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Case Name:

York Region Condominium Corp. No. 890 v. 1610875 Ontario Ltd.

Between
York Region Condominium Corporation No. 890, Applicant,
and
1610875 Ontario Ltd. and O'Canada Inc. c.o.b. as Food Jungle, Defendants

[2007] O.J. No. 4104

Court File No. 07-CV-328068 PD2

Ontario Superior Court of Justice

M.C. Cullity J.

Heard: October 12, 2007.
Judgment: October 25, 2007.

(14 paras.)

Counsel:

Darcy Davison-Roberts - for the Plaintiff/Moving Party.

Leo Klug - for the Defendant/Respondent, 1610875 Ontario Ltd.

Sue K. Chen and ***Michael Campbell*** - for the Defendant/Respondent, O'Canada Inc.

REASONS FOR DECISION

1 **M.C. CULLITY J.**:-- This motion for summary judgment will be dismissed for essentially the same reasons as those released contemporaneously in respect of the similar motion against 1185010 Ontario Inc ("118") - Court File No. 07-CV-328068 PD 2. The actions were commenced on the same day - February 20, 2007 - and the course of the proceeding in this case followed the same disjointed process as that in which 118 was involved.

2 The relief sought by the plaintiff in each of the motions, and the grounds on which its counsel relied, were not materially different. The submissions of counsel for O' Canada Inc. ("O'Canada") were generally much the same as those advanced on behalf of 118, although they were supported by additional evidence and more elaborate arguments of counsel. The comments that follow should be read together with the reasons for decision of the motion involving that corporation.

3 Apart from the status of O' Canada Inc. as a tenant and occupant - and not the owner - of the Unit in which there was allegedly a failure to comply with the Declaration of the condominium, the relevant facts on which the parties rely

are the same as in the proceedings against 118. The impugned activities in this case consisted of heating pre-cooked Chinese dumplings, meat balls and fish balls in the Unit for the purpose of sale to customers. In addition, boiling water is used to make bubble tea and to prepare instant noodles. The plaintiff's position is that, under the provisions of the Declaration, these activities were those of a Restaurant and, as such, were not permitted on the first level of Pacific Mall. O'Canada's position is that, with the exception of bubble tea - which is a beverage that is almost always sold cold - they were snack foods and, accordingly, excluded from the definition of a Restaurant in section 1.1(g) of the Declaration. In support of this submission, the principal of O' Canada, Mr Moore Leung Fun Hui, deposed that the vast majority of its customers, and of the owners of Units in Pacific Mall, are either Chinese Canadians, or individuals of Chinese descent. He deposed further that he would refer to Chinese dumplings, meat balls and fish balls in the Cantonese language as "dim sum" - a term that he asserted would be "directly translated" as "snack food". Although he did not claim expertise as a linguist, he stated that Cantonese is his first language and that he believed the great majority of his customers would agree with his understanding that the items he was selling would be regarded by them as snack foods. He stated, further, that at least seven other Units on the first level of the Pacific Mall engage in the same methods of preparing food and bubble tea for sale.

4 In connection with the submission - made also in the motion involving 118 - that, even if the plaintiff's interpretation of the Declaration was correct, it should be considered to be estopped from now objecting to the impugned activities, Mr Moore Leung Fun Hui provided evidence that contradicted statements in an affidavit delivered for the purpose of the motions, and in the original, and the proposed amended, statement of claim. The evidence was to the effect that, contrary to the plaintiff's assertion that it did not discover the activities until in, or about, August, 2006, it had prior notice of them. Mr Moore Leung Fun Hui also stated that he had been informed by the former occupier of the Unit from whom O'Canada had acquired the business in 1997, that substantially the same practices had been followed in the past. He stated, further, that employees, or agents, of the plaintiff had inspected the premises on more than one occasion after the commencement of the tenancy and presumably were aware that food was being heated.

5 On the basis of the material filed in this motion, I doubt whether the plaintiff has established that there are no genuine issues for trial. While issues of contractual interpretation may be considered to raise questions of law that are amenable to summary judgment, in cases where extrinsic evidence may be admissible and competing inferences may be drawn from it, justice may require that oral evidence be given at a trial: see, for example, *Berry v. Pulley,* [2005] O.J. No. 4113 (C.A.). I am not satisfied on the basis simply of the documentation that the interpretation supported by plaintiff's counsel is self-evidently correct. I believe there is also force in Ms Chen's submission that, notwithstanding the existence of a non-waiver clause in the Declaration, the evidence of the plaintiff's knowledge and possible acquiescence is sufficient to raise an issue to be tried.

6 Independently of the above comments, I will decide this motion on the procedural grounds to which I referred in the reasons dismissing the motion for judgment against 118 and, in particular, to those relating to the effect of sections 132 and 134 of the *Condominium Act*.

7 As I have mentioned, the course of the proceeding has followed the same pattern as that involving 118. Significant amendments to the notice of motion and the statement of claim were served in May, other proposed amendments were served on October 3, and, during the course of the hearing of the motion, the plaintiff indicated that it would seek leave to delete the claims for damages. The same objections to the timing of the motion for summary judgment that I found to be valid in the proceeding against 118 apply equally to this motion.

8 The principal difference between the two cases is that, unlike 118, O'Canada Inc. is a tenant under a lease originally granted by the predecessor to 161 as the owner of the Unit. The claims against 161 are based on an alleged obligation to ensure that its tenant complies with the Declaration and the rules and regulations of the condominium. Section 4.2(b) of the latter provides that:

> No Unit shall be occupied under a lease or licence agreement for any purpose other than as permitted in the Declaration or herein.

9 The lease provides that the premises are to be used:

> ... only for the purposes of the retail sale of fresh vegetable juices, carbonated and non-carbonated soft drinks, ice-creams and yogurts, pastries, bagels, muffins, sandwiches, cold coffee and teas, confectionery items, popcorn, other similar food and beverage, gift and souvenir in compliance with the rules and regulations of the Pacific Mall.

10 161 received a notice of default from the property manager of the plaintiff on January 30, 2006. Upon receipt of this, and subsequent letters from the plaintiff's solicitor, 161 advised O'Canada that it should stop using the heating appliances in the unit. Although 161's position from the outset has been that the tenant must comply with the provisions of the Declaration, it has most recently stopped short of endorsing the plaintiff's interpretation of the Declaration. It regards the dispute as one between the plaintiff and the tenant and, through its solicitor, Mr Klug, it advised the court that it wishes to remain neutral on the issues and to submit its rights to the court.

11 In these circumstances, I am satisfied that sections 132 and 134 of the *Condominium Act* apply and that the motion should be dismissed pursuant to section 134(2). Section 132(4) incorporates in the Declaration a provision that the plaintiff and the owners agree to submit to mediation and arbitration "a disagreement between the parties" with respect to the Declaration. I believe there is sufficient "disagreement" between the plaintiff and 161 for the purposes of section 132(4). The latter does not now concede that the interpretation advanced on behalf of the plaintiff is correct, and has recognised the existence of the issue raised by O'Canada. In a letter of May 15, 2007 to counsel for the plaintiff, Mr Klug drew counsel's attention to the "mandatory provisions of section 132(4) of the Condominium Act" and enquired whether "you wish to have this manner proceed through mediation as soon as possible?" In my opinion, Mr Klug's suggestion should have been accepted.

12 I am also the opinion that O'Canada must be a party to the process of mediation and arbitration. By virtue of section 119(1) of the *Condominium Act*, it is under an obligation to comply with the Declaration. Although section 134(1) entitles the plaintiff to make application to the court to enforce compliance against O'Canada, section 134(2) provides that any such application must be preceded by an unsuccessful attempt to obtain compliance through the mediation and arbitration processes in section 132 if they are "available". In my opinion they are available here as the essential purpose of the mediation and arbitration as between the plaintiff and 161 will be to determine whether O'Canada is complying with the Declaration and to enforce compliance if it is not.

13 In consequence, the proceeding by way of a statement of claim against each of the defendants is contrary to section 134(2) of the *Condominium Act*, and the present motion - like that in the proceeding against 118 - is dismissed on that ground.

14 Costs may be spoken to.
M.C. CULLITY J.