

Case Name:

Waterloo North Condominium Corp. No. 186 v. Weidner

Between

Waterloo North Condominium Corporation No. 186, applicant, and
Johanna Theresa Weidner, John Richard Weidner and Elizabeth
Mary Weidner, respondents

[2003] O.J. No. 2496

Court File No. C-1011-02

Ontario Superior Court of Justice

Flynn J.

Heard: March 17, 2003.

Judgment: June 3, 2003.

(53 paras.)

Counsel:

Edward L. D'Agostino, for the applicant.

R. Sandy Bruce, for the respondents.

¶ 1 **FLYNN J.**— This is an Application by the applicant Condominium Corporation ("the Corporation") for an order:

- (a) requiring the Respondent Johanna Theresa Weidner ("Johanna") to permanently remove the Greyhound dog, Simon ("the dog") from Unit #306, 30 Hugo Crescent, Kitchener, Ontario ("the Unit"), more particularly described as Unit 6, Level 3, Waterloo Condominium Plan No. 186, which is owned by all of the Respondents and occupied by Johanna; and
- (b) requiring the Respondents to forthwith comply with two specific paragraphs of the Declaration of the Corporation which forbid pets on the Corporation's common elements and which forbid pets from being kept or allowed in any of the units.

¶ 2 The Corporation was created by the registration of a Declaration on February 1, 1991. That Declaration provides at Article III, paragraph 7:

"Pets

No animal, livestock or fowl of any kind whatsoever, including those usually considered pets, shall be allowed upon the Common Elements, including the Exclusive Use Common Elements."

¶ 3 At Article IV, paragraph 2(d), the same Declaration provides:

"2. Residential Units

...

- (d) No animal, livestock or fowl of any kind whatsoever, including those usually considered pets, shall be kept or allowed in the Units."

¶ 4 Prior to April, 2000, these prohibitions against pets had not been enforced by the Corporation for some time and some of the residents of the units kept pets.

¶ 5 On April 20, 2000, the Corporation passed a Resolution authorizing the Board of Directors to enforce the Corporation's Declaration, Bylaws, Rules and Regulations, particularly the prohibition against pets in the units and set out that as at April 21, 2000, there would be strict enforcement, save for pets then on the property registered with the property manager. That Resolution went on to specify that:

"Owners failing to register their dog(s) by April 21, 2000 will be asked to permanently remove their dog(s) from the premises."

¶ 6 Months after the passing of this Resolution, in February, 2001, Johanna entered into an agreement of purchase and sale for the purchase of the Unit. She had the assistance of a real estate agent who knew of her ownership of the dog. She advised the agent that she wanted to purchase in a condominium that allowed pets.

¶ 7 The agreement of Purchase and Sale made no specific mention of the prohibition against pets. It was on a standard form agreement in which Johanna as purchaser agreed to accept title to the real property subject to the provisions of the Condominium Act and the Terms, Conditions and Provisions of the Declaration and Bylaw and the Common Element Rules and Regulations.

¶ 8 Johanna viewed the property twice before entering into the agreement and said that she saw cats in the windows and on one occasion believed she saw a dog being walked on the common elements. However, after seeing these animals, Johanna did not make any inquiries as to whether her dog would be permitted in the unit.

¶ 9 The agreement was not made conditional upon her satisfying herself that her dog would be permitted.

¶ 10 Prior to the completion of the purchase transaction, Johanna, as a result of her solicitor's request, was provided with and reviewed with her solicitor an Estoppel Certificate, which set out the following, most of it in bold letters:

- "(c) Please make certain that your client is aware that pursuant to WNCC No. 186's Declaration, which states in part, 'no animal, livestock or fowl of any king (sic) whatsoever, including those usually considered pets, shall be kept or allowed in the units'. The Corporation, through its Board of Directors has Resolved to strictly enforce said Declaration."

¶ 11 The purchase transaction was completed by Transfer to the Respondents on May 1, 2001, and Johanna moved in about a week later, bringing her dog with her.

¶ 12 On May 15, 2001, the Corporation's solicitors wrote to Johanna and reminded her that having her dog there was contrary to the provisions of the Declaration and asked her to remove it within 14 days. She did. She took the dog to the home of her parents -- the other respondents -- where it remained until the middle of September, 2001, before Johanna brought it back to the Unit. It has remained with her in the Unit since then. In June, 2001, the Corporation's solicitor advised Johanna's solicitor that the Corporation was considering an amendment to its Declaration so as to permit pets and was holding the determination of the matter of Johanna's dog in abeyance while

reserving its right to continue enforcement proceedings.

¶ 13 At the end of August, 2001, the Corporation's solicitors wrote again to Johanna's solicitors indicating that the matter of pets would be on the September 6, 2001, Unit owner's meeting agenda, again reserving the right to enforce. In September, 2001, it was determined that the Corporation would poll the owners to determine whether there was sufficient support to amend the Declaration and that until that was determined the Corporation would not take any action against pet owners.

¶ 14 Johanna and another resident lobbied the residents of the corporation to conduct that survey of Unit owners to determine whether there was the sufficient support required to amend the Declaration to allow pets. They also lobbied other residents during the polling process.

¶ 15 In accordance with the provisions of the Condominium Act, the vote of 80 percent of the Unit owners is required to amend a Corporation's Declaration.

¶ 16 By late November, 2001, a poll had been taken. Owners representing 22 of the 33 units responded (about 63 percent). Thirteen owners supported the amendment (about 37 percent). Nine unit owners were against the amendment (about 26 percent). The Corporation therefore determined that the amendment would not carry by the required 80 percent vote of owners and put all on notice that it would commence on January 1, 2002, to enforce the pet restriction provisions against all whom had not been registered by April 20, 2000.

¶ 17 On March 20, 2002, the Corporation's solicitor wrote to Johanna's solicitor to advise that they had learned that Johanna's dog was back in the unit. That letter warned of legal action if the dog was not permanently removed by May 1, 2002. This Application was commenced on September 26, 2002. It was first returnable on October 9, 2002, was thereafter thrice adjourned on consent, then examinations were conducted. It proceeded as a long Application on March 17, 2003.

¶ 18 In answer to the Application the Respondents ask that this Court:

- (a) exercise its discretion under the Condominium Act and its inherent jurisdiction to dismiss the application; or,
- (b) exercise its discretion to "grandfather" the dog and exempt the dog from the operation of the Declaration so that the respondents will not be required to move the dog.

¶ 19 The Respondents say that the prohibition against the pet in this case is unreasonable; that the Corporation acquiesced or slept on its rights and must not succeed on the basis of laches; and that condominium Declarations are subject to the Ontario Human Rights Code and enforcement of this prohibition against pets would be an act of discrimination within the meaning of that Code.

¶ 20 Counsel have been very able in their argument and their facts and authorities have been helpful. There has been found no binding appellate decision directly on point.

¶ 21 Moving out from under her parents, finishing school and starting a new career caused Johanna stress. So did the issue of removing the dog from the Unit. In August, 2001, she was first diagnosed with depression and her doctor prescribed medication. That medication eliminated the migraine headaches she was suffering and resulted in an improvement in her condition such that she could function very well. Her doctor recommended counselling several times. She declined. Johanna has seen no specialist for her depression. Her family physician is of the view that one of the "stressors related to [her] depression" was having to give up the dog, a stressor which, he says, would adversely affect her mental health.

¶ 22 The Respondents concede that the Declaration cannot be attacked as being unreasonable unless there is a human rights violation. They say that their path to that attack here is the fact that Johanna suffers from an identified mental disorder and that this Court has the discretion not to apply the full force of a Declaration which is presumptively valid.

¶ 23 A prohibition against pets in a Declaration would be reasonable, the Respondents argue, if it were flexible enough to accommodate identified disabilities.

¶ 24 In the main, the Respondents rely on the reasoning of my sister, McDonald J., in Niagara North Condominium Corp. No. 46 v. Chassie [1999] O.J. No. 1201 Ontario Court of Justice (Gen. Div.), as set out in her conclusions at paragraph 94 of that judgment:

"I agree with counsel for the Applicant that the residence of the Chassie's cats in the NNCC complex is contrary to the Condominium Declaration and Rules, that there is a strong presumption as to the validity of the Declaration and that the Board of Directors has a statutory obligation to enforce the Declaration and Rules. However, for the reasons set out above, I am of the opinion that the pet prohibition is not a reasonable one. On the other hand, while the provisions in the Declaration may not be reasonable, it is not necessarily invalid given the strong presumption in favour of the validity of Declarations. Nevertheless, I think it would not be fair to enforce it given that it is not reasonable and given the circumstances of the present case. The Chassies were put in a position of disadvantage in purchasing the unit that they would not have placed themselves in had they known, before they purchased their unit, of the cat prohibition and that an attempt to enforce it might be made. Their lack of comprehension of the situation is the fault of the Board of Directors. The Board has acquiesced in the presence of cats in the building over a number of years and has not provided any explanation to justify the delay in enforcement and lead the court to find that the equities favour the Applicant. Finally, I have found that Mrs. Chassie suffers from a handicap within the meaning of the Human Rights Code and that to enforce the Declaration would constitute discrimination against her because of her handicap. On the totality of all three grounds of defence, I find that this is a proper case in which to exercise my judicial discretion in favour of the Respondents and to dismiss the application."

¶ 25 The Condominium Act, 1998 S.O. 1998, c. 19 is the operative statute here.

¶ 26 A Declaration may contain conditions or restrictions with respect to the occupation and use of the Units or Common Elements.

¶ 27 The Condominium Corporation has a duty to take all reasonable steps to ensure that the owners and occupiers of units comply with the Declaration. The Board of Directors of a Condominium Corporation has a statutory obligation to enforce the Declaration.

¶ 28 A Declaration cannot be amended unless 80 percent of the owners of the Units have consented to the amendment in writing.

¶ 29 An owner of a Unit may make an Application to the Superior Court of Justice for an order to amend a Declaration.

¶ 30 A Condominium Corporation, its Directors, as well as the owners and occupiers of the Unit, are required to comply with a Declaration as well as the Condominium Act. A Condominium Corporation not only has a duty to require compliance but where compliance is not forthcoming, the Condominium Corporation has the right to apply to court for an order directing compliance.

¶ 31 There is a strong presumption as to the validity of a Declaration of a Condominium Corporation. The Declaration is vital to the integrity of the title acquired by the Unit owner. She is not only bound by the terms and provisions of the Declaration but she is entitled to insist that the other Unit owners are similarly bound. The revised Condominium Act, as aforesaid, was proclaimed into force on December 18, 1998, after the Chassie case was heard, but before judgment was rendered. In fact, Justice McDonald refers to the draft legislation in her discussion and analysis of the circumstances of the Chassie case. The new Act did not reflect the kind of treatment for pet owners envisaged by Justice McDonald's analogies to the rules permissible under the provisions of the Tenants Protection Act, 1997.

¶ 32 The Condominium Act requires Bylaws and Rules to be reasonable, if they are to be enforced. But the same is not required of a provision in a Declaration, which will be presumed valid.

¶ 33 Here, in the ordinary course of the transaction, the Respondent Johanna agreed in writing to comply with the Declaration. The Corporation properly brought the salient prohibition provision of the Declaration to Johanna's attention before closing. Johanna not only had a real estate agent assisting her in the transaction, she had a qualified and competent real estate solicitor whose duty it was to review the declaration and other documents, including the Estoppel Certificate and to advise her in respect thereof.

¶ 34 Moreover, as must be done, the Declaration and Bylaws were registered on the title to the property as notice to all the world, including the Respondents, of their provisions.

¶ 35 The Respondents, in written argument, rely upon s. 2(1) of the Ontario Human Rights Code, R.S.O. 1990, c. H-19:

"Accommodation

2.1 Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status, disability or the receipt of public assistance."

¶ 36 It seems to me that in reality the Respondents derive much of their argument from a consideration of s. 2(2) of that Act:

"Harassment in Accommodation

(2) Every person who occupies accommodation has a right to freedom from harassment by the landlord or agent of the landlord or by an occupant of the same building because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, marital status, same-sex partnership status, family status, disability or the receipt of public assistance."

¶ 37 It is clear that this latter subsection prohibiting harassment in accommodation is restricted to the freedom enjoyed by tenants. It can have no application in this case, where the prohibition against pets is in effect an appurtenance ancillary to the purchase of any unit in this condominium plan.

¶ 38 The answers of the Respondent Johanna on her examination for discovery conducted on January 15, 2003 are informative:

"205 Q: Would your parents be willing to take the dog back if the court ordered that he was not to return to the condominium:

A: Of course.

206 Q: And would you then go down and visit your dog on a regular basis as you did during the time that he wasn't there?

A: Well I don't know what I would do if I had to get rid of him.

207 Q: Would you visit your dog regularly?

A: Well yes, if I didn't move."

¶ 39 In my view it is important to note that the sentiment expressed in these answers was not: "I cannot live without that dog - I'll have to move!" While it is clear that Johanna loves this dog and wants to keep it, it is not at all evident to me that she needs it. In the case of Waterloo North Condominium Corp. No. 198 v. Donner (1997), 36 O.R. (3d) 243, Justice Salhany was dealing with a hearing ear dog, one that the learned justice found, if removed, would prohibit the owner from living in the building. Salhany J. tackled that issue on the basis of an attack on the "no pet restriction" as unreasonable or failing that as a contravention of the Human Rights Code. In the end, Salhany J. decided that enforcement of the Declaration would effectively prohibit Ms. Donner from living in the condominium.

¶ 40 In this case there is no evidence that Johanna is dependent on the dog or needs the dog to be able to live in the unit. Her doctor's report indicated that the removal of the dog was but one of the stressors she suffered which related to her depression. While there is no evidence before me that depression is a "mental disorder" such as would make it a "disability" within the meaning of s. 10(1) of the Human Rights Code, I accept Dr. Ashton's opinion that having to give up the dog would adversely affect Johanna's mental health.

¶ 41 The facts of this case, in any event, can be distinguished from Donner; but the principles relied upon by Salhany J. are very persuasive.

¶ 42 While the Condominium Act does require rules governing the use of common elements and units to be reasonable, the question of the "reasonableness" of the Declaration is not an issue that may be attacked. The law presumes Declarations to be valid.

¶ 43 In the Chassie case, McDonald J. recites a passage from John Mascarin in his case comment on the trial decision of York Condominium Corp. No. 382 v. Dvorchik (1992), 24 R.P.R. (2d) 19, wherein Mr. Mascarin sets out very clearly that there is a difference in the case law treatment of the "no pet" clauses, depending upon the nature of the condominium documents in which they are found, that is to say, whether in part of the Declaration or merely in a rule or regulation. Then McDonald J. goes on at length to analogize the law of residential tenancy in Ontario and bases her decision largely on her conclusion that "the law and societal attitudes have also evolved to give rise to new concepts as to what are reasonable rules for community living and to a greater appreciation as to how pets can appropriately fit into a closely knit community".

¶ 44 I am unable to make that leap, nor am I able to accept McDonald J.'s conclusion that a total prohibition of animals is not reasonable.

¶ 45 In this I must agree with Salhany J. in Donner: "We are dealing with a Declaration. Surely those purchasers of a unit who understood they were buying into a 'no pet' building are entitled to have that understanding

protected".

¶ 46 Salhany J. went on in the circumstances of that case to refuse to enforce the "no pet" provision of the Declaration because the strict application in that case would amount to a breach of the Human Rights Code against a wholly dependent 85-year-old hearing impaired woman with a disability and the effect of that enforcement would effectively prohibit her from living in the building. That is not the case here.

¶ 47 That leaves only the question of laches or the applicant "sleeping on its rights".

¶ 48 In my view that complaint cannot succeed. Johanna employed both a real estate agent and a real estate lawyer. She (and all the world) had notice of the Declaration. Prior to closing her lawyer received the Estoppel Certificate which highlighted the restriction and reviewed it with her. Whether or not she remembers that specific review is not material. She made no inquiries as to the enforcement of that pet prohibition. While she took the view on examination that had she known about the enforcement of the pet prohibition she would not have moved into the building, perhaps her quarrel is with one of the professionals advising her.

Conclusion

¶ 49 While the Condominium Corporation had not enforced the restrictions against pets for some years prior to the making and delivery of that Estoppel Certificate, the certificate made it clear that the provision was to be strictly enforced from that point. The conduct and actions of the corporation, its board and solicitors after that, in conducting the survey and holding enforcement in abeyance while that was done and in giving the Respondent Johanna time to deal with the consequences of enforcement, were entirely reasonable.

¶ 50 In summary I find that:

- (a) the Declaration provision complained of is reasonable and, in any event, cannot be assailed on that basis;
- (b) there is no violation of the Ontario Human Rights Code such as would compel me to exercise my discretion in refusing to allow enforcement of the provisions; and,
- (c) the Applicant has not slept on its rights and is not to be refused the right to enforce its Declaration's restrictions because of laches.

¶ 51 Therefore I grant the Application and order that the Respondent forthwith comply with the Declaration of Waterloo North Condominium Corporation No. 186 and permanently remove the Greyhound dog, "Simon" from unit 306, 30 Hugo Crescent, Kitchener, Ontario, being Unit 6, level 3, Waterloo Condominium Plan No. 186, and from the common elements of that condominium plan.

Costs

¶ 52 I see no reason to depart from the usual rule that costs follow the event. The Applicant, unless I am shown a relevant offer, shall have its costs on a partial indemnity basis in an amount to be fixed by me after receiving the parties' written submissions.

¶ 53 The Applicant shall deliver its submissions on or before June 13, 2003 and the Respondent shall deliver their submissions on or before June 27, 2003.

FLYNN J.

QUICKLAW

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