CITATION: York Condominium Corporation No. 78 v. Stein 2016 ONSC 1837
COURT FILE NO.: CV-15-537228
DATE: 20160316

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
YORK CONDOMINIUM CORPORATION NO. 78	)	*Carol A. Dirks*, for the Applicant
	)	
Applicant	)	
	)	
– and –	)	
	)	
JOANNA RUTH STEIN	)	*Christopher J. Jaglowitz*, for the Respondent
	)	
Respondent	)	
	)	
	)	**HEARD: March 8, 2016**

REASONS FOR DECISION

DIAMOND J.:

Overview

[1] The applicant is a non-profit condominium corporation created pursuant to the provisions of *Condominium Act 1998* S.O. 1990 c.19 (the "Act"), and is responsible for administrating and managing the residential building municipally known as 60 Pavane Linkway (the "property") in Toronto, Ontario.

[2] The respondent Joanna Ruth Stein ("Stein") purchased Unit 1908 (the "Unit") at the property on July 30, 2010 and has remained the registered owner of the Unit ever since.

[3] In the spring of 2014, the applicant received a complaint of alleged exterior water penetration in the Unit. Upon investigating that complaint, the applicant discovered that for the previous 3 years, Stein had carried out extensive, significant renovations in the Unit including material changes to the common elements.

[4] According to the applicant, Stein has completely "gutted" the Unit leaving it with no functioning bathroom or kitchen for over 18 months. Notwithstanding the current state of the Unit, Stein continues to reside there.

[5] The applicant brings this application seeking, *inter alia*:

a) a declaratory order that Stein is in breach of sections 90, 92 and 98 of the Act;

b) in accordance with section 134 of the Act, a compliance order

(i) granting the applicant access to the Unit to carry out a full inspection to determine any unauthorized additions and/or alterations to the unit and the common elements;

(ii) permitting the applicant to restore the unauthorized additions and/or alterations to the unit and the common elements to their original condition; and,

c) an order deeming any losses or costs incurred by the applicant in carrying out the above steps to be a common expense of Stein's unit and recoverable in accordance to sections 92 and 134 of the Act.

Disposition of Applications - Generally

[6] This Court is being asked to determine an application. The disposition of an application is governed by Rule 38.10 of the *Rules of Civil Procedure* which empowers the presiding judge to:

(a) grant the relief sought or dismiss or adjourn the application, in whole or in part and with or without terms; or

(b) order that the whole application or any issue proceed to trial and give such directions as are just.

[7] As held in *Moyle v. Palmerston Police Services Board* (1995), 25 O.R. (3d) 127 (Div. Ct.), when faced with a dispute in the record about a fact(s) material to an issue essential to the resolution of a subject matter of an application, the Court must either direct a trial of an issue in respect of the fact(s) in dispute, or convert the application into an action.

[8] Having reviewed the evidentiary record, I am satisfied that the primary relief sought by the applicant can be disposed of by way of application. However, for the reasons which follow, I am seizing myself of the balance of this application, if necessary, for further determination upon additional evidence.

Summary of Relevant Facts

[9] In support of the relief sought, the applicant has filed the supporting affidavits of its property manager Julian Bequiri ("Bequiri"), its director Gordon Walsh ("Walsh") and a professional engineering consultant Mike Panahi ("Panahi"), whose Form 53 was filed at the opening of the hearing of the application.

[10] In response, Stein has tendered her own affidavits, and has not filed any admissible opinion evidence to counter the contents of the Panahi affidavit.

[11] There is little dispute that the scope of the renovations undertaken by Stein include significant changes to the common elements in her unit. Panahi's observations included:

a) the removal of existing plaster and insulation at one location of the exterior wall;

b) the installation of an electrical plug box;

c) the removal and apparent reconstruction of electrical and plumbing connections;

d) the removal of parquet flooring exposing the concrete slab underneath which has already been painted or sealed; and

e) the heating radiator system tampered with and covered in plastic.

[12] Stein has completely rewired the Unit and made alterations to the plumbing pipes within the walls. Stein has testified that she has carried out most if not all of the electrical work to date herself.

[13] Article IV of the applicant's Declarations (registered on November 1, 1972) provides that the common elements include:

a) concrete, masonry or block portions of the walls within the Unit;

b) doors leading out of the Unit and windows;

c) such pipes, wires, conduits, ducts, flues or public utility lines used for power, cable TV, gas, water heating or drainage which are within any walls or floors; and

d) any heating equipment, including without limitation furnaces ducts and controls.

[14] The applicant has produced many pictures taken inside the unit during attendance in the Unit. Panahi considered the extent of Stein's renovations to amount to "major construction activity". It is the applicant's position that, contrary to section 98 of the Act requiring an owner to obtain written approval and/or an agreement with the applicant before making any additions, alterations, or improvements to common elements, Stein never sought such an agreement or approval from the applicant, let alone obtain them.

[15] In response, Stein relies upon an "Action Alert Form" which she apparently completed and submitted to the applicant's board of directors. It is addressed to Bequiri and states as follows:

> "I have received the status report for 60 Pavanne (*sic*). It states that no installation of washer, dryer is permitted. The owner of the Unit told me that other Units do have them installed. Also my storage?+ when does the electrical need updating if at all? My lawyer says I need something in writing by noon tomorrow Wed to state the above would be permissible.
>
> I will drop by in the morning.
>
> Thank you"

[16] This Action Alert Form is dated June 29, 2010, more than 10 days prior to Stein acquiring title to the Unit. It does not evidence any approval or agreement of the applicant as required by section 98 of the Act, and in any event does not provide any particulars whatsoever of the contemplated renovation work ultimately carried out by Stein.

[17] After inspecting the Unit, Panahi made a number of recommendations for Stein to implement including applying for a building and plumbing permit, obtaining a PASS Report from the Electrical Safety Authority for the work undertaken to date, and obtaining drawing details from a professional engineer for the methods and materials used in the exterior wall, and additional work going forward.

[18] It is Stein's position that she is unable to obtain the necessary building permit because she does not have the "as built drawings" for the condominium building. The applicant does not have those "as built drawings" in its records. And according to Stein's evidence, the City of Toronto's Building Department could not locate them as well.

[19] What the City of Toronto Building Department has confirmed is that it has issued an Order to Comply against Stein, but is not in a position to provide a copy to the applicant despite its requests. Stein has yet to produce that order to comply in this proceeding.

[20] In response to further inquiries from the applicant, Stein has produced mechanical drawings but no architectural drawings to date.

[21] Stein has not produced any reports or certificates of inspection from the Electrical Safety Authority.

[22] Stein also takes the position that she should not be responsible for the costs of having the applicant's professional consultants review all of Stein's proposed changes in order for them to be able to advise the applicant's directors as to whether any approval can be considered or provided. It is the applicant's position that none of the other unit owners at the property should have to pay any share of the costs associated with those steps.

Requirement to Mediate/Arbitrate?

[23] At the outset of the hearing, Stein took the position that the applicant was required to comply with section 134(2) of the Act which precludes a person from proceeding with an application to the Superior Court of Justice for a compliance order in the absence of invoking the mediation and arbitration processes set out in section 132 of the Act.

[24] After hearing argument on this preliminary issue, I rejected Stein's argument with brief oral reasons, and advised the parties that I would expand upon those reasons in these formal Reasons for Decision.

[25] In *Toronto Common Element Condominium Corporation 1508 v. Stasyna* 2012 ONSC 1504 (CanLII), Justice Quiqley addressed this very argument as it related to common elements being the subject matter of the application before him:

> "The second question that arises is whether the Corporation is required under sections 132 and 134 of the *Condominium Act* to pursue mediation and/or arbitration with the respondents before this court can acquire jurisdiction over the subject matter of the application and before the Corporation may seek an order requiring compliance.
>
> The answer in a word is no. The simple reason is that the alterations and variations that have been made in this case to TCECC No. 1508's common element areas have *never* been in compliance with section 98 of the Act. It is only under section 98 that permissible variations can be made. The language of sections 132 and 134 of the Act show that the mediation and arbitration provisions are not "available" when what is at issue is *initial compliance* with section 98 of the Act itself."

[26] As held by Justice Code in *Metropolitan Toronto Condominium Corporation No. 747 v. Korolekh* 2010 ONSC 448 (CanLII), the duty to mediate applies only to lesser disputes or disagreements arising out of the interpretation, application or non-application of the declarations, by-laws or rules of the condominium corporation itself.

[27] The unilateral, unauthorized changes to the common elements do not qualify as "lesser disputes" as that term has been defined in the jurisprudence. Similarly, the current state of repair of the Unit, which according to the applicant has now created additional safety risks, is not a "lesser dispute".

[28] Accordingly, I find that section 134(2) does not bar the applicant from proceeding with this application.

Compliance Order

[29] As effectively conceded by Stein during argument of the application, in the absence of written approval from, or an agreement with, the applicant's board of directors, Stein was completely without authority to carry out those renovations which altered the common elements. As stated by Justice Low in *MTCC No. 985 v. Vanduzer* 2010 ONSC 900 (CanLII):

> "I do not accept that submission. Under the predecessor legislation, there was no right given to unit owners to make alterations, additions or improvements to common elements. The Act loosened the prohibition by allowing them on the conditions set forth in s. 98 of the Act. Under the Act there is still no right vested in an owner of a unit to make alterations, additions or improvements to common elements. There is merely a statutory mechanism whereby an owner may acquire permission to do so from the condominium corporation through compliance with the requirements in s. 98 and at the discretion of the condominium corporation.
>
> There are no statutory criteria limiting the scope of the discretion reposed in condominium boards in assessing a request and either giving or denying approval of proposed alterations, additions or improvements. The basis of a denial could be for reasons of safety concerns, as I find it was here, but they could equally be for aesthetic reasons, or reasons relating to the market value of the property among others."

[30] Stein submitted that any compliance order I may make ought to amount to the least intrusive order possible. Having reviewed the evidentiary record, in my view it does not lie in Stein's mouth to now request a "toned down" compliance order. The applicant has been attempting to uncover the particulars of Stein's renovation project for years, after it was carried out without the applicant's knowledge or approval in the first place.

[31] The applicant has a statutory duty to oversee and manage the common elements. Stein has altered the common elements without city or Electrical Authority approval, and in a way that now creates potential safety hazards.

[32] As such, a proper section 98 compliance order is warranted.

Failure to Maintain Unit

[33] Section 92 of the Act permits the corporation carrying out construction work to a unit on behalf of the unit owner in various circumstances. Specifically, section 92(3) states as follows:

> "If an owner has an obligation under this Act to maintain the owner's unit and fails to carry out the obligations within a reasonable time and if a failure presents a potential risk of damage to the property or the assets of the Corporation or a potential risk of personal injury to persons on the property, the Corporation may do the work necessary to carry out the obligation."

[34] Admittedly, the thrust of the material filed by the applicant focused upon Stein's unilateral alterations to the common elements. The applicant is also seeking a section 98 compliance order with respect to "all necessary repairs and/or maintenance to the Unit in accordance with the Act with declarations". While the photographs produced by the applicant depict Stein's unit in what appears to be a perpetual state of disrepair, this is not unlike most renovation projects.

[35] The applicant's request to carry out "all necessary repairs and/or maintenance to the unit" is simply too broad, and there is currently insufficient evidence for me to arrive at the necessary conclusions to support the issuance of such a compliance order.

[36] At this stage, it is unclear whether Stein's unit poses a risk of "damage to the property or the assets to the corporation" or "personal injury to persons on the property". That said, those two potential risks are not outside the realm of possibilities given the history and continuous physical state of Stein's unit, especially in light of an outstanding Order to Comply from the city and the lack of approval from the Electrical Safety Authority.

[37] While the applicant has cause for concern that the risks set out in section 92(3) of the Act are real, on the record before me I cannot make the leap being suggested by the applicant which would effectively grant it a license to bring the Unit into a state of repair to the applicant's own liking. Under a section 92(3) analysis, there is simply no "yardstick" against which I can measure the current state of repair of Stein's unit.

[38] Accordingly, pursuant to section 134 of the Act I believe that a further section 98 compliance order is necessary, although lesser in scope than that sought by the applicant.

Summary

[39] Accordingly, I hereby grant the following relief:

a) Stein is in breach of the provisions of sections 98 and 117 of the Act;

b) the applicant is hereby granted access to Stein's unit as reasonably necessary and upon providing 48 hours' notice to Stein for the purpose of:

i. carrying out a full inspection to determine any further unauthorized additions and/or alterations to the common elements;

ii. restoring any such unauthorized additions and/or alterations to the common elements to their original condition;

iii. carrying out a full inspection to determine whether the current state of the Unit poses any risk(s) as provided for in section 92 of the Act.

c) this application is adjourned, if necessary, to myself for the purpose of determining whether a further section 98 compliance order is necessary after the applicant completes its inspection of the unit for purpose (b)(iii) above; and,

d) any losses or costs incurred by the applicant in obtaining entry to the Unit and/or effecting all necessary repairs and/or maintenance to restore the unauthorized additions and/or alterations to the common elements shall be common expenses of Stein's unit and are recoverable as such in accordance with section 134 of the Act and the applicant's Declarations.

Costs

[40] At the conclusion of the hearing of the application, both parties submitted their respective Costs Outlines and Bills of Costs. Not surprisingly, the total amount of costs sought by the applicant is much higher than that sought by Stein, especially given the applicant's attempts to "peel back the layers" and obtain the transparency they were seeking from Stein.

[41] As held by the Court of Appeal for Ontario in *Boucher v. Public Council (Ontario)* 2004 CanLII 14579 (ON CA), I am required to consider what is "fair and reasonable" in fixing costs with a view to balancing compensation of a successful party with the goal of fostering access to justice.

[42] The applicant was largely successful on this application. While the allegations that Stein was in breach of section 92 of the Act were technically not (yet) proven, given the terms of my decision the balance of the application may still prove warranted and necessary. As well, those specific allegations were so intertwined with Stein's unauthorized alterations to the common elements that it made practical and economic sense to include them in one application.

[43] I have reviewed the time spent by counsel for the applicant and the disbursements charged. Overall, and in the circumstances in this case, I hereby award the applicant its costs of the application on a partial indemnity basis in the all-inclusive amount of $25,000.00 payable by Stein forthwith.

Diamond J.

Released: March 16, 2016

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– and –

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Respondent

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