

COURT FILE NO: CV-08-00361675

DATE: 20081007

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: YORK CONDOMINIUM CORP. NO. 414

Applicant

- and -

ALL UNIT OWNERS AND MORTGAGEES OF YORK CONDOMINIUM CORP. NO.
414

Respondents

BEFORE: The Honourable Madam Justice Darla A. Wilson

COUNSEL: *Jonathan H. Fine,*
for the Applicant

Douglas H. Levitt,
for the Respondents Rangwani, Takhar and Karthigesu

HEARD: October 6, 2008

WILSON D.A., J:

ENDORSEMENT

[1] This is a motion brought by the applicant, Condominium Corporation (“York”), against the Unit Owners for an order restraining the holding of the requisitioned owner’s meeting currently set for October 11, 2008, until the application for the appointment of an Administrator has been dealt with. This is opposed by the respondents, Rangwani, Takhar and Karthigesu, who were represented on the motion by Mr. Levitt.

[2] At the outset, counsel for the applicant brought a motion for an order validating service of the motion materials and I granted that order.

Background to the motion

[3] York has brought an application for an order appointing an administrator for the condominium corporation to manage the affairs of York. Counsel for York has attended at Triage court to secure a date for the hearing of the application but at present, a date has not been obtained. Both counsel agree that the application should proceed as expeditiously as possible.

[4] A meeting set for October 11, 2008 has been requisitioned by the Unit Owners to call a vote and elect a new Board of Directors. Counsel for the moving party seeks to restrain the convening of an Owners' meeting until after the application has been disposed of, citing the serious financial difficulties York faces as well as the instability of the current situation. The represented Unit Owners oppose the relief sought, arguing that the meeting is necessary in order to permit the Unit Owners to elect a new Board who can then put their position before the Court on the application. Counsel for the respondents argues there is no evidence of irreparable harm that would ensue if the injunction is denied and the meeting goes ahead as scheduled.

The Evidence

[5] The moving party relies on the following material in support of its motion: the affidavit of Johnson Olaniyi (member of the Board and unit owner) sworn September 12, 2008 filed in support of the application; the affidavit of Anthony Seljack (property manager of York) sworn September 16, 2008; further affidavit of Mr. Seljack sworn September 29, 2008; further affidavit of Johnson Olaniyi sworn September 29, 2008; the further affidavit of Mr. Seljack sworn October 3, 2008; the affidavit of Charan Sharma (Board member and Unit Owner) sworn October 4, 2008; the affidavit of Shabnam Ali (owner of 2 units) sworn October 4, 2008; the affidavit of Jimmy Philip (Unit Owner) sworn October 4, 2008; and the affidavit of Mohinder Bahl (Board member and owner of 10 units) sworn October 6, 2008.

[6] In his first affidavit, Mr. Olaniyi states that he is President of the Board and has been on the Board for 4 years. He notes that York has accumulated large debts which it cannot pay. The view of the current board is that an administrator must be appointed who is impartial and experienced to make the decisions that are in the best interests of the corporation. He details the debts of York totalling approximately \$400,000 at the present time and notes that the requisitioning Unit Owners want to keep common expenses down, which is unrealistic given the current financial situation.

[7] In his affidavit, Mr. Seljack deposes that he has worked in condominium property management for more than 18 years and in the short time that he has worked at York, he has observed an "unrivalled level of hostility at this building, among residents, owners and the board..." He notes that at a recent meeting held September 7, 2008, numerous

misrepresentations were made concerning the conduct of the Board of Directors and the role of an administrator.

[8] Mr. Olanyi states that York is in a precarious financial situation having accumulated extensive debts and it is currently unable to meet its payment obligations to entities such as Rogers, Enbridge and the City of Toronto. Mr. Olanyi provides a brief history of the acrimonious relations between the Board and the Unit Owners over the course of the past 4 years. Indeed, since June of 2004, there have been 5 attempts at requisitions to remove and replace Board members. He notes that a number of the requisitioners were formerly Board members who caused internal strife and in-fighting. He is very concerned about the financial situation of York and notes that the fighting and resultant instability has gone on for too long and adversely affected the management of the condominium.

[9] The affidavit of Sharma details the troubled history of the condominium corporation, including a court application in 2006 dealing with the election of a new Board of Directors which resulted in significant expense and legal fees to York. There have been several requisitions for the removal of Board members over the last few years, which included misinformation and aggression. Sharma states that given the precarious financial situation of York, it should not have to incur the expense of an election in the face of the existing application to put an administrator in place.

[10] Ms. Ali who owns 2 units in the building has witnessed the deterioration of the situation at York since 2002 and she believes that a Board cannot operate successfully because of personal agendas and the politics that is involved. In the past, the election campaigns have been "personal" and most unpleasant with "nothing fruitful gained" from the meetings organized by the requisitioners.

[11] In his affidavit, Mr. Philip states that he is worried about the state of York's financial situation and he is concerned that the corporation is on the brink of bankruptcy given the huge amounts of money that it owes to creditors. He agrees with Ms. Ali that the meetings of the requisitioners are always chaotic with blame being heaped on others for the corporation's problems. Mr. Philip expresses concern for his safety because of the current atmosphere at the condominium. In his view, it is time to put an administrator in place to deal with the situation which has become urgent.

[12] Mr. Bahl who owns 10 units in the condominium agrees with the sentiments expressed by Ali, Philips and Sharma concerning the current situation at the building. He believes York is on the brink of financial collapse and that it is in the best interests of the corporation to allow an administrator to run the corporation for a period of time. If the meeting proceeds and a new Board is elected, it will be comprised of individuals who have contributed to the current problems and will be a needless expense for the corporation which is already on the doorstep of bankruptcy.

[13] The responding affidavits of Mario Marasco and Dashpal Takhar sworn October 2, 2008 were identical to each other. Mr. Marasco is a unit owner and one of the

requisitionists. He denies that the requisitioned meeting was motivated by anything other than concern with the manner in which the current Board has handled the affairs of York. He and the other requisitioners want to hold a meeting to remove the current Board and elect a new Board that can manage the affairs of the corporation properly. The responding affidavits do not deny that York is in dire financial straits; nor do they indicate how they believe that a new Board can turn things around quickly.

Positions of the Parties

[14] Mr. Fine argued that based on the evidence, the situation is critical and one that a new Board cannot quickly remedy. As a result of the precarious financial situation together with the chaos and infighting, it makes no sense to proceed with a meeting for the removal of the Board and its replacement. He noted that 4 of the new candidates have previously sat on the Board. Given the pending application, the meeting must be delayed because if the application is successful and an administrator is appointed by the Court, the issue will be moot.

[15] Mr. Levitt stated that no irreparable harm would ensue if the meeting proceeded as scheduled prior to the hearing of the application. However, there *will* be irreparable harm if the injunction is granted and the new Board does not have the opportunity to effect change and demonstrate this to the Court at the return of the application. In effect, this outcome will prevent the Court from hearing the application on its merits.

Analysis

[16] The law is well settled that in order to be successful on an injunction, the moving party must satisfy the three stage test: there is a serious issue to be tried; irreparable harm will result to the applicant if the relief is not granted; and as between the parties, the applicant would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits - the balance of convenience test: *RJR MacDonald Inc. v. Canada*, [1994] 1 SCR 311 (SCC).

Serious Issue

[17] In the case before me, York has brought an application to appoint an administrator pursuant to Section 131 of the Condominium Act on the basis that the corporation is on the brink of financial disaster. The uncontradicted evidence before me is that York owes in excess of \$400,000 to creditors and there are other significant structural repairs that are necessary which have not been attended to because of lack of funds. The average price of a unit in the condominium is in the range of \$85,000-\$100,000 making payment of a special assessment for Unit Owners problematic.

[18] In addition, there is a history of discord among various factions of the unit owners and unhappiness with the actions of the Board which resulted in requisitions in order to get rid of the Board members and replace them. The atmosphere at the building is "depressing" to use the term of Jimmy Philip and the animosity between certain unit

owners and the Board has given rise to conduct which has led to intimidation and fear among unit owners. There have been several requisitioned meetings over the last few years and acrimonious litigation, and the affairs of the corporation appear to have continued in a downward spiral, notwithstanding the replacement of Board members.

[19] The affidavits sworn by the respondents deny there is any political agenda behind the requisitions and state that the requisitions were made only due to concern with the mismanagement by the current Board. I need not make a determination as to what prompted the requisitioning of the meeting. Similarly, it is not my function to make a determination as to whether an administrator ought to be appointed. I am mindful of the rights of unit owners to democratic government and this is not something to be lightly interfered with. It is clear to me, however, on the basis of the evidence before me that the situation at York is, indeed, very serious. The financial situation is at a crisis point and all of the unit owners face significant risk if things continue as they have for the last few years. In my opinion, the application for the appointment of an administrator is a serious issue to be tried.

Irreparable Harm

[20] Counsel for the respondents urges me to allow the meeting to proceed on the basis that a new Board, if elected, will not act until the application has been dealt with. I do not find this to be a sensible solution but rather, in my view, this manner of proceeding would only serve to increase the turmoil that currently exists. I do not accept the suggestion that without the meeting the respondents will not be in a position to file responding materials on the application. The unit owners who are respondents to the application can certainly file evidence, should they wish to do so, rebutting the contents of the affidavits filed in support of the application. Whether or not a meeting is held pursuant to requisitions will have no bearing on their ability to respond to the application to appoint an administrator.

[21] I am of the opinion that given the current dysfunctional situation at the condominium, irreparable harm would result by the holding of a meeting to elect a new Board of Directors. It would serve to increase the existing instability and in all likelihood inflame the situation.

Balance of Convenience

[22] Both counsel agreed that they will attend Triage court and attempt to secure the earliest possible date for the hearing of the application. Hopefully, it can be heard in a matter of weeks. At that time, the concerns of the Unit Owners can be heard and the Court will determine whether it is necessary to appoint an administrator to manage the property. In effect, as Mr. Fine pointed out, the meeting requisitioned will simply be delayed, not denied.

[23] Counsel for the moving party referred to the decision of Justice Herman in *York Condominium Corp. No. 25 v. Persaud*, 52 RPR (4th) 156. In my view, this case is

factually very similar to the case at hand. The condominium corporation brought a motion for an injunction restraining the holding of a meeting called by the unit owners, pending the hearing of an application to appoint an administrator. In balancing the rights of the unit owners against the serious problems at the condominium corporation including disrepair of the property, a precarious financial situation and mismanagement of the corporation, Justice Herman noted,

... I am sympathetic to the concerns of the Unit Owners as a result of obtaining an earlier date for the hearing of the application, the opportunity for a new Board, if elected, to address problems of alleged mismanagement of the property will be delayed for weeks, not months. This greatly reduces the potential inconvenience to the respondents...

The situation in the *Persaud* case, *supra*, is analogous to the case before me and I agree with and adopt the sentiments expressed by Herman, J.

[24] In my opinion, when I compare the harm that is occasioned by denying the injunction to the harm in granting the injunction, I find that the former outweighs the latter. The situation at York is grave and could have far-reaching impacts on the unit owners if it continues.

Conclusion

[25] I am satisfied that the moving party has met the 3 prong test which has been articulated by the Supreme Court of Canada for the granting of an injunction: there is a serious question to be tried; there will be irreparable harm if the injunction is not granted; and the balance of convenience favours the granting of an injunction. An order will, therefore, issue that the requisitioned Owners' meeting set for October 11, 2008 is hereby restrained until the application for the appointment of an Administrator is heard by the Court. Further, the respondents are hereby restrained from the holding of any other requisitioned Owners' meeting until the aforesaid application has been dealt with.

[26] Costs of this motion to be dealt with by the judge hearing the application.

Wilson D.A., J.

Released: October 7, 2008