

2016 ONSC 8000
Ontario Superior Court of Justice

Toronto Standard Condominium Corp. No. 2395 v. Wong

2016 CarswellOnt 20824, 2016 ONSC 8000, 274 A.C.W.S. (3d) 654

Toronto Standard Condominium Corporation No. 2395 and Joyce Wong

Jasmine T. Akbarali J.

Heard: December 19, 2016
Judgment: December 20, 2016
Docket: CV-16-562131

Counsel: Jonathan Fine, for Applicant
Ariel Schneider, for Office of the Public Guardian and Trustee
No one, for Respondent

Subject: Civil Practice and Procedure; Estates and Trusts; Property

APPLICATION by condominium corporation for interlocutory injunction and compliance order, declaratory relief, order validating service and dispensing with respondent's approval of form and content of order, and order for mental examination and litigation guardian for respondent.

Jasmine T. Akbarali J.:

Overview of Relief Sought

1 The applicant, Toronto Standard Condominium Corporation No. 2395 ("TSCC 2395") brings this application seeking an interlocutory injunction pursuant to the *Condominium Act*, S.O. 1998, c. 19 and an interlocutory compliance order pursuant to s. 134(1) of the *Condominium Act*, prohibiting the respondent, Joyce Wong, from:

- a. having direct or indirect contact with any employee, manager, security personnel, or agent of the applicant or member of the applicant's board of directors (the "TSCC 2395 Personnel");
- b. coming within 25 feet of the TSCC 2395 Personnel in so far as the physical configuration of the property (as that term is defined in s. 1 of the *Condominium Act*) permits, and where it does not, keeping the maximum distance between herself and the TSCC 2395 Personnel;
- c. disturbing the comfort and quiet enjoyment of the common elements of the property;
- d. entering or coming within 25 feet of the management office located on the property in so far as the physical configuration of the property permits, and where it does not, keeping the maximum possible distance between the management office and herself.

2 The applicant also seeks declaratory relief, declaring that:

- a. Ms. Wong's behaviour constitutes workplace harassment as defined in the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1;

b. Ms. Wong has breached s. 117 of the *Condominium Act* by harassing, threatening, intimidating, verbally abusing and physically assaulting TSCC 2395 Personnel; and

c. Ms. Wong has breached Rule 1 of the "Quiet Enjoyment" Rules in that she has created noise and nuisance, including yelling, using threatening language and attempting to instigate a fight on the common elements to disturb the comfort and quiet enjoyment of persons therein, namely the TSCC 2395 Personnel.

3 Given Ms. Wong's behaviour, the applicant asks this court to consider whether it is necessary to order that Ms. Wong undergo a mental examination by a health practitioner to enable the health practitioner to opine on whether Ms. Wong is a party under a disability as defined in r. 1.03(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and thus to enable this court to determine at a later date whether Ms. Wong is a party under a disability such that the court should order the appointment of a litigation guardian, being the Office of the Public Guardian and Trustee.

4 The applicant also seeks an order validating service of the application record and factum in respect of this application, and prescribing the manner of service of the order I make herein. The applicant also asks that Ms. Wong's approval as to the form and content of the order I make herein be dispensed with. Finally, the applicant seeks its costs.

5 I have concluded that the interlocutory injunctive relief, the interlocutory compliance order and the declaratory relief must issue. I decline to order the mental examination and therefore dismiss the application insofar as it seeks the appointment of a litigation guardian for Ms. Wong.

The Facts

6 Ms. Wong is the registered owner of a condominium on Toronto Standard Condominium Plan No. 2395. She purchased her unit in September 2014.

7 In November 2015, Ms. Wong began a pattern of behaviour that has escalated, and is now threatening and dangerous. In November 2015, Ms. Wong began making complaints, including that her pet was abused while she was out, and that a prior superintendent employed by TSCC 2395 was a "bad guy" and had done "scary" things to her. She accused TSCC 2395 Personnel of intrusions on her privacy, damaging her belongings and criminal behaviour.

8 In December 2015, at TSCC 2395's annual general meeting, Ms. Wong caused a disturbance, including shoving her camera in people's faces and taking their photographs despite being asked to stop. She grabbed Ami Lum, a member of TSCC 2395 Personnel, by the arm and attempted to turn Ms. Lum around to take her photo. Ms. Wong was asked to leave and she did.

9 By June 2016, Ms. Wong's behaviour became threatening. Much of it was directed towards Ms. Lum. Ms. Wong left threatening voicemails for Ms. Lum, telling Ms. Lum that she should hide if she sees Ms. Wong and that Ms. Lum "better be careful" coming in and out of the condominium property. Ms. Wong told a member of TSCC 2395's board of directors that Ms. Lum was "going to pay because [Ms. Wong could not allow Ms. Wong's] toes to be in pain." Ms. Wong has accused Ms. Lum of wanting to kill her.

10 On one occasion, Ms. Wong violently banged on and kicked the door to the property management office as Ms. Lum was closing it. Ms. Wong's behaviour towards Ms. Lum led first to TSCC 2395 attempting to address the safety concern by hiring security for Ms. Lum when her manager was out of the office, and by adjusting Ms. Lum's hours to coordinate with her manager's hours. In addition, Ms. Lum is accompanied by staff members at all times due to the perceived threat to her safety. Ms. Lum has recently, and with regret, requested a transfer from TSCC 2395 due to her fear that Ms. Wong may harm her in some way.

11 In addition, Ms. Wong has made allegations that are not directed at Ms. Lum including, at different times, that flies and gas were "injected" into her unit, that her neighbor wanted to burn her (Ms. Wong's) unit down, and that there was a burning sensation in Ms. Wong's bedroom.

12 Recently Ms. Wong has also engaged in strange behaviour in the common elements of the property, including rearranging furniture in the lobby, sleeping on the lobby couch with a table on top of her, sitting by the intercom system and repeatedly dialing the same number, and spending a morning singing loudly and pacing in the lobby.

13 Ms. Wong has also been knocking on the doors of other residents at inappropriate times, including late at night, asking for "Justin" and claiming to be "Justin's sister". She has also alleged that her "crazy aunt Hedy" lives below her and is on TSCC 2395's board of directors, which is why Ms. Wong has so much trouble living in her unit.

14 I have set out these examples of Ms. Wong's behaviour in some detail because it is important to the resolution of the issues before me.

Issues

15 The issues before me on this application are as follows:

- a. Should an order be made pursuant to s. 105(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, that Ms. Wong undergo a mental examination by one or more health practitioners to obtain an opinion as to whether Ms. Wong is a "party under a disability" to assist the court in determining, at a future date, whether an order appointing a litigation guardian should be made because Ms. Wong is a party under a disability or is mentally incapable;
- b. Should an interlocutory injunction and compliance order be granted restraining Ms. Wong's conduct in the manner described in para. 1 above?
- c. Should the declaratory relief described above in para. 2 be granted?

16 I have concluded that I do not have a proper basis to order Ms. Wong to undergo a mental examination. The applicant has established that the interlocutory injunction, compliance order and declaratory relief it seeks is warranted.

The Mental Examination

17 The applicant raises the issue of whether Ms. Wong requires a litigation guardian. Because of its relationship to Ms. Wong, the applicant does not have information, or access to the kind of information, that would justify the appointment of a litigation guardian. Accordingly, and in view of Ms. Wong's conduct, the applicant asks whether a mental examination of Ms. Wong is required.

18 In considering this question, I have had regard to the decision in *626381 Ontario Ltd. v. Kagan, Shastri, Barristers & Solicitors* (2013), 230 A.C.W.S. (3d) 1004 (Ont. S.C.J.) [2013 CarswellOnt 8104 (Ont. S.C.J.)] where Stinson J. thoroughly reviews the relevant law.

19 I agree with Stinson J.'s conclusion, at para. 41, that I have jurisdiction under s. 105 of the *Courts of Justice Act* to compel Ms. Wong to undergo a mental examination for the purposes of providing evidence to decide whether she is a person under a disability for whom a litigation guardian is required pursuant to r. 7.01(1) of the *Rules of Civil Procedure*. I also agree with his analysis, at para. 40, that a s. 105 order to obtain the required evidence "should be the rare exception". An order for a mental examination is a significant intrusion into the autonomy of the individual. The order should not be made lightly or without good reason.

20 To make an order under s. 105(1), I must be mindful of the limitations set out in s. 105(3) which provides that the court shall not make an order for a mental examination of a party when the issue is raised by another party unless (i) the allegation is relevant to a material issue in the proceeding; and (ii) there is good reason to believe that there is substance to the allegation: see *626381 Ontario Ltd, supra*, at para. 25.

21 I have concluded that the evidentiary record before me does not justify an order under s. 105(1) in view of the limitations contained in s. 105(3).

22 In particular, there is no evidence before me that Ms. Wong's mental condition is in question in a way that is relevant to a material issue in the proceeding. With respect, I disagree with the decision in *Rishi v. Kakaoutis* (2011), 210 A.C.W.S. (3d) 610 (Ont. S.C.J.) [2011 CarswellOnt 14616 (Ont. S.C.J.)], in which the court found that a mental examination could be ordered because it was relevant to a material issue in that proceeding, namely whether a litigation guardian should have been appointed for, in that case, the defendants. This reasoning is circular and would result in an order for a mental examination whenever any party raised the issue of whether a litigation guardian is required. Such an approach would be inconsistent with the analysis of Stinson J., which as I have noted I accept, that an order under s. 105(1) should be the rare exception, and not made lightly.

23 The material issues in the litigation before me relate to Ms. Wong's abusive and threatening behaviour. There is nothing before me, beyond the fact of her behaviour itself, to suggest that Ms. Wong is not capable of understanding information that is relevant to making a decision in respect of the issues in the proceeding, or that she is unable to appreciate the reasonably foreseeable consequences of a decision or lack of decision in respect of an issue in the proceeding: see *626381 Ontario Ltd.*, *supra* at para. 25. I have concluded that Ms. Wong's behaviour on its own is not a sufficient evidentiary basis to make the invasive and rare order that she undergo a mental examination pursuant to s. 105(1) of the *Courts of Justice Act*.

24 The Office of the Public Guardian and Trustee appeared on the application. It had received the materials on the previous business day, and sought only that any decision regarding whether Ms. Wong required a litigation guardian be adjourned. Given my decision not to order a mental examination, I also dismiss the application for a litigation guardian, without prejudice to the applicant's ability to seek that a litigation guardian be appointed in the future should it become necessary.

Injunctive Relief and Compliance Order

25 In order to grant an interlocutory injunction, I must be satisfied that the three part test in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) at paras. 83-85, is met. First, the moving party must demonstrate that there is a serious issue to be tried. Second, the moving party must demonstrate that irreparable harm will result if the relief is not granted. Finally, the balance of convenience must favour the applicant.

26 I am satisfied that the test for an interlocutory injunction is met in this case.

27 First, there is a serious issue to be tried.

28 Section 117 of the *Condominium Act* provides that "no person shall permit a condition to exist or carry on an activity in a unit or in the common elements if the condition or the activity is likely to damage the property or cause injury to an individual". There is a serious issue as to whether Ms. Wong's conduct is likely to damage property or cause injury, including psychological injury, to other owners and occupiers of units, or to TSCC 2395 Personnel.

29 TSCC 2395's declaration and rules prohibit a noise or nuisance that interferes with the ability of others to enjoy the common elements. There is a serious question to be tried as to whether Ms. Wong's conduct is in breach of the declaration and rules.

30 Section 119(1) of the *Condominium Act* requires owners and occupiers of a unit to comply with the *Act*, the declaration, the by-laws and the rules of the condominium corporation. TSCC 2395 has the right, by s. 119(2) of the *Act*, to require the owners and occupiers of units to comply with the *Act*, as well as with the condominium corporation's declaration, by-laws and rules. TSCC 2395 also has the duty to control, manage and administer the common elements

and the duty to take all reasonable steps to ensure that the owners of units comply with the *Act*, the declaration, the by-laws and the rules: see ss. 17(2) and (3) of the *Condominium Act*.

31 Ms. Wong's conduct raises serious concerns about the physical and emotional safety, security, comfort and enjoyment of the other unit owners and residents in the building, and of TSCC 2395 Personnel. The first element of the test is thus satisfied.

32 Second, I am satisfied that the moving party has demonstrated that irreparable harm will result if the injunction is not granted. Irreparable harm may include the increased risk of personal injury or assault: see *Ivaco Rolling Mills (2004) LP v. LeBlanc (2005), 144 A.C.W.S. (3d) 82* (Ont. S.C.J.) [2005 CarswellOnt 7050 (Ont. S.C.J.)] at paras. 22-24. Irreparable harm also includes psychological harm that is more than transient or trifling: see *Metropolitan Toronto Condominium Corp. No. 747 v. Korolekh (2010), 322 D.L.R. (4th) 443* (Ont. S.C.J.) at para. 71.

33 In this case, Ms. Wong's threatening behaviour toward Ms. Lum has caused irreparable harm. Ms. Lum can no longer work unimpeded at TSCC 2395 and she has regretfully sought a transfer as a result of the fear and anxiety she now feels at work.

34 Third, the balance of convenience favours the applicant. Ms. Wong is not inconvenienced by being prohibited from engaging in harassing and threatening conduct. On the other hand, if the injunction is not granted, TSCC 2395 Personnel will continue to be subject to Ms. Wong's inappropriate conduct.

35 Accordingly, an interlocutory injunction is warranted.

36 For the same reasons, a compliance order under s. 134(1) of the *Condominium Act* is also warranted. Although the relief in s. 134(1) of the *Condominium Act* is discretionary, this court has held that "enforcement is expected and exceptions will be rare". This is because people who move into a condominium must be prepared to live by the rules of the community that they are joining. The *Act*, the declaration, by-laws and rules are vital to the integrity of the title acquired by the unit owners: see *York Condominium Corp. No. 137 v. Hayes (2012), 20 R.P.R. (5th) 154* (Ont. S.C.J.) at paras. 22-23.

37 The order shall go in accordance with paragraph 3 of the applicant's draft order contained at Tab C of its factum.

Declaratory Relief

38 The applicant also seeks declaratory relief. On the basis of the facts I have reviewed, I am satisfied that the applicant is entitled to this relief.

39 The applicant seeks a declaration that Ms. Wong's behaviour constitutes workplace harassment under the *Occupational Health and Safety Act*. In s. 1(1), that *Act* defines workplace harassment as "engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome". This definition applies to Ms. Wong's behaviour.

40 The applicant seeks a declaration pursuant to s. 134(1) of the *Condominium Act* that Ms. Wong has breached s. 117 of the *Act* by harassing, threatening, intimidating, verbally abusing and physically assaulting TSCC 2395 Personnel. I find that the facts established by TSCC 2395 support this request for declaratory relief. I note that while most of Ms. Wong's behaviour has been threatening but not physical, on at least two occasions her conduct became physical: once at the annual general meeting when she grabbed Ms. Lum's arm and attempted to forcibly turn her around to take her photo, and again when she banged on and kicked at the door that Ms. Lum was closing.

41 The applicant also seeks a declaration that Ms. Wong has breached Rule 1 of the "Quiet Enjoyment" Rules in that she has created noise and nuisance, including yelling, using threatening language and attempting to instigate a fight on the common elements, so as to disturb the comfort and quiet enjoyment of persons therein, namely TSCC 2395 Personnel. I

find the facts TSCC 2395 has established support this request for declaratory relief. In particular, the attempt to instigate a fight refers to the incident when Ms. Wong kicked and banged at the door Ms. Lum was closing.

42 The declaratory relief sought in the applicant's draft order in paras. 5-7 is hereby granted.

Service

43 After a number of failed attempts at personal service, the applicant obtained an order for substituted service of the Notice of Application on November 17, 2016, that allowed it to serve the Notice of Application by taping a copy of it to the front door of Ms. Wong's condominium unit, and by sending a copy by way of ordinary mail to Ms. Wong at her condominium unit.

44 The applicant subsequently served the entirety of the application record on Ms. Wong in the same manner, by taping a copy to the front door of her unit and sending a copy by regular mail. It now seeks an order validating service of the application record and factum, which I hereby grant.

45 In addition, I order that Ms. Wong's approval as to form and content of my order arising out of this application is not required. I further direct the applicant to serve these reasons and the order on Ms. Wong in the manner set out in the order of Master Pope dated November 17, 2016, that is, by taping a copy to the front door of her condominium unit and by sending a copy to Ms. Wong by ordinary mail addressed to her at her condominium unit.

Costs

46 The applicant seeks its costs of this application on a partial indemnity scale in the amount of \$16,621.45. The application record consisted of many affidavits. The matter was particularly complex in view of the applicant's concern, which was not unreasonable, about whether Ms. Wong requires a litigation guardian. The applicant thus had to undertake legal research into the issues around the injunctive relief, and also with respect to the law with respect to requiring a mental examination. I am satisfied that the amount sought in costs is fair and reasonable in the circumstances.

Compliance

47 Finally, I also grant the applicant's request for an order allowing it to reattend on two days' notice for a further order to enforce compliance if Ms. Wong fails to comply with my order.

Application granted in part.