2017 ONSC 1813
Ontario Superior Court of Justice

Keele Medical Properties Ltd. v. Toronto Standard Condominium Corp. No. 1786

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KEELE MEDICAL PROPERTIES LTD. (Applicant) and TORONTO STANDARD CONDOMINIUM CORPORATION NO. 1786 (Respondent)

V.R. Chiappetta J.

Heard: March 2, 2017
Judgment: March 24, 2017
Docket: CV-15-533147

Counsel: Norman Ronski, for Applicant
Antonio G. Casalinuovo, Megan Molloy, for Respondent

Subject: Property

***V.R. Chiappetta J.*:**

1 The applicant caused this proceeding to be commenced seeking relief that includes a declaration that it is exempt from paying a special assessment levied by the respondent on March 1, 2015 and that the condominium lien the respondent registered against title to the commercial units owned by the applicant is therefore invalid and unenforceable.

2 The special assessment at issue was levied by the respondent upon all of its unit holders three months after the applicant's purchase of the commercial units. The applicant submits that it should not be liable for or required to pay any of the amounts owing under the special assessment. The respondent disagrees. The critical issue before the court therefore is the validity of the special assessment. For reasons that follow I have concluded that the applicant is not exempt from the special assessment levied by the respondent on March 1, 2015 and that the lien the respondent registered against title to the commercial units owned by the applicant is therefore valid and enforceable.

The Parties

3 The applicant is a for-profit corporation incorporated pursuant to the laws of the Province of Ontario. It is the owner of numerous commercial, parking, sign and rooftop units at the respondent (the "commercial units"). The applicant was incorporated by Tier 1 Transaction Advisory Services Inc. ("Tier 1") for the sole purpose of holding title to the commercial units. Mr. Bhaktraj Singh ("Singh") is the president of Tier 1 and the principal and operational manager of the applicant.

4 The respondent is a not-for-profit condominium corporation. It was incorporated pursuant to the *Condominium Act, 1998*, S.O. 1998, c. 19 (the "Act") for the purpose of controlling, managing and administering the assets and property of a condominium development municipally located at 2737 Keele Street, Toronto, Ontario, M3M 2E9. The respondent has been managed by Malvern Condominium Property Management ("Malvern") since January 1, 2014. Prior to engaging Malvern, the respondent was managed by Vero Property Management ("Vero").

Background

5 The applicant acquired the commercial units as a result of an agreement of purchase and sale entered into with the declarant of the respondent, Westmount-Keele Limited ("Westmount"), dated August 11, 2014. The applicant

acquired title on December 10, 2014. Collectively, the commercial units have an 11.3 percent proportionate interest in the respondent's common elements.

6 Westmount's principal, Mr. Joseph Ieradi ("Ieradi") was a member of the respondent's board of directors until September 2013. In the summer of 2013, a group of unit owners commenced litigation against the respondent and its board of directors, which at the time was declarant-controlled and comprised of Ieradi, Mr. Giorgio Marchi and Mr. Konstantinos Koutoumanos (the "former board"). On August 29, 2013, Justice Belobaba ordered that the respondent hold an annual general meeting and elections, which had occurred only once since 2006.

7 The annual general meeting was held on September 26, 2013. A vote of the unit owners resulted in the removal and replacement of the former board. Shortly thereafter, the respondent terminated Vero as its property management company due to Vero's inability to produce records related to the management of the respondent. As noted, on January 1, 2014, the respondent hired Malvern to replace Vero.

8 John Damaren ("Damaren") was the vice president of operations at Malvern until April 2016. He had been directly involved in the administration and operations of the respondent since January 2014. Damaren has no financial interest in the outcome of this litigation and there is no evidence to demonstrate or suggest that Malvern's retainer with the respondent is dependent on the respondent's success on this application. I found Damaren's evidence on matters for which he has direct knowledge and information to be both objective and logical and I accept it.

9 Vero was not cooperative in assisting with Malvern's efforts to piece together the respondent's financial, maintenance/repair, governance and operational records. Vero did not produce any such records until June 2014. Upon receipt of the documents provided by Vero, the respondent realized that the records maintained by Vero were deficient and/or wholly inaccurate and therefore provided little assistance to its reconstruction efforts.

10 On December 18, 2014, in response to a separate application commenced by the respondent, Justice Emery appointment Armand Conant ("Conant") as the inspector of the respondent to assist the respondent in the recovery and reconstruction of its records.

11 During its efforts to reconstruct the respondent's financial history, Malvern discovered that a special assessment in the amount of $2,598,350 had been imposed by the former board against unit owners owning a parking unit (the "first special assessment"). Two notices advising the respondent's unit owners of the first special assessment were issued by the former board on November 27, 2012 and December 11, 2012, respectively, and the first payments under the special assessment were due on February 1, 2013.

12 After receipt of a legal opinion dated November 25, 2014, the respondent discovered that the first special assessment failed to comply with the Act as it had been improperly levied against parking units only. The respondent eventually determined that there was a shortfall in the payment of the first special assessment as a number of unit owners either did not pay same or paid insufficient amounts. Of relevance to this application, Malvern discovered that Westmount was never levied and did not contribute to the first special assessment although Westmount owned approximately 79 parking units (21.9 percent of all parking units) at the time the first special assessment was levied.

13 As noted, the applicant acquired title to the commercial units on December 10, 2014.

14 The respondent's board of directors met on January 15, 2015 (the "January meeting"). At the meeting, the board decided to cancel the first special assessment due to the first assessment's non-compliance with the Act, the shortfall in the payment of the monies levied and the fact that the respondent still required additional monies to fulfill its financial obligations. It was further decided at the January meeting that a new special assessment (the "second special assessment") would be levied in the same amount as the first special assessment but that all unit owners would be required to contribute to the second assessment in accordance with the proportionate interest of their units as described in Schedule D of the respondent's declaration and not their ownership of parking units. The board further decided that any parties who

contributed to the first special assessment would receive a credit of the amounts they had paid under the first assessment to be applied toward future common expense obligations.

15 Notice of the second special assessment was issued by the respondent on January 20, 2015. The notice provided that a special assessment would be levied by the respondent on March 1, 2015 on all units in proportion to their interest in the respondent's common elements as described in Schedule D of the respondent's declaration. The applicant's proportionate interest in the respondent's common elements in accordance with Schedule D of the declaration is 11.3 percent. Westmount owned and subsequently transferred to the applicant 79 parking units, which is 21.9 percent of the 360 parking units at the respondent. I accept the respondent's submission that had Westmount contributed its 21.9 percent share of the first special assessment, the applicant would have received the benefit of a credit once the first special assessment was cancelled and the second special assessment was levied.

16 The applicant did not pay the second special assessment. The respondent registered a condominium lien against title to the commercial units on May 29, 2015.

The Issue

17 The issue before the court is whether the condominium lien registered by the applicant is invalid. The applicant argues that it is for two reasons: first, that there was inadequate disclosure in the status certificates that the applicant relied upon to effect its purchase of the commercial units and that the applicant is consequently exempt from paying the second special assessment; and second, that in any event, the respondent is statute-barred from registering a lien on account of the applicant's default in paying the second special assessment.

Is the Applicant Exempt from the Second Special Assessment Because of Inadequate Disclosure

18 The agreement of purchase and sale is dated August 11, 2014. After the parties entered into the agreement, Westmount provided the applicant with a status certificate dated April 11, 2014 (the "April status certificate"), which had been provided to Westmount by the respondent in connection with a separate and failed transaction. Prior to the closing of the purchase transaction between the applicant and Westmount, the lawyers for the applicant were also provided with two additional status certificates, one dated October 20, 2014 (the "October status certificate") and the other dated December 5, 2014 (the "December status certificate").

19 The applicant submits that the respondent misrepresented material information rendering the three status certificates inadequate in terms of disclosure such that the second special assessment does not apply to the commercial units.

20 The April status certificate was provided to the applicant by Westmount after the applicant executed the agreement of purchase and sale. The April status certificate reads in relevant part (emphasis in the original):

> **Common Expenses**
>
> 5. The owner **Westmount-Keele Limited** of Unit **1** Level **1** (2737 Keele Street, Unit 11, Toronto, Ontario, M3M 2E9) of **Toronto Standard Condominium Corporation No. 1786**, registered in the Land Registry Office for Land Titles Division of **Toronto**, is **not** in default (but see **Disclaimer** below) in the payment of common expenses. All amounts in this clause are subject to any cheques or pre-authorized payments issued by the owner of the unit clearing the bank. This unit may have parking and/or locker units which cannot be confirmed; it is recommended a title search be conducted to confirm. Parking and locker units may only be owned by a registered owner of a residential or commercial unit.
>
> **Disclaimer: Due to lack of all financial records being disclosed from the previous management company, the Corporation is unable to confirm the current status of maintenance fee payments to date.**
>
> . . .

8. There are no amounts that the Condominium Act, 1998 requires to be added to the common expenses payable for the unit. **This clause is subject to verification once all financial records have been turned over.**

Budget

9. The Corporation is presently attempting to meet its obligations as and when they become due and may be considering an increase in the common expenses in this fiscal period. To this extent the current budget (a copy of which is enclosed) is accurate, however, the Corporation is currently in a deficit.

. . .

11. Since the date of the original budget of the Corporation for the current fiscal year, the board levied on November 27, 2012 a special assessment for repairs to the Garage. The proportion of that assessment applicable to the parking units was in the amount of $7,850.00 for each parking unit. The proportion of that assessment applicable to the residential and commercial units was paid by the declarant. The outstanding amounts will be amortized over 12 months with the initial payment of $654.16 starting on February 1, 2013 and payments of $654.16 per month thereafter. The Board may be compelled to contemplate an additional special assessment to cover the deficit in the operating account, however, the amount and payment terms cannot be determined at this time.

12. The Corporation has no knowledge of any circumstances that may result in an increase in the common expenses for said unit. **Except: 1) The reserve fund contributions are increasing as per the attached cash flow analysis. 2) The board of directors has approved a budget which will increase the maintenance fees approximately 70.42% effective May 1, 2014. 3) Since the last approved audited financial statement was for the year ending July 31, 2009, the Board of Directors are not in a position to determine if an increase to the budget or a special assessment will be required now or in the future.**

. . .

Rights of person requesting certificate

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38. TSCC 1786 is in a state of administrative difficulty. The elected board has terminated the management agreement with the former management company effective January 1, 2014, but since the appeal referred to in this certificate challenges the validity of the election of the current board majority, it is difficult to verify owner accounts and other operational matters and the contents of this certificate must be read subject to an ultimate resolution of this matter which is being actively sought by the board of directors through its legal counsel Deacon, Spears, Fedson + Montizambert. The current board has established control over the TSCC 1786 general and reserve fund accounts with RBC, but records of contracts, payments, and owner contributions may be incomplete.

21 Singh and Ieradi agree that subsequent to the applicant's receipt of the April status certificate additional terms were negotiated into Schedule A of the agreement of purchase and sale. These terms, executed September 16, 2014, gave the applicant the contractual right to set off monies otherwise payable under a vendor take-back mortgage (provided for in the original agreement of purchase and sale) for any future special assessment, indemnification for any monies owed on the first special assessment and/or protection against an increase of common element fees. Specifically the additional terms read in relevant part:

The Buyer shall also be entitled, at the Buyer's option, to set off against amounts otherwise payable under the mortgage any additional amounts levied by the condominium corporation against the Buyer as special assessments or extraordinary increases in common expenses after the Completion Date for the Term of the [vendor take-back mortgage].

. . .

> The Seller shall indemnify the Buyer for any and all special assessments levied by the condominium corporation against the Buyer after the Completion Date for the Term of the [vendor take-back mortgage]. The Seller shall further indemnify the Buyer for any and all extraordinary increase in the common expenses levied by the condominium corporation against the Buyer after the Completion Date for the Term of the [vendor take-back mortgage]. For clarity, "extraordinary increases" shall mean any increases in the common expenses in a calendar year in excess of the consumer price index for that year.

22 Counsel for the applicant submits that the amendments were unrelated to the information disclosed in the April 2014 status certificate. He relies in this regard on Singh's evidence. Singh denied that the term requiring Westmount to indemnify the applicant for special assessments or extraordinary increases in common expenses during the term of the vendor take-back mortgage was negotiated because the applicant was aware there could be an increase in the cost of ownership of the commercial units shortly after the purchase transaction. Instead, according to Singh, the indemnification clause was inserted into the agreement of purchase and sale because the applicant had discovered a number of issues during the due diligence process such as repairs that were required to a part of the roof, the placement of corridors that did not correspond to the original building drawings, that a slip-and-fall that had occurred in a staircase, and ventilation and temperature control problems. Singh also indicated he was aware of a large increase in expenses that had occurred prior to the purchase and wished to be protected against similar increases in costs after the purchase transaction closed. Singh denied that he had concerns about the operations or the financial health of the respondent.

23 I do not accept Singh's evidence on this point. Considering the clear wording of the April status certificate, the clear wording of the amendment and the timing of the amendment, in my view it is a reasonable inference that on a balance of probabilities the amendment was made at least in part to address the potential for liability raised by the information in the April status certificate that the Board may be compelled to contemplate an additional special assessment.

24 The October 20, 2014 status certificate reads in relevant part (emphasis in the original):

> **Common Expenses** —5. The owner Westmount-Keele Limited of Unit 1 Level 1 (2737 Keele Street, Unit 1, Toronto, Ontario, M3M 2E9) of Toronto Standard Condominium Corporation No. 1786, registered in the Land Registry Office for Land Titles Division of Toronto, is not in default (but see Disclaimer below) in the payment of common expenses. All amounts in this clause are subject to any cheques or pre-authorized payments issued by the owner of the unit clearing the bank.
>
> **Disclaimer:** This assessment is necessarily qualified due to the lack of records (financial and other). Accordingly, the Corporation is unable to confirm same without qualification. Upon recovery or recreation of the financial or other records, the Corporation may be required to seek payment of any arrears discovered as owing. This certificate covers only the units noted herein and is not a representation of any other property, including but not limited, [*sic*] parking and/or locker unit(s) which may form part of the purchaser's transaction with the vendor. This certificate does not represent any knowledge as to who is the title holder to any parking and/or locker unit(s) which may accompany the transfer of the unit described herein but parking and/or locker unit(s) may only be owned by a registered owner of a residential or commercial unit and must be separately identified in any transfer. Purchasers are encouraged to confirm that the unit(s) being purchased are properly reflected in this certificate.
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> . . .
>
> 8. There are no amounts that the Condominium Act, 1998 requires to be added to the common expenses payable for the unit. This clause is subject to verification once all financial records have been turned over.
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> . . .

Budget

. . .

11. Since the date of the budget of the Corporation for the current fiscal year, the board has not levied any assessments against the unit to increase the contribution to the reserve fund or the Corporation's operating fund or for any other purpose.

12. The Corporation has no knowledge of any circumstances that may result in an increase in the common expenses for said unit, *Except:* 1) the reserve fund contributions should be increasing as per the attached cash flow analysis; 2) the Corporation is operating at a deficit which is presently resulting in no monthly contributions to the reserve fund; 3) since the last approved audited financial statement for the year ending July 31, 2012, and notwithstanding the absence of many financial records, the Board is considering the need for a budget increase and/or special assessments but has not levied or assessed said as of the date of this certificate; 4) the Corporation is disputing a payment allegedly owed to a third party for repairs to its parking garage, the costs in addressing this matter and potentially any monies owed to the third party are an unbudgeted expense; [*sic*] 5) costs including accounting and legal costs associated in the significant efforts to recover and/or reconstruct records which were not provided by previous property management, removed by previous board members, not provided by various third party contractors, and/or not turned over by the Declarant or its principals (acting in their personal capacity); 6) the Corporation is contemplating legal action against a number of parties including contractors, the declarant, successor declarant (if any exist), former board members, former property manager (and its principals), former solicitors and other parties as a result of various breaches of fiduciary duty, breaches of contract, breaches of statutory obligations and failure to advance the best interests of the Corporation; 7) the Corporation is considering bringing an Application for the appointment of an inspector to assist in reconciling and reconstructing the Corporation's financial records, the cost of said Application are not budgeted. [*sic*]

. . .

Rights of person requesting certificate

. . .

39. TSCC 1786 is in a state of administrative difficulty for reasons as described herein. The elected board has terminated the management agreement with the former management company effective January 1, 2014. At the present time, the former property management has not provided copies of all records belonging to the Corporation (financial or other). There are other parties as described in paragraph 12 who have also not returned records belonging to the Corporation. At this time it is difficult to verify owner accounts and other operational matters. The contents of this certificate must be read subject to an ultimate resolution of this matter, which are [*sic*] further described in paragraph 12. The Corporation has retained legal counsel to assist it in this regard and its current property management is attempting to reconstruct records based on the very limited records which is [*sic*] in the Corporation [*sic*] current possession. The current board has established control over the TSCC 1786 general and reserve fund accounts with RBC, but records of contracts, payments, and owner contributions from previous fiscal years are incomplete.

25 The December status certificate reads in relevant part (emphasis in the original):

Common Expenses

. . .

8. There are no amounts that the Condominium Act, 1998 requires to be added to the common expenses payable for the unit. This clause is subject to verification once all financial records have been turned over.

. . .

Budget

. . .

11. Since the date of the budget of the Corporation for the current fiscal year, the board has not levied any assessments against the unit to increase the contribution to the reserve fund or the Corporation's operating fund or for any other purpose.

12. The Corporation has no knowledge of any circumstances that may result in an increase in the common expenses for said unit. *Except: 1) the reserve fund contributions should be increasing as per the attached cash flow analysis; 2) the Corporation is operating at a deficit which is presently resulting in no monthly contributions to the reserve fund; 3) since the last approved audited financial statement for the year ending July 31, 2012, and notwithstanding the absence of many financial records, the Board is considering the need for a budget increase and/or special assessments but has not levied or assessed said as of the date of this certificate; 4) the Corporation is disputing a payment allegedly owned to a third party for repairs to its parking garage, the costs in addressing this matter and potentially any monies owed to the third party are an unbudgeted expense; 5) costs including accounting and legal costs associated in the significant efforts to recover and/or reconstruct records which were not provided by previous property management, removed by previous board members, not provided by various third party contractors, and/or not turned over by the Declarant or its principals (acting in their personal capacity); 6) the Corporation is contemplating legal action against a number of parties including contractors, the declarant, successor declarant (if any exist), former board members, former property manager (and its principals), former solicitors and other parties as a result of various breaches of fiduciary duty, breaches of contract, breaches of statutory obligations and failure to advance the best interests of the Corporation; 7) the Corporation is a party to an Application for the appointment of an Inspector pursuant to section 130 of the Act, to assist in reconciling and reconstructing the Corporation's records, the cost of said Application are not budgeted and it is anticipated that an Inspector will be appointed.*

. . .

Rights of person requesting certificate

. . .

39. TSCC 1786 is in a state of administrative difficulty for reasons as described herein. The elected board has terminated the management agreement with former management company effective January 1, 2014. At the present time, the former property management has not provided copies of all records belonging to the Corporation (financial or other). There are other parties as described in paragraph 12 who have also not returned records belonging to the Corporation. At this time it is difficult to verify owner accounts and other operational matters. The contents of this certificate must be read subject to an ultimate resolution to this matter, which are [*sic*] further described in paragraph 12. The Corporation has retained legal counsel to assist it in this regard and its current property management is attempting to reconstruct records based on the very limited records which is [*sic*] in the Corporation [*sic*] current possession. The current board has established control over the TSCC 1786 general and reserve fund accounts with RBC, but records of contracts, payments, and owner contributions from previous fiscal years are incomplete.

26 Section 76 of the Act requires a condominium corporation to provide to anyone who requests it a status certificate with respect to a unit in the corporation. The purpose of a status certificate is to "ensure prospective buyers have enough information to assist them in making an informed purchase" (*Tarko v. Metropolitan Toronto Condominium Corp. 626*, 2015 ONSC 982, 124 O.R. (3d) 360 (Ont. Div. Ct.), at para. 28, citing *1716243 Ontario Inc. v. Muskoka Standard Condominium Corp. No. 54*, 2014 ONSC 1848, [2014] O.J. No. 1359 (Ont. S.C.J.), at para. 35, and *Orr v. Metropolitan Toronto Condominium Corp. No. 1056*, 2014 ONCA 855, 327 O.A.C. 228 (Ont. C.A.), at paras. 48, 69).

27 The status certificate must be in a prescribed form and "must contain a variety of organizational and financial information about both the unit and the corporation as a whole" (*Trez Capital Limited Partnership v. Wynford Professional Centre Ltd.*, 2015 ONSC 2794, 63 R.P.R. (5th) 138 (Ont. S.C.J.), at para. 42). For example, a certificate must contain, pursuant s. 76(1)(a), "a statement of the common expenses for the unit and the default, if any, in payment of the common expenses," and, pursuant to s. 76(1)(b), "a statement of the increase, if any, in the common expenses for the unit that the board has declared since the date of the budget of the corporation for the current fiscal year and the reason for the increase."

28 Paragraph 12 of the status certificate requires a corporation to disclose whether it has "knowledge of a circumstance that may result in an increase in the common expenses" for a unit. Courts have cited with approval Audrey Loeb's statement of what is required by para. 12 (*Condominium Law and Administration*, loose-leaf (2012 — Rel. 3) (Toronto: Thomson Reuters Canada Limited, 1998, 2016) now at p. 9-12, cited with approval in*Durham Condominium Corp. No. 63 v. On-Cite Solutions Ltd.*, 2010 ONSC 6342, 99 R.P.R. (4th) 68 (Ont. S.C.J.), at para. 24; *673830 Ontario Ltd. v. Metropolitan Toronto Condominium Corp. 673*, 2014 ONSC 2364 (Ont. Div. Ct.) (unreported), at para. 17):

> This statement requires the corporation to give particulars of any potential increase that it knows or, in the author's view, ought to know about, including the potential for expenses that are forthcoming, for example, as a result of engineering studies currently being conducted, even if no increase in common expenses or a special assessment has been approved by the board.

29 Pursuant to s. 76(6), the status certificate binds the corporation, as of the date it is given and with respect to the information it contains, as against a purchaser or mortgagee of a unit who relies on the certificate. Therefore, a corporation is prohibited from claiming as against a unit owner payment for an expenditure that the corporation was negligent in failing to disclose in the status certificate (*Fisher v. Metropolitan Toronto Condominium Corp. No. 596* (2004), 31 R.P.R. (4th) 273, [2004] O.J. No. 5758 (Ont. Div. Ct.), at paras. 8, 10; see also *673830 Ontario Ltd. v. Metropolitan Toronto Condominium Corp. 673*, at paras. 20-22).

30 In my view, the evidence fails to demonstrate that the respondent misrepresented material information rendering the status certificates inadequate in terms of disclosure such that the second special assessment does not apply to the commercial units. The respondent knew that there was a shortfall in the payment of the first special assessment by the fall of 2014 and knew by November 25, 2014 that the first special assessment was invalid. At the time of the status certificates, however, the respondent did not know if a special assessment was forthcoming in the 2014-2015 fiscal year as a result of and to address the problems with the first assessment. This decision was delayed to January 2015 to permit an opportunity for detailed research and informed discussion, as evidenced by the management report. The evidence is that a number of possibilities were being considered at the time of the status certificates, including levying a special assessment in the 2015-2016 fiscal year.

31 The October and December status certificates were issued in contemplation of the purchase of the commercial units, within the August 2014 to July 2015 fiscal year. Both status certificates unequivocally informed the prospective purchaser that the respondent was operating at a deficit, that the board was considering the need for a special assessment and that the respondent was in a state of administrative difficulty, without copies of all financial records belonging to it and with incomplete records of payments and owner contributions to reserve fund accounts.

32 In my view, the general but no less material disclosure that the board was considering the need for a special assessment, coupled with the notice of the state of administrative difficulty fully and accurately informed the prospective purchaser of the respondent's knowledge of the state of its finances including the potential for a forthcoming special assessment in the 2014-2015 fiscal year.

33 Further, from a factual perspective, the evidence is that Singh was aware of the likelihood of a special assessment after the transfer of title of the commercial units. Damaren and Andrew Jon Weinsieder ("Weinsieder"), another former employee of Malvern, state that they met with Singh on February 9, 2015 to discuss the lack of parking spaces available at the property. This was after the issuance of the notice of the second special assessment. Both Damaren and Weinsieder deposed that during this meeting Singh confirmed that the applicant was aware in the fall of 2014 of the respondent's precarious financial position and that an increase in common expenses or a special assessment was likely, and that he had taken steps to safeguard the applicant's interests by negotiating provisions in the agreement of purchase and sale with Westmount.

34 Singh agrees that he attended one meeting with Damaren but denies that the meeting took place in February 2015. He deposed that he met with Weinsieder in December 2014, before the issuance of the notice of the second special assessment and sometime after title to the commercial units was transferred, and that "Damaren happened to be present" at this meeting. Singh denies any discussion with Damaren about the respondent's financial position or that an increase in expenses would be likely. Singh relies on the evidence of Dinesh Achria ("Achria"), the vice president of operations and corporate development of Tier 1. Achria deposed that he accompanied Singh to the property on December 15, 2014 and produced a print screen of his calendar showing a scheduled tour of the property on December 15, 2014. Singh does not deny that he met with Weinsieder in February 2015 but states that Damaren was not present.

35 I accept the evidence of Damaren and Weinsieder on this issue. I make this conclusion for the following reasons taken together:

1. Weinsieder is a former employee of Malvern and has no financial interest in this litigation.

2. In evidence is an email chain wherein Singh confirmed the date, time and location of the February 9, 2015 meeting. Weinsieder states he requested Damaren's attendance at the February 9, 2015 meeting, although Damaren was not included on the email.

3. Weinsieder states that February 9, 2015 was the first time he met with Singh.

4. Singh has provided no documentary evidence to support his statements.

5. Achria confirmed on cross-examination that he did not witness any meeting between Singh, Damaren, and Weinsieder; his only direct knowledge regarding any meetings in which Singh participated on December 15, 2014 is that he drove with Singh to the respondent on that date.

6. Damaren's evidence is that he was on vacation on December 15, 2014.

7. My previous comments as noted above with respect to Damaren's credibility.

36 It is for these reasons that I have concluded that there was adequate disclosure in the status certificates and that the applicant is consequently not exempt from paying the second special assessment.

Is the Respondent's Lien Statute-Barred

37 The applicant submits that second special assessment is simply a resurrection of the first special assessment. The applicant argues therefore that to permit the respondent to register a condominium lien based on the second special assessment is to permit it to circumvent the requirements of s. 85 of the Act, which provides that a condominium lien

arising upon an owners' default with respect to contributions to common expenses expires within three months of the default unless a certificate of lien is registered.

38 The November 27, 2012 notice to owners with respect to the first special assessment reads in relevant part:

> In addition to the structural work, the Garage will be undergoing substantial repairs and refurbishment for [*sic*] which will benefit all unit owners and increase the value of your units.
>
> . . .
>
> Westmount Keele Street Ltd. (the developer of TSCC 1786) has agreed to absorb a large portion of the repair costs in order to reduce the cost burden on the owners of TSCC 1786. Based on this substantial reduction in costs, the total estimated amount for which the owners of TSCC 1786 are responsible to contribute is $2,598,350 ("**TSCC Repair Costs**"). The Board of Directors has decided to collect the TSCC Repair Cost from each owner of a parking unit based on an equal amount being $7,850 per parking unit. There are 331 parking units in the Garage (exclusive of the visitors parking units). The amount of $7,850 is less than half the amount which would otherwise be the amount to be paid by each unit owner if they were required to pay the full amount of the repair cost ($5,367,500) based on the owner's proportionate shares set out in Schedule "D" attached to the Condominium's Declaration.

39 Notice of the second special assessment was sent to Singh on January 20, 2015. It reads in relevant part (emphasis in the original):

> It was discovered that the process and distribution of the original assessment did not satisfy the requirements under the Condominium Act as it was not levied against all unit owners in the proportions found in Schedule D of the Declaration. The Board of Directors has decided by resolution, passed at a Board of Directors Meeting held on January 15, 2015 the following:
>
> > The special assessment, which was levied in the amount of $2,017,431.60 will be reversed effective January 22, 2015. Anyone that was assessed that amount against their maintenance fee account will receive a credit towards future common expense obligations. Furthermore, the Board of Directors has decided to levy a new special assessment, also in the amount of $2,017,431.60, which will become due and payable by all unit owners, in accordance with the Condominium Act and Schedule D of the Declaration effective March 1, 2015. Any credits in a unit owner's maintenance fee account will be used to pay for the new assessment and if a balance remains owing, unit owners will be required to pay the balance on March 1, 2015. If a credit bill remains after March 1, 2015, that can be used to pay for future common expenses until the credit has been used completely. Since the Corporation is still trying to ensure sufficient cash flow, refunds are not possible at this time.
> >
> > **Your unit was previously assessed an amount of $0. This amount will be applied to your maintenance fee account as a credit on January 22, 2015. On March 1, 2015 the new assessment of $4,377.83 will be applied, resulting in a balance/(credit) of $4,377.83.** ***Note that any other balances on your account are not included in these figures, and we invite you to fully review your account history on your Nexus community website www.malvern.caltscc1786. Your account ledger is located in your profile once you have logged into the site.***

40 The applicant submits that the first special assessment was levied against the commercial units, and that any liens that would have arisen on a default to pay the first special assessment would have expired in 2014, at the latest. For its proposition that the first special assessment was levied against the commercial units, the applicant relies on the evidence of Ieradi. Ieradi, Westmount's principal, was the respondent's president and a member of its board of directors at the time of the first special assessment. He was questioned about the levying of the first special assessment and about Westmount's proportionate payment of that assessment. I find his evidence on this issue neither logical nor credible and I do not accept it. I reach this conclusion for the following reasons taken together:

1. Ieradi asserts that the former board received, through Vero, a legal opinion justifying the exclusivity of the first special assessment to the parking units. There is no evidence of such an opinion despite an undertaking by Ieradi to make best efforts to review records and make inquiries of Vero to see if it had a copy of any legal opinion. Further, when asked to confirm his involvement with the respondent the lawyer whom Ieradi claims rendered a legal opinion to the board responded that he represented Ieradi only with respect to preparing a disclosure statement and sale of units.

2. The document that Ieradi relies upon as evidence of Westmount's payment of the first special assessment is a spreadsheet created by him on behalf of the respondent. The spreadsheet never formed a part of the respondent's records. Further, when Ieradi was asked by the respondent's inspector, Conant, to produce all of the records he had in his possession regarding the respondent's affairs, he did not provide the spreadsheet, which appeared for the first time as an exhibit to his affidavit sworn in support of this application.

3. Ultimately, no evidence was submitted demonstrating Westmount's payment of the first special assessment.

4. Ieradi's evidence is that Westmount performed work in lieu of payment of the first special assessment but there is no evidence of the work in lieu of payment despite an undertaking to make best efforts to evidence the same. Ieradi further stated that the "work in lieu of" was the selling of a separate and distinct parcel of land owned by Westmount to a third party at a discount which somehow benefitted the respondent. There is no evidence demonstrating how the respondent received a benefit from such a transaction.

5. Ieradi's evidence is that the first special assessment was levied for $3.9 million despite the fact that documentation executed by him on behalf of the respondent states the amount of the assessment was $2,598,350.

6. A letter advising that the first special assessment was levied in the amount of $2,074,000 and that the commercial units were not in arrears was issued by Vero on Ieradi's instructions.

7. There is no evidence in the unit ledgers maintained by Vero for the commercial units that the first special assessment was levied to the commercial units or that any payment was made by Westmount, Ieradi or any other corporate entity controlled by him to the respondent for the first special assessment. This is in contrast to other unit owners who owned a parking spot when the first special assessment came into effect as evidenced by the unit ledger maintained by Vero.

41 I therefore accept that the commercial units were never levied with any amount under the first special assessment and that Westmount made no payment towards the first special assessment.

42 The first special assessment was issued in 2012. It was cancelled in 2015. Credit was given to those owners who paid under the first special assessment. A second special assessment was issued in 2015.

43 The issue before the court is whether the respondent is statute-barred from registering a lien on account of the applicant's default in paying the second special assessment. The first special assessment was never levied as against the applicant. The respondent is not attempting to resurrect rights it had in 2013 or 2014 to register a condominium lien against the commercial units. It never had such rights as the assessment was not levied against the commercial units. As the first special assessment was never levied, there was never a default and therefore never a corresponding right to register a lien to the commercial units with respect to that assessment. The second special assessment represents the first levy to the commercial units for the costs to repair the garage and as such, the right of the respondent to register liens to the commercial units upon the applicant's default on March 1, 2015 had not expired before the lien was registered on May 29, 2015.

Conclusion

44 It is for these reasons that I have concluded that that the applicant is not exempt from the special assessment levied by the respondent on March 1, 2015 and that the lien the respondent registered against title to the commercial units owned by the applicant are therefore valid and enforceable.

Costs

45 If the parties are unable to agree on an appropriate costs award for this application, I will accept written submissions. The respondent shall serve and file submission within 30 days of the release of these reasons, and the applicant shall serve and file responding submissions within 30 days of the filing of the respondent's submissions. A reply if any shall be served and filed within 15 days thereafter.

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