also counsel on this application.

[9] Heenan Blaikie accepted Mr. Chan's position that a real estate office was not prohibited, but took the position that severing the unit was contrary to the zoning by-laws and represented a

misuse of the "live/work" units as only residents and not third parties were permitted to conduct business in those units.

[10] When, in early January, Ms. Chan's unit was inspected, it was determined that the residential portion of the divided unit had no life safety systems in it. The condominium corporation asked that Ms. Chan restore her unit to its original state immediately.

[11] Once the fire and safety inspector for Spen-Tech, the company retained by the condominium corporation to conduct annual safety inspections gained access to Ms. Chan's unit, he reported to Ms. Smith that the partitioning of the unit created a serous problem and recommended that it be rectified immediately.

[12] The parties were at a stalemate until the November 19, 1999 condominium corporation board meeting convened to consider the dispute. Ms. Chan did not attend the meeting, but was represented by Mr. Chan. The meeting concluded with Mr. Chan saying that the unauthorized additions to the unit would be taken out and the unit would be restored to its original state. The board proposed, and it was agreed that this would be done by February 20, 2010, though Mr. Chan said it was his client's intention to begin the work before the end of the month.

[13] Several days later, On November 23, Mr. Chan wrote to the condominium board stating that Ms. Chan need not take down the dividing walls in her unit as board approval was not required for their construction. (As is referred to later in these reasons, Mr. Chan has conceded that this position is wrong.) Meanwhile, he enclosed a plan showing the partitions and said that "on a without prejudice basis", Ms. Chan sought retroactive approval and undertook to comply with building codes and planning by-laws. However, Mr. Chan stated that if the board rejected Ms. Chan' application, Ms. Chan was prepared to dismantle the walls installed by her as soon as her tenant vacated on Nov. 30, 2009. She expected the dismantling to be completed within a week. Mr. Chan stated she would do so to avoid the incursion of costs by the board in obtaining an order to comply,

[14] The condominium board rejected the application and confirmed Ms. Chan's agreement to restore her unit to its original state by February 20, 2010.

[15] But, Ms. Chan changed her mind. While the condominium board, as a courtesy to Ms. Chan, continued to extend the deadline for restoration of the unit, Ms. Chan sought a retroactive building permit from the City. Mr. Chan admitted during submissions that, contrary to her undertaking to the Condominium Board, Ms. Chan had decided to hold off on making a decision as to whether to comply with her agreement until she knew whether the City would grant a building permit.

[16] A permit was granted on April 20, 2010, subject to Ms. Chan removing one of the two doors she had installed and installing a smoke alarm connected to an uninterruptable constant electricity supply and a heat detector connected to the building fire prevention system. Mr. Chan then notified the board that its refusal to approve Ms. Chan's changes to her unit was unreasonable and threatened the board members personally as well the property manager with a civil action for loss of rent and punitive damages if the board did not change its position, subject to Ms. Chan complying with the terms of the building permit.

[17] Since then, Ms. Chan has removed the doors dividing the units from their doorframes and claims to have installed a smoke detector, though she has failed to produce any evidence of having done so. She has not installed the required heat detector. To do so would require wiring into the building's electrical system and, as a result, the cooperation of the Condominium Board. But, she has made no proposal to the board with respect to the necessary wiring.

Analysis of Ms. Chan's position

[18] In resisting this application, in her written submissions Ms. Chan relied primarily on the submission that board approval is not required for the construction she did in her unit. She based this on the argument that s. 30(c) of the Declaration applied only to structural work and the changes she had made did not amount to structural changes. During oral submissions, Mr. Chan acknowledged that the application s. 30(c) and the requirement for board approval was not limited to structural work and therefore withdrew this submission.

[19] What remains of Ms. Chan's submission is that the board acted in bad faith and is therefore not entitled to the order it seeks. She relies on the following.

(i) the board knew of the changes and acquiesced to their being made

[20] It is Ms. Chan's evidence that two board members and the property manager at the time were in her unit in 2005, during construction and after the partition was in place and did not object to it. However, there is reason to question the reliability of this evidence. On cross-examination, Ms. Chan testified that the partition walls were constructed in 2007 or 2008. This is consistent with all of the other evidence including correspondence from Mr. Chan. Yet, on a subsequent cross-examination, Ms. Chan dealt with the inconsistencies in her evidence by testifying that she had confirmed with her contractor that it was indeed 2005 that the work was done. She did not suggest that she might be mistaken as to when the board members were in her unit. I find it improbable on the evidence before me that the work was done in 2005 and therefore can place no reliance on the evidence of board members being aware of the construction.

[21] Ms. Chan relies on the Resident Information Sheets submitted to the property manager by the two tenants who occupied the two separate subunits in her unit as demonstrating that the board knew that she had two tenants and did not object. However, in my view, these Sheets dated eight months apart do not make it evident that the unit had been divided into two, as it had. The management cannot be taken to have known of and acquiesced to the subdivision of the unit by the construction of the dividing wall based on these documents.

[22] Ms. Chan does not suggest that she applied for approval or obtained written consent as is required. Even if her evidence were credible, it would be insufficient to warrant interference with the board's decision, in my view, given the ongoing health safety equipment violation in the unit.

(ii) the board is guilty of applying the provisions of the Declaration unevenly

[23] Ms. Chan's evidence is that the board has taken no steps against the owner of another live/work unit that has been subdivided in the same way as hers.

[24] However, the unit Ms. Chan identified, unit 127, is not comparable as the dividing wall in that unit does not rise as high as the ceiling and the two areas created by the wall do not have separate occupants.

[25] In any event, the board denies having any knowledge of the existence of this wall until it was brought to her attention in this proceeding. Unlike the circumstances involving Ms. Chan's unit, there was no report regarding the unit identified by Ms. Chan from the safety inspector, and no enquiry regarding the rental of the sub-unit. Ms. Chan is mistaken in maintaining that through correspondence to the board, Mr. Chan had brought the board's failure to take action with respect to the wall in unit 127 to its attention. Based on the evidence before, Mr. Chan did not identify for the board, this or any other unit as having been subdivided.

[26] Ms. Smith investigated and determined that construction work had been done in the unit 127 without board approval. Although the construction did not result in the creation of two separate units with the resulting safety equipment breaches and separate tenanting of the "live" and "work" portions of the unit, the board demanded that the owner restore the unit to its original layout.

[27] The evidence is that the occupant of this unit believed he could make the changes he did to it, based on the more extensive changes he knew Ms. Chan had made to her unit.

[28] The evidence does not disclose that the board has been selective in its enforcement of the *Act* and its Declaration or has discriminated against Ms. Chan.

(iii) the board failed to consider Ms. Chan's after the fact application

[29] Ms. Chan submits that if the board were acting in good faith it would have no reason not to retroactively approve the changes she made to her unit. She relies on the fact that there is no evidence that insurance premiums have increased and the fact that the safety concerns on which the board now relies were not a serious concern until after this application was commenced. The real reason, she submits that the board refused her request for approval was that it did not want a real estate agency in the building, as it would be competition for the board president.

[30] Ms. Chan points to the fact that it was only after Ms. Smith was approached by the person to whom Ms. Chan intended to rent the commercial side of her unit, and Ms. Smith learned that he was a real estate agent, that any questions were raised about the construction she had done. But, it is Ms. Smith's evidence that the partitioning of Ms. Chan's unit came to her attention both as a result of the enquiries of the tenant and her being told by the inspector conducting the annual fire and safety inspection that a locked door prevented him from accessing one half of Ms. Chan's unit. Ms. Smith was not cross-examined on this evidence and, unlike the case with Ms. Chan, I have been given no reason to question her credibility apart from Ms. Chan's evidence to the contrary. I have no reason to doubt Ms. Smith's evidence.

[31] The board has been consistent from the outset in its demand that the unit be restored to its original condition. Had this position been a product of wanting to keep out a real estate agency, the board would have had plenty of opportunity to reconsider in light of the agency not becoming a tenant. The fact that Ms. Smith mistakenly said that real estate agencies were not a permitted use is not sufficient, based on the evidence, to support a finding that the board did not consider Ms. Chan's request in good faith.

[32] In its letter of November 24, 2009, the board responded to Ms. Chan's request that the partitioning of her unit be approved. It denied the request and gave as its first reason for doing so, section 30(a) of the Declaration, the section dealing with safety and insurance coverage. No one can take issue with the fact that the failure to have adequate fire safety equipment in a unit threatens the safety of the residents and their property and while there is no evidence that insurance premiums have been increased as a result of the breach by Ms. Chan of the fire safety requirements, the evidence is that there is the potential for it to happen.

[33] The board continued, relying on the requirement of prior written consent from the condominium corporation for any changes of a nature identified in section 30(f) of the Declaration; on section 98 of the *Act* requiring the approval of the board for the stated changes to the common elements; on Rule 1, stating that "no addition, alteration ... of any kind shall be made to any portion of the common elements without prior written approval of the board"[1]; and, on the fact that Ms. Chan's proposed plan revising the existing unapproved alterations do not rectify the violations referred to.

[34] It cannot credibly be argued that the board did not consider Ms. Chan's application.

[35] Ms. Chan submits that the board should have considered some less "draconian" measure than the restoration of the unit to its original state, for example lowering the partitioning walls so that they do not extent all the way to the ceiling. Spen-Tech, after its March 2011 inspection, stated that the separating wall would have to be lowered for proper operation of the life safety devices in the unit and that unless that was done, the unit would not be in compliance with the Fire Code and would have to be excluded from the Certificate of Operation that Spen-Tech would be providing. Ms. Chan suggests that this would be a reasonable approach. But, it is not what she asked the board to approve.

[36] Apart from that, the board has other legitimate concerns regarding what Ms. Chan has done and its potential impact on the condominium corporation. The evidence is that the board is concerned that allowing Ms. Chan to divide her unit into two distinct units would set a precedent that is not in the interests of the condominium corporation. So too, it is concerned that failing to meet its obligation to enforce its own declaration, would set a damaging precedent. This has already been borne out by the owner of unit 127 attempting to justify his construction on the basis of Ms. Chan having been allowed to make more significant changes to her unit.

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[1] As I have found that the board's application of its Declaration to the facts is reasonable it is not necessary for me to determine the issue of whether its interpretation of Rule 1as applying to the facts should be interfered with.

(iv) the board was high handed in its dealings with Ms. Chan

[37] Ms. Chan complains that Ms. Smith twice entered her unit without authorization. While the first occasion may have been a product of an over broad interpretation of "emergency" by Ms. Smith, it was nonetheless with the tenant present. Notice was given to Ms. Chan in advance of the second entry.

[38] Ms. Chan claims that one of her two key fobs for entry into the building was unjustifiably deactivated. However, the unchallenged evidence of Ms. Smith is that the deactivation occurred in the normal course, when Ms. Chan's previous tenant moved out. When Ms. Chan provided the required registration documentation for her unit's second resident, a second key fob was immediately activated. Ms. Chan did not provide the necessary documentation until after the commencement of the hearing of this application.

[39] Neither of these complaints cast doubt on the reasonableness of the board's decision. What there is reason to doubt is Ms. Chan's credibility. Her evidence contains inconsistencies and demonstrates unreliability. Although her evidence by way of affidavit was that she did not subdivide the unit into two distinct sub-units, on cross-examination she acknowledged that she installed a separate door to lead to each unit. She testified on cross-examination that she had installed a heat detector. She has not done so. In her affidavit sworn on May 24, 2011, she stated for the purposes of this application, she would arrange a final inspection by the City to confirm her compliance with its building permit. She has not done so. And, I have already referred to the inconsistent and unreliable nature of her evidence with respect to when the construction in her unit was done.

Conclusion

[40] Ms. Chan raises the issue of "bad faith". But, it is not on the part of the board that there has been bad faith. Rather, it is on Ms. Chan's part. She recognized the appropriateness of returning her unit to its original state, and agreed to do so. She has since attempted to justify her breaching that agreement on the basis of unsupported allegations against the board.

[41] However, Ms. Chan argues that the board, if not acting in bad faith, has failed in its obligation to strike an appropriate balance between the rights of individual owners and the right of the owners collectively. It relies on the Court of Appeal decision in *Wentworth Condominium Corporation. No. 198 v. McMahon,* 2009 ONCA 870. The issue in that case was whether a hot tub was an addition or alteration as those words are used in section 98 (1) of the *Act.* The owner had installed the hot tub without the consent of the board on his back patio that, though he had exclusive use of it, formed part of the common elements. Board consent was only required if the hot tub was an addition or alternation. The application judge held that it was neither. In upholding that decision, the Court of Appeal referred to the need to strike a balance "between the rights of individual owners and rights of the owners collectively speaking through their board of directors." The principle applies across the board to disputes between owners and their condominium board of directors. But, the issue decided in *Wentworth* has no relevance to the facts in this case.

[42] The board has a statutory duty to ensure that the provisions of its Declaration are adhered to. As the Court of Appeal stated in *London Condominium Corporation No. 13 v. Awaaji*, 2007 ONCA 154, at para. 6, "...it is for the Condominium Corporation to interpret its Declaration and By-Laws and that so long as its interpretation is not unreasonable, the court should not interfere".

[43] The purpose and effect of the construction work done by Ms. Chan in her unit was to create a distinct commercial unit, separate from the residential portion of the unit. This is contrary to the provisions of the Declaration. In the process of dividing her unit, Ms. Chan has created a situation that represents a potential danger to all residents, as the life safety equipment remains inadequate. This inadequacy continues to represent an underwriting risk with respect to insurance coverage for the building. These, too, are contrary to the Declaration.

[44] The board acted reasonably in interpreting s. 30 and 34 (c) of its Declaration as having been breached by Ms. Chan's acts. Further, its decision to require Ms. Chan to return her unit to its original state does not amount to an inappropriate favouring of the condominium corporation interests over those of Ms. Chan when viewed in the context of the board's statutory obligations and responsibilities to the owners as a whole.

[45] The application is granted. Ms. Chan is ordered to take immediate steps, at her own expense, to return Unit 134 to the condition and layout indicated in the condominium corporation's builder's plans.

[46] The parties agreed that the question of costs should be left to be decided after the result of the application was known. The applicant shall file cost submissions within 10 days of the release of these reasons. The respondent shall file her response within a further 10 days.

Frank J.

DATE: September 22, 2011