CITATION: Waterloo North Condominium Corp v. Silacshi, 2012 ONSC 5403
COURT FILE NO.: C-327-12
DATE: 2012-09-25

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: WATERLOO NORTH CONDOMINIUM CORPORATION NO. 37, Applicant

AND:

JOSEPH SILASCHI, Respondent

BEFORE: The Honourable Mr. Justice D.A. BROAD

COUNSEL: Nelson Amaral - for the Applicant

Respondent - self-represented

DATE HEARD: September 13, 2012

E N D O R S E M E N T

[1] The Applicant (the "Condo Corporation") applies under section 134 of the *Condominium Act, 1998*, S.O. 1998, c. 19 (the "Act") for a declaration that the Respondent (Mr. Silaschi) is in breach of sections 98 and 119 of the Act and of the Condo Corporation's Declaration and for an order permitting it to enter Mr. Silaschi's unit to remove window frames in the balcony area which it says were attached to the exclusive use common elements in violation of the Act and the Declaration.

[2] Mr. Silaschi is the owner of the subject unit in the building, which is a multi-story apartment building. The unit is occupied by a tenant of Mr. Silaschi.

Background

[3] The window frames which are attached to the balcony formed part of a balcony enclosure which was installed by a previous owner of the unit prior to acquisition of the unit by Mr. Silaschi in 2006. The windows forming part of the enclosure have been removed but the window frames remain. It is apparent that no agreement permitting the installation of the balcony enclosure was registered on the title to the unit pursuant to section 98 of the Act, and no documentation has been produced indicating formal approval of the installation by the Board of Directors of the Condo Corporation (the "Board").

[4] In or about 2007 the Board engaged engineers to oversee a program of repair of the balconies on the exterior of the building which had experienced wear and tear over the years following its original construction. In the course of their review the engineers found that the enclosures which had been installed on many of the balconies by unit owners did not meet current *Building Code* standards and, in their opinion, posed a safety concern. The Chief Building Official of the City of Waterloo became involved in the issue.

[5] In April 2010 the Board held a membership meeting at which time it presented three options to the owners of the units which had constructed balcony enclosures. Eventually all of the affected unit owners, save for Mr. Silaschi, chose one of the options and rectification work was carried out with respect to the enclosures on the balconies on their units.

[6] An exchange of correspondence ensued between the Condo Corporation, through its property manager and its lawyers, and Mr. Silaschi over the period from February 2011 to February 2012 dealing with the Condo Corporation's demand that the window frames be removed, or alternatively, that it be given access to the unit to effect the removal. Although access was exercised on one occasion, the Condo Corporation's contractor did not proceed with the removal on the basis that the window frames would be damaged in the course of removal, and a further opportunity was provided by the Condo Corporation to Mr. Silaschi to remove them himself. The removal of the window frames has not been effected to date.

[7] Mr. Silaschi maintains that the window frames do not pose a safety hazard and their removal is not warranted, and in any event, their installation was not in violation of the Declaration as it was not a structural change to an installation upon the common elements, nor

did it constitute maintenance, decoration or repair of any part of the common elements or a change to an existing installation upon the common elements. Mr. Silaschi further states that the Application is barred by the *Limitation Act, 2002* S.O. 2002, c. 24, Schedule B, or alternatively, by reason of delay and laches on the part of the Condo Corporation. In short, he argues that the Condo Corporation has "slept on its rights" and should not be permitted, at this stage, to require removal of the window frames from the balcony of his unit.

Finding

[8] For the reasons that follow, I would allow the Application and order that the Condo Corporation be permitted to remove the window frames from the unit owned by the Respondent.

Discussion

(a) Was the Installation of the Balcony Enclosure in Violation of the Act, Declaration or By-laws?

[9] As indicated above, Mr. Silaschi argues that the window frames, forming part of the balcony enclosure, do not offend the section of the Declaration on which the Condo Corporation relies, which reads, in part, as follows:

> No Owner shall make any structural change in or to his unit or any change to an installation upon the Common Elements, or maintain, decorate or repair any part of the Common Elements…without the prior consent in writing of the Board.

[10] Mr. Silaschi argues that the installation of window frames was not a "structural change", but rather represented an installation to a non-structural element of the building, and neither was it a "change to an installation upon the Common Elements."

[11] In my view, for the purposes of the Application, it is not necessary to make a finding on whether the installation of the window frames without consent of the Condo Corporation, offended the Declaration, since I find that it breached section 98 of the Act.

[12] Section 98 of the Act provides as follows:

> **Changes made by owners**

98. (1) An owner may make an addition, alteration or improvement to the common elements that is not contrary to this Act or the declaration if,

(a) the board, by resolution, has approved the proposed addition, alteration or improvement;

(b) the owner and the corporation have entered into an agreement that,

(i) allocates the cost of the proposed addition, alteration or improvement between the corporation and the owner,

(ii) sets out the respective duties and responsibilities, including the responsibilities for the cost of repair after damage, maintenance and insurance, of the corporation and the owner with respect to the proposed addition, alteration or improvement, and

(iii) sets out the other matters that the regulations made under this Act require;

(c) subject to subsection (2), the requirements of section 97 have been met in cases where that section would apply if the proposed addition, alteration or improvement were done by the corporation; and

(d) the corporation has included a copy of the agreement described in clause (b) in the notice that the corporation is required to send to the owners. 1998, c. 19, s. 98 (1).

No notice or approval

(2) Clauses (1) (c) and (d) do not apply if the proposed addition, alteration or improvement relates to a part of the common elements of which the owner has exclusive use and if the board is satisfied on the evidence that it may require that the proposed addition, alteration or improvement,

(a) will not have an adverse effect on units owned by other owners;

(b) will not give rise to any expense to the corporation;

(c) will not detract from the appearance of buildings on the property;

(d) will not affect the structural integrity of buildings on the property according to a certificate of an engineer, if the proposed addition, alteration or improvement involves a change to the structure of the buildings; and

(e) will not contravene the declaration or any prescribed requirements. 1998, c. 19, s. 98 (2).

When agreement effective

(3) An agreement described in clause (1) (b) does not take effect until,

(a) the conditions set out in clause (1) (a) and subsection (2) have been met or the conditions set out in clauses (1) (a), (c) and (d) have been met; and

(b) the corporation has registered it against the title to the owner's unit. 1998, c. 19, s. 98 (3).

Lien for default under agreement

(4) The corporation may add the costs, charges, interest and expenses resulting from an owner's failure to comply with an agreement to the common expenses payable for the owner's unit and may specify a time for payment by the owner. 1998, c. 19, s. 98 (4).

Agreement binds unit

(5) An agreement binds the owner's unit and is enforceable against the owner's successors and assigns. 1998, c. 19, s. 98 (5).

[13] Although section 98 is worded positively in that it confers on owners the right to make changes to the common elements, provided the conditions set forth in the section are satisfied, most notably an agreement with the condominium corporation that is registered against the title to the unit, the converse is that an owner who makes such changes without satisfying the conditions breaches the section. In the case of *Peel Condominium Corp. No. 283 v Genik* 2007 CarswellOnt 4113 (SCJ) Dawson, J. held that an owner who caused a satellite dish to be installed on her unit without benefit of a section 98 agreement was in breach of the Act. It was noted in that case that section 119(1) of the Act requires all owners, occupiers or occupants of a condominium unit to comply with the Act.

[14] In my opinion, for the purposes of sections 98 and 119 of the Act, there is no functional difference between the satellite dish referred to in *Genik* and the window frames involved in this case. Their installation, without the support of a section 98 agreement, breached the Act.

(b) Is the Application barred by expiry of a limitation period or by application of the doctrine of laches?

[15] Mr. Silaschi also relies upon the *Limitation Act, 2002*, arguing that the Condo Corporation was aware of the balcony enclosure as early as February 23, 2006, when a letter discussing an agreement under section 98 of the Act was sent to his counsel. Under section 4 of the *Limitation Act, 2002* a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

[16] As pointed out by Quigley, J. in *Toronto Common Element Condominium Corporation No. 1508 v. Stasyna*, 2012 ONSC 1504 at para. 40, the proposition that questions of enforcement and compliance under the *Condominium Act* may be subject to the application of a limitation period is well recognized in the case law. However, as further pointed out by Quigley, J. in *Stasyna* at para. 41, the cases that support that proposition do not relate to actions commenced to enforce compliance with the Act itself, but rather with internal governance documents. Where there is a breach of the statute itself, such as here, the *Limitation Act, 2002* can have no application.

[17] Similarly, with respect to the argument of Mr. Silaschi that the Condo Corporation "slept on its rights" and was guilty of laches, rendering the bringing of the Application unreasonable, para. XVII (5) of the Declaration provides a complete answer. That paragraph stipulates that the failure to take action to enforce any provision of the Act, declaration, bylaws or rules, irrespective of the number of violations or breaches which may occur, shall not constitute a waiver of the right to do so thereafter, nor can it be deemed to abrogate or waive any such provision.

[18] In addition to the foregoing, it is noted that the bringing of an application under section 134 of the Act, is not the only recourse that the Condo Corporation has to enforce compliance with the Act. Under section 17(3) of the Act the corporation has a positive duty to take all reasonable steps to ensure that the owners and occupiers of units comply with the Act, the declaration, the by-laws and the rules. Section 19 provides that, on reasonable notice, a corporation or a person authorized by it may enter a unit to perform the objects and duties of the

corporation or to exercise the powers of the corporation. As appears from the exchange of correspondence between the parties, it was Mr. Silaschi's refusal to permit entry to the unit by the Condo Corporation that necessitated the commencement of the Application. There was no unreasonable delay on the part of the Condo Corporation in launching the Application once it became clear that Mr. Silaschi would not cooperate in removal of the offending window frames.

Disposition

[19] On the basis of the foregoing, it is declared that the Respondent has breached sections 98 and 119 of the Act and it is ordered that the Respondent be restrained from preventing the Applicant and/or its agents from entering the Respondent's unit and allowing the Applicant and/or its agents to remove the non-permitted items, being the window frames in the balcony area, attached to the exclusive use common elements appurtenant to such unit.

[20] The parties may make brief written submissions with respect to costs (comprising no more than three double spaced pages, not including a Costs Outline or Bill of Costs); the Applicant by October 15, 2012 and the Respondent by October 31, 2012, with any reply by the Applicant to be submitted by November 9, 2012.

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D. A. Broad J.

DATE: September 25, 2012