2016 ONSC 6256
Ontario Superior Court of Justice

2308478 Ontario Ltd. v. York Region Condominium Corp. No. 715

2016 CarswellOnt 19335, 2016 ONSC 6256, 274 A.C.W.S. (3d) 199

2308478 ONTARIO LTD. (Applicant) and YORK REGION CONDOMINIUM CORPORATION NO. 715 (Respondent)

G. Dow J.

Heard: October 4, 2016; November 24, 2016
Judgment: December 9, 2016
Docket: CV-16-550261

Counsel: M. Gosia Bawolska, for Applicant
Safia J. Lakhani, for Respondent

Subject: Corporate and Commercial; Property

APPLICATION by condominium unit owner for appointment of administrator to replace board of directors.

***G. Dow J.*:**

1 The applicant seeks an order appointing an administrator pursuant to section 131 of *The Condominium Act*, 1998, S.O. 1998 c.19 alleging the existing Board of Directors are not acting in the best interests of the corporation. The defendant opposes the motion.

Background

2 The applicant is a corporation operating under the business name Creative Kitchen Gallery Inc. ("Creative Kitchen") with a show room in Unit 1 of 166 Bullock Drive, Markham, an industrial-retail building with 36 condominium units. The common elements are managed and governed by the respondent. There are five directors, last elected by the 18 different unit owners in November, 2013. The principal of the applicant, Steve Torok, (following purchase of Unit 1 December 14, 2011) sought a position on the Board of Directors at that time given his concerns detailed below but was not elected. In fact, it is clear there is conflict between he and of the respondent Board of Directors, which has resulted in two other court actions referred in the evidence before me, being:

a) a Statement of Claim issued December 24, 2014 by Mr. Torok and his corporation against the respondent and the five directors for property damage, business interruption, loss of profit, breach of contract, aggravated and punitive damages;

b) a Small Claims Court Action for punitive damages against Mr. Torok arising from an alleged assault of the respondent's property manager on August 8, 2014, apparently in the afternoon which makes the Special Board Meeting Minutes of August 8, 2014 commenced at noon and adjourned at 1:15 pm authorizing the action confounding. The explanation for this from the respondent is the Board of Directors meeting was held immediately after the incident occurred and/or the inclusions of the word "afternoon" in the Minutes is inaccurate.

3 The applicant focused on two examples on how the respondent Board of Directors had failed to fulfill its (Section 27) statutory mandate to act in the best interests of the condominium corporation. The first is the failure to maintain an

adequate reserve fund with regard to and in response to a reserve fund study identifying maintenance issues, particularly the roof. The second aspect is a failure to properly address parking issues.

4 Regarding the reserve fund, the applicant points to the statutorily mandated Reserve Fund Study report by First Condo Group Limited dated July 6, 2011. It forecast anticipated expenditures of $704,609.00 and a shortfall of $433,871.00 by May 31, 2012 and recommended an immediate 8% increase in reserve fund contributions. However, the cover letter of the report states: "The current reserve fund balance and proposed contributions are adequate to cover any potential major repairs or replacements".

5 In 2012-2014, little or no money was spent doing any capital repairs or maintenance.

6 On January 6, 2014 the applicant reported a water leak and damage with repairs and damage with repairs which cost $4,359.52. By May 21, 2014, the City of Markham building department had served a Property Standards Order on the respondent with regard to the condition of the roof and by late 2014 roof repairs had been conducted following receipt of an estimate from Proteck Roof and Sheet Metal for $261,900.00 plus HST. The year-end May 31, 2015 financial statements of the respondent indicate $217,600.00 was paid for roof repairs.

7 The draft Entuitive Reserve Fund Study report dated November 17, 2015 indicates more than $3 million would be required over the next 30 years (or more than $100,000.00 per year) and the need to raise those funds from common elements monthly fees.

8 The evidence regarding parking irregularities is based upon observations of double parking, blocking fire routes and unauthorized parking in the visitors lot. This resulted in amongst other things, the inability of the snow removal contractors to properly clear the lot as required.

9 The inactivity of the Board of Directors through its property manager and failure to properly maintain the property including maintaining the reserve fund has changed more recently and before this Application was issued April 5, 2016. The steps taken include:

a) adoption of the Entuitive report recommendations to set aside $71,000.00 for that fiscal year with rate of inflation increases at the January 22, 2016 board meeting;

b) the repair to the roof commenced with the quotation in June, 2014 with work done and $217,600.00 paid before May 31, 2015 as reflected in that year-end's financial statement;

c) replacement of the property management company in the Fall of 2013;

d) the respondent retaining Ontario Parking Authority to tag illegally parked vehicles in the lot and a security company being retained to conduct weekly visits.

Analysis

10 The parties agree the five factors to consider are outlined in *Skyline Executive Properties Inc. v. Metropolitan Toronto Condominium Corp. No. 1385*, [2002] O.J. No. 5117 (Ont. S.C.J.) which are:

a) whether there has been established a demonstrated inability to manage the corporation;

b) whether there has been demonstrated substantial misconduct or mismanagement or both in relation to the affairs of the corporation;

c) whether the appointment of an administrator is necessary to bring order to the affairs of the corporation;

d) whether there is a struggle within the corporation among competing groups such as to impede or prevent proper governance of the corporation; and

e) where only the appointment of an administrator has any reasonable prospect of bringing to order the affairs of the corporation.

11 Regarding the first factor of demonstrating an inability to manage the corporation, my observation and conclusion is that this application would have had greater success had it been returnable in or about August, 2013, that is, before the more recent activity by the respondent Board of Directors to take the steps listed above. As repeated by Justice D. Brown (as he then was) in *Bahadoor v. York Condominium Corp. No. 82* [2006 CarswellOnt 7608 (Ont. S.C.J.)], 2006 CanLII 40487, referencing the comment of Justice Hoilett in *Skyline Executive Properties Inc. v. Metropolitan Toronto Condominium Corp. No. 1385*, *supra* the Court should utilize the provisions of Section 31 "only as a last resort" given the Act contemplates the unit owners should govern their own affairs. Were this the only factor to consider, I would not grant the relief sought.

12 Regarding the second factor of demonstrated substantial misconduct or mismanagement or both in the affairs of the corporation, the position of the applicant is that his actions, which preceded issuance of this Application prodded the respondent's Board of Directors to begin taking the steps that they were required to take and the more recent attention and activity to the affairs of the respondent should not be in their favour. I agree with this position. Were this the only factor to consider, I would be inclined to grant the relief sought.

13 Regarding the third factor of appointment of an administrator as a necessary step to bring order to the affairs of the corporation, the applicant's position is weakened by not having identified the individual or entity to be the administrator along with their qualifications to do so. This was raised when initial submissions were made on October 4 and attempted to be remedied by providing a Supplementary Affidavit of Steve Torok on November 24 that contained the resumes of two individuals that appeared to be qualified and willing to be administrators.

14 In the case law relied upon by the applicant where an administrator was appointed, the situation for the condominium corporation was significantly more grave in my view. It is important to note the current Board of Directors for the respondent is active and that the financial affairs of the respondent is not one of any significant debt. Further, they have adopted the recommendation of the most recent reserve funds study which should avoid that occurring in the future. Were this the sole factor considered, I would not grant the application.

15 Regarding the fourth factor and the struggle within the corporation among competing groups such as to impede or prevent proper governance, I interpret this to be more at the Board of Directors level such that the ability of the Board of Directors to make decisions and take necessary steps is being frustrated. That is not the case in this situation before me. Here the Board of Directors has been capable of making decisions and is proceeding with the business of the corporation. The applicant may not be satisfied with or in favour of those decisions (or the speed with which they are being made) but the situation has not reached a point where, in my view, the activity of the Board of Directors has stopped or the market value of each unit holder's investment, including that of the applicant, has been seriously compromised or is about to be seriously compromised. Were this the sole factor, I would not grant the application.

16 Regarding the final factor and the appointment of an administrator as the only reasonable prospect for bringing order, I am again guided by the comments of Justice D. Brown (as he then was) in *Bahadoor v. York Condominium Corp. No. 82*, *supra*, and (at paragraph 26) that "good reason must be shown why unit owners should not manage their corporation's affairs through an elected Board of Directors. Self-governance is the norm; administrators are the exception". While I would conclude the actions of this Board of Directors has been substandard in the past, I would also note the evidence that they were elected by the unit owners in November, 2013 for a three year term and I was provided a copy of the Notice of Annual General Meeting to proceed on December 6, 2016 in the Supplementary Affidavit of Steve Torok. Were this the only factor to consider, I would not grant the relief sought.

17 Overall, while I would not consider one factor to be more or less important than another and that one factor could overwhelm the rest, it is my conclusion that this application should be and is dismissed. However, it should also

be stated that it is dismissed without prejudice to a new and further Application on new and additional evidence in order to ensure the activity and attention to the best interests of the unit holders continues rather than any resumption of the inactivity noted in 2011-2013.

Costs

18 Counsel for the applicant submitted a bill of costs indicating actual time and fees to be charged to her client to be $30,385.00 plus HST (of $3,950.05) and disbursements of $1,164.67 for total of $35,499.72. If successful, counsel sought costs on a substantial indemnity (90%) level or by my calculation, $27,346.50 plus HST of $3,555.05 and disbursements of $1,164.67 for a total of $32,066.22.

19 This compared to the respondent's bill of costs indicating counsel was charging her client $14,596.00 plus HST of $1,897.48 and disbursements of $1,124.16 for a total of $17,617.64. I also reviewed, with the consent of applicant's counsel, the respondent's formal offer to settle of July 5, 2016 proposing settlement on a without costs basis (that the application be dismissed) until July 12, 2016 with partial indemnity costs to be paid to that date and substantial indemnity costs thereafter. The offer also required execution of a full and final release if accepted subsequently and was open for acceptance until the commencement of the hearing.

20 The requirement to execute a full and final release (which in my view, bars any future claim) results in the applicant being relieved of the consequences of Rule 49.10 given my decision that the application is dismissed is without prejudice to a new and further application on new and additional evidence. Alternatively, I would rely on my discretion under that Rule as well as Rule 57.01 and Section 131 of the *Courts of Justice Act* R.S.O. 1990 c. C.43. It seems clear the efforts of the applicant resulted in the respondent Board of Directors improving its performance and fulfilling its obligations to act in the best interests of the unit holders. Further, I take note of the fact that the legal costs of the respondent will no doubt be partially borne by the applicant through its payment of common elements fees. Not only does section 131 of the *Courts of Justice Act* provide discretion to determine by whom and to what extent costs shall be paid but rule 57.01(2) specifically provides for awarding costs against a party that has been successful. As a result, I would award and fix costs payable by the respondent to the applicant in the amount of $2,500.00 inclusive of fees, HST and disbursements.

Application dismissed.

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