CITATION: Toronto Standard Condominium Corporation No. 2032 v. Boudair, et al. 2016 ONSC 509
COURT FILE NO.: CV-15-541470
DATE: 20160122

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

TORONTO STANDARD CONDOMINIUM CORPORATION NO. 2032 Applicant	*Carol A. Dirks*, for the Applicant
– and –	
YOUMNA BOUDAIR, AHMAD BADRAN AND IAN DONG Respondents	*Younma Boudaii and Ahmad Badian*, self-represented and acting in person *John Lee*, for the Respondent, Ian Dong
	HEARD: January 15, 2016

ENDORSEMENT

DIAMOND J.:

Overview

[1] On January 6, 2016, the parties to this application appeared before Justice Lederman and consented to an order under section 134(1) of the *Condominium Act, 1998* S.O. 1998 c. 19 (the "Act") enforcing compliance with Rules A.1, A.2 and B.2 of the applicant's Rules. In addition, the respondents, Youmna Boudair ("Boudair") and Ahmad Badran ("Badran") also consented to an order prohibiting them from smoking inside the unit which they leased (at the time) from the respondent Ian Dong ("Dong").

[2] The parties further consented to an order terminating the subject lease of Dong's unit (termination date of January 12, 2016) pursuant to section 134(4) of the Act.

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[3] The sole issues left to be determined by the Court were the liability and quantum of costs of the application. The parties attended before me on January 15, 2016 to argue those outstanding costs issues.

The Facts

[4] It is necessary to set out a summary of the key facts leading up to the issuance of this application and its ultimate resolution (save for the issue of costs) on January 6, 2016.

[5] Dong is the owner of Unit 115 in the condominium building municipally known as 10 Mendelssohn Street, Toronto, Ontario. He has never resided in the unit.

[6] Pursuant to a Lease Agreement dated August 5, 2015, Dong leased the unit to Boudair and Badran as tenants. The term of the lease was for one year commencing on September 1, 2015, with a monthly payment of $1,200.00. Of note, Schedule "A" to the lease provided that the tenants would abide by the applicant's rules and regulations. The tenants also expressly agreed to a term that they not smoke inside the unit.

[7] After Boudair and Badran moved into the unit, the applicant gave evidence that it began to receive complaints about the smell of tobacco smoke originating from the unit. These complaints were primarily received from the occupiers of suites 114, 116 and 216 (i.e. the adjoining neighbours and the unit above Unit 115).

[8] On September 18, 2015, the applicant notified Dong that his tenants were causing smoke to infiltrate into other units. Obviously, given the terms of the lease, it was Dong's intention from the start to ensure that no tenant smoked within the unit. Dong immediately advised his tenants of the allegations of smoke complaints from the other unit owners/occupiers, and instructed the tenants not to continue to smoke within the unit (something which the tenants had already covenanted not to do under the lease).

[9] Unfortunately, the applicant continued to receive further complaints from the adjacent unit owners of the smell of tobacco smoke permeating those adjourning units. Dong approached the tenants again, who denied "excessive smoking". Dong continued to communicate with the tenants by email and text messages as he resided with his wife in Brampton and had no first-hand experience of what was happening inside the condominium building.

[10] A review of the communication exchanged between Dong and the tenants discloses that Dong was exerting efforts to convince the tenants to simply move out of the Unit. In one of the text messages exchanges, Dong and the tenants stated as follows:

> Tenants: "If u can give us first and last month for new place and moving cost, we can move out before end of month. Thank u"
>
> Dong: "If you do not smoke, then problem solved"

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[11] On November 4, 2015, counsel for the applicant sent out a demand letter to Dong requesting compliance with the applicant's rules and regulations. That letter was forwarded by Dong to the tenants with the following message:

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> "Hi Youmna/Ahmad,
>
> Please see attached letters from the lawyer. Legal Action has been taken by the condo management. I regrettably advise you that unless you take action to ensure no more complaints about smoke from the neighbouring units, I have to terminate our lease agreement. The lease has a non-smoke in the unit clause and you have breached the leased. If you do not act properly to either stop smoking in the unit or vacant (*sic*) the unit, you will be responsible for all the expenses incurred associated to this matter".

[12] Despite Dong's efforts, the applicant continued to receive complaints from the adjacent unit owners/occupiers. This application was then commenced on November 27, 2015.

[13] It is Dong's position that he did not obtain copies of any substantive documents supporting the allegations from the adjacent unit owners/occupiers until the Application Record was served upon him on December 8, 2015. Up until that point, he had only received correspondence directly from the applicant summarizing the nature of those complaints from the adjacent unit owner/occupiers. Upon being served with the Application Record, Dong was now privy to, *inter alia*, copies of the actual complaints from the three neighbouring unit owners/occupiers, and a Site Review for Smoke Intrusion Investigation carried out by environmental scientists.

[14] Of note, once served with the Application Record, Dong served his Notice of Early Termination upon the tenants and filed an Application for Early Termination on December 18, 2015 with the Landlord and Tenant Board. The earliest available hearing date before the Landlord and Tenant Board was February 3, 2016 which was approximately one month after the original return date for this application.

[15] Ultimately, Dong gave evidence that he was able to convince the tenants to agree to the terms of the order dated January 6, 2016 of Justice Lederman including a compliance order and an agreement to terminate the lease and vacate the unit shortly thereafter.

[16] Finally, although the tenants filed no responding material, I understood from their submissions before me that (a) denied ever smoking "in the unit", and (b) Boudair suffered from some form of mental health/memory issue, the particulars of which were not explained nor substantiated by any medical evidence.

<u>Positions of the Parties</u>

[17] The applicant seeks costs payable by both Dong and the tenants on a substantial indemnity basis in the amount of $32,976.94, or in the alternative on a partial indemnity basis of $25,125.00 (all inclusive of HST and disbursements).

[18] Dong seeks an order requiring the applicant and the tenants to pay his costs on a substantial indemnity basis in the amount of $25,184.60. Additionally, and/or in the alternative, Dong submits that he should not be ordered to pay any costs to the applicant.

[19] The tenants do not seek costs of this application, but requested that they not be ordered to pay the costs of either the applicant or Dong.

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The Condominium Act

[20] There is no dispute that the applicant has a duty to control, manage and administer its common elements and assets, and take all reasonable steps to ensure that owners and any occupiers of units comply with the Act and the applicant's declarations, by-laws and rules.

[21] Section 131(1) of the Act permits the applicant to bring an application to the Court for an order enforcing compliance with any provision of the Act, or the applicant's declarations, by-laws or rules. That section applies to, *inter alia*, an owner or occupier of a unit.

[22] Section 131(4) of the Act permits the Court to grant an order terminating a lease of a unit, but such an order cannot be made until the tenant is in contravention of a compliance order made by the Court. In other words, before the applicant could seek an order terminating these tenants' lease, it had to first obtain a compliance order against them.

[23] Pursuant to section 119(2) of the Act, every owner must take "all reasonable steps" to ensure that an occupier of that owner's unit comply with the Act and the applicant's declarations, by-laws or rules. The term "reasonable steps" is not defined. In *Carleton Condominium Corporation No. 555 v. Legace* 2004 CanLII 26137 (S.C.J.), Justice Aitken observed as follows:

> "The *Condominium Act, 1998* does not establish the strict liability of unit owners for all infractions of tenants, even if they have had no notice of the infractions. The wording of s. 119(2) to the effect that an owner shall take "all reasonable steps" to ensure that an occupier of the owner's unit complies with the Act, the declaration, the by-laws and the rules, implies that the owner has to know what is going on at the unit so that he or she can take whatever steps would be reasonable to deal with any problems. Put another way, it only stands to reason that the owner has to be notified of any unacceptable conduct on the part of the tenant if it is the owner's responsibility to vouch for that conduct and to take reasonable steps to correct problems. In many, if not most, situations, the unit owner who is renting to a tenant does not live at the condominium complex. If the property manager of the complex does not inform

> the owner of tenant infractions, how can the owner live up to his or her responsibility to ensure that the tenant abides by condominium rules? It would be contrary to public policy to expect unit owners to become private investigators checking up on their tenants to see if they are breaching any rules. It makes much more sense for the condominium's property manager to notify the unit owner of any significant or on-going breaches.

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[24] There is no question that the applicant and/or its property manager informed Dong of the nature of the complaints being received from the neighbouring unit owner/occupiers about the excessive smoke emanating from Unit 115. However, Dong argues that in the absence of being provided with all of the relevant documentation/information in the applicant's possession, he lacked the requisite "ammunition" to negotiate an amicable early termination of the lease with the tenants.

[25] Dong submits that he acted reasonably throughout the entire matter. Rather than seek to terminate the residential tenancy – which as stated above would have required a notice period and likely would have created a process under the provisions of the *Residential Tenancies Act, 2006* S.O. 2006 c. 17 – Dong exerted considerable effort in trying to convince the tenants to comply with the applicant's requests, or alternatively move out to a new residence.

[26] Dong believed that putting increased pressure on the tenants to move out was a faster, cheaper and more effective approach that having the applicant commence legal proceeding. Dong argued before me that if he had been provided with the contents of the Application Record from the outset, he likely would have secured the consent of the tenants to move out earlier, and relief upon the actual consent Order of Justice Lederman in support of that position. In other words, as Dong was able to successfully negotiate an early termination of the lease using the Application Record in his possession, Dong argues that had he been served with the applicant's supporting documentation/information earlier, he would have achieved the same result earlier, and without the parties incurring legal costs.

[27] Dong further submits that at the time of the issuance of the applicant's Notice of Application, he had already informed the applicant that the tenants would be moving out by the end of January 2016. My review of the record discloses that the tenants' agreement to do so was not as secure as Dong suggests.

Decision

[28] As held by Justice Doherty in *MTCC No. 1385 v. Skyline Executive Properties Inc.* 2005 CanLII 13778 (Ont. C.A.), the purpose of section 134(5) is to ensure that costs properly incurred by a condominium corporation in seeking compliance orders are not borne by the other, non-offending unit owners:

> “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.”

[29] When asked what Dong could have done differently to satisfy his obligation to use reasonable efforts, counsel for the applicant submitted that Dong should have issued a Notice of Early Termination earlier than he did. Counsel for the applicant also took the position that her client (and the other “innocent unit owners”) should not be saddled with the costs of successfully achieving the goal that Dong ought to have achieved himself.

[30] To begin, I do not believe that the applicant can take all, or even most, of the credit for securing the tenants’ consent to an early termination of the lease. The record is clear that Dong did not sit by and do nothing. He was very active in dealing with the tenants once he learned of the existence of the complaints (again, which he never saw until after being served with the Application Record). He threatened the tenants with termination, and was hopeful that he could convince them to move out voluntarily so as to avoid a potentially lengthy eviction process.

[31] While I believe that the “pending court date” likely played a role in convincing the tenants to agree to an early termination of the lease, that factor was on the back of all of Dong’s efforts up to that point.

[32] In my view, pursuing an early termination of the lease was a prudent course of action. While it can be argued that it was Dong who brought the tenants to the building, and thus was the “original cause” of the situation, there is nothing in the applicant’s declarations, by-laws or rules, or in law, which prevents Dong from leasing his unit to third parties. Further, Dong did so in good faith by ensuring that the terms of his lease contained a no smoking covenant.

[33] Even if Dong had started the eviction process earlier (which I find was not necessary as it was reasonable to try and conduct good faith negotiations with the tenants), there was no guarantee that the tenants would have been formally evicted prior to the return date of this application, or at all. I find merit in Dong’s submission that he likely could have secured the tenants’ consent to an early termination of the lease sooner had he been provided with the additional documentation/information in the applicant’s possession.

[34] Accordingly, I find that Dong did take all reasonable steps as required by section 119(2) of the Act. As such, in the circumstances of this case, I order that there shall be no costs of the application as between the applicant and Dong.

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[35] With respect to the claims for costs against the tenants, there is no responding material filed by Boudair or Badran. The record is replete with evidence confirming the existence of smoke emanating from Unit 115, including the Site Review carried out by environmental scientists. The tenants took the position before me that they never smoked inside the unit, but I find that extremely difficult to believe in the face of the evidentiary record.

[36] That said, I do not believe that all of the costs sought by the applicant and Dong should lay at the feet of the tenants. I have already found that the applicant jumped the "smoking gun" by moving straight for a compliance order under section 131 of the Act without working with and assisting Dong with his efforts. Prior to the issuance of this application, the tenants were already in negotiations with Dong to move out of the unit and were moving towards that goal.

[37] As per the Court of Appeal for Ontario's findings in *Boucher v. Public Accountants Council (Ontario)* (2004) 71 O.R. (3d) 291 (C.A.), the fixing of costs is a discretionary decision under section 131 of the *Courts of Justice Act*. That discretion is generally to be exercised in accordance with the factors listed in Rule 57.01 of the *Rules of Civil Procedure*. These factors include the principle of indemnity for the successful party, the expectations of the unsuccessful party and the complexity of the issues. Overall, the Court is required to consider what is "fair and reasonable" in fixing costs, and it is to do so with a view to balance and compensation of the successful party with the goal of fostering access to justice:

[38] In the circumstances of this case, I order the respondents Boudair and Badran, on a joint and several basis, to pay (a) the applicant its costs on a partial indemnity basis fixed in the all-inclusive amount of $10,000.00, and (b) Dong his costs on a partial indemnity basis also fixed in the all-inclusive amount of $10,000.00.

Diamond J.

Released: January 22, 2016

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