CITATION: White Snow and Sunshine Holdings Inc., v. Metropolitan Toronto Condominium Corporation No. 561, 2017 ONSC 4558
COURT FILE NO.: CV-16-559197
DATE: 20170728

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
WHITE SNOW AND SUNSHINE HOLDINGS INC.	)	*Morris Cooper*, for the Applicant
	)	
Applicant	)	
	)	
– and –	)	
	)	
METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 561	)	*Joshua Milgrom*, for the Respondent
	)	
Respondent	)	
	)	
	)	**HEARD:** May 19, 2017

LEDERER J.

[1] The Respondent, Metropolitan Toronto Condominium Corporation No. 561, operates and is the owner of the common elements of a building located at 60-62 Wellesley Street West in the City of Toronto. It includes 102 residential and two commercial units. The latter two units are owned by the Applicant, White Snow and Sunshine Holdings Inc.

[2] The common elements of the condominium include recreational amenities:, a swimming pool, a gymnasium, a library, terrace area and a squash court. At present the Applicant, more particularly, its employees are not permitted access to these uses, particularly the pool and the gymnasium.

[3] The Applicant believes that to the extent that the Condominium Declaration reserves the right to use the recreational facilities to those associated with the residential units, it is

inconsistent with the provisions of the *Condominium Act, 1998*[1], and should be corrected. This application is in furtherance of that proposition and is specifically mandated by the legislation:

> The court may make an order to amend the declaration or description if satisfied that the amendment is necessary or desirable *to correct an error or inconsistency that appears in the declaration* or description or that arises out of the carrying out of the intent and purpose of the declaration or description.[2]
>
> [Emphasis added]

[4] The Applicant begins with a plea that the equities are in its favour. The two units it owns take up 10,000 square feet requiring it to pay 5.7 % of the fees dedicated to the condominium's common expenses which, apparently, are equivalent to six separate residential units. This amounts to $87,000 of the total common element fees of $1,504,000, some portion of which would be applied to the operation and maintenance of the recreational uses including the pool and the gymnasium.

[5] The Applicant asks the rhetorical question: how can it be that it has to pay and yet is denied the use of these important facilities?

[6] The Respondent, Metropolitan Condominium Corporation No. 561, provides a partial response. A calculation undertaken by a long time member of its Board of Directors demonstrates that the commercial units pay less per square foot than the residential units. No evidence was provided to explain the difference but it does suggests that the owners of the residential units receive some service or benefit not offered to the commercial unit holders.

[7] The Applicant maintains that the use of the pool and the gymnasium would not conflict with usage by the residential owners or their guests. The commercial premises are occupied during normal business hours which, the Applicant suggests, is when the recreational areas are rarely used by residents. There is no evidence to support this understanding of the prospective usage of the facilities. In answer to questions from the court the Applicant suggested it had approximately 45 employees working at this location. The representative of the Board of Directors described the size of the gym and the pool. No reliable measurements were provided but it is not a big space: the possibility being that it could be overrun by employees during, at least, the lunch hour.

[8] Be that as it may, the owner of the commercial units has attempted to press its case with the Board of Directors but without success. He has complained about the unfairness of being obliged to pay for all the common expenses without the use of two principal common areas: the

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[1] S.O.1998, c.19
[2] *Ibid* at s. 109(3)

pool and the gymnasium. He wanted and wants the declaration changed to accommodate his employees. The Board of Directors of the condominium responded by advising that it did not have the authority to change the Declaration.

[9] The Applicant requested mediation and, if necessary, arbitration pursuant to the *Condominium Act, 1998*. The condominium corporation responded that it would not participate. It took the position that the mediation and arbitration provisions of the legislation were not applicable to this case.

[10] The Applicant proposed an amendment to the Declaration to be voted on by all the unit holders. This would require the Board of Directors of the condominium corporation to approve the proposed change. No Director was prepared to table the necessary motion. Nonetheless, the Board of Directors indicated a willingness to place the matter before a meeting of the unit holders for discussion. The Applicant was not satisfied. A vote without prior approval by the Board of Directors would be of no consequence.

[11] Upon receipt of the Notice of Application which commenced this proceeding, the Board of Directors, while making it clear that it believed the position of the Applicant was without merit did indicate a willingness to put the issue to arbitration. For whatever reason the arbitration did not take place. I presume the Applicant determined that it preferred to proceed with this application.

[12] The legal position of the Applicant is founded on the *Condominium Act*, section 7(2)(f):

> (2) A declaration shall contain,
>
> …
>
> (f) a specification of all parts of the common elements that are to be used by the owners of one or more designated units and not by all the owners;

and on O. Reg. 48/01 section 5(7)

> (7) Schedule F shall contain a specification of all parts of the common elements that are to be used by the owners of one or more designated units and not by all the owners or shall indicate that there are no such parts if that is the case.

[13] The Applicant relies on these provisions and submits that the Declaration stands in breach of them. The recreational facilities are to be used by one or more units but not all of them. While they can be used by people associated with the residential units, they are not available to the commercial units. On this basis, they should be referred to and included on Schedule "F" of the condominium declaration. They are not. The error or inconsistency is not the failure to refer

to the recreational facilities on Schedule "F" but the failure to recognize that those associated with the commercial units have the right use them.

[14] As counsel for the Applicant sees it, this is illegal because where the Declaration is inconsistent with the legislation, it is the legislation that governs. The *Condominium Act, 1998* section 7(5) says, under the heading "Inconsistent Provisions":

> (5) If any provision in a declaration is inconsistent with the provisions of this Act, the provisions of this Act prevail and the declaration shall be deemed to be amended accordingly.

[15] On this basis it is submitted that the Declaration should be amended. The limitation that only those associated with the dwelling units have access to the recreational facilities should be removed. In the alternative, if the error is the failure to refer to the recreational uses in Schedule "F" to the Declaration, they should be included, but the contribution of the commercial units to the common expenses reduced by the amount of their contribution to the operation and maintenance of the recreational facilities. If you cannot use them, you should not have to pay for them.

[16] The logic is flawed. It fails to consider a further and relevant section of the *Condominium Act, 1998*. Section 7(4)(b) states:

> *In addition to* the material mentioned in subsection (2) and in any other section in this Act, a declaration may contain:
>
> …
>
> (b) conditions or restrictions with respect to the occupation and use of the units or common elements
>
> [Emphasis added]

[17] The impact of this is to put in place a provision for limitations that are separate from those referred to in section 7(2)(f). By that clause the Condominium Declaration must refer to and, by the direction found in section 5 (7) of the regulation, Schedule F must include a listing of those areas set aside for the exclusive use of the designated units. In this case certain terraces are set aside for the exclusive use of Units 1, 2, 3 and 5 on Level 2.[3] This is a more limited purpose

[3] This has been recognized the literature:

> Section 7 (2) (f) requires that the declaration specify any exclusive-use areas within the condominium. This is to be done in Schedule F attached to the declaration. Because this

than proposed by the submissions of counsel for the Applicant. The Declaration recognizes the narrower application of these provisions. Article I (2) under the title "Common Elements" notes:

> Exclusive Use of Parts of Common Elements - Subject to compliance with the Act, the Declaration, Bi-Laws, and Rules passed pursuant to the Act, each owner shall have the exclusive use of those parts of the common elements as set out in Schedule "F" attached hereto.

[18] Section 7(4)(b) of the *Condominium Act* is directed to a different purpose. It does not account for the exclusive use of identified areas by the owners of designated units. It is "in addition to…" section 7(2). It allows for restrictions on the use of common elements. In this case a restriction is placed on the use of the recreational facilities. Only those associated with residential units can use them. Article I (7) under the title "Common Elements" states:

> Recreational Portion- Only owners of a dwelling unit, their household and invited guests shall be entitled to the use and enjoyment of the part of the common elements used for recreational purposes, subject to the Rules and Regulations passed pursuant to the Act.

[19] With section 7(4)(b) of the *Condominium Act* and Article I (7) added to the analysis the intention of the sections and Articles dealing with "exclusive uses" is made clear. They (s. 7(2)(f) of the *Condominium Act* and s. 5(7) of O. Reg. 48/01) apply to the exclusive use of

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> provision is mandatory, one can determine immediately whether the parking, storage, balcony or patio areas are exclusive-use, and which space is exclusively assigned to which unit….
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> (Audrey Loeb, *Condominium Law and Administration*, loose-leaf, 2017-Release 2, (Toronto: Thomson Reuters Canada, 2017) at p. 3-16
> **Schedule F**
>
> Schedule F contains a specification of the exclusive-use common elements that are to be used solely by the owners of one of our more designated units and not by all the owners of all the units, if any. It must be included even if left blank.
>
> (Audrey Loeb, *Condominium Law and Administration*, loose-leaf, 2017-Release 2, (Toronto: Thomson Reuters Canada, 2017) at p. 3-20.3)
>
> Schedule "F" specifies the parts of the common elements that are to be used by owners of one or more designated units and not by all the owners, which are commonly referred to as "exclusive use" common elements (see subsection 5(7) of O. Reg. 48/01
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> (Harry Herskowitz & Marc F. Freedman, *Condominiums in Ontario: A Practical Analysis of the New Legislation*, (Toronto: Law Society of Upper Canada and the Ontario Bar Association, 2001) at p. 27-28)

certain areas being attributed to specific ("designated") units and not to restrictions applicable to a broad class of units.

[20] The property was the subject of a site specific by-law passed by the council of the City of Toronto (By-law No. 231-79 amending By-law 20623 respecting certain lands known as No. 62 Wellesley St. West). The By-law refers to the development permitted to be constructed on the site. It requires that recreational space be provided for the exclusive use of "residents" of the building. Section 8(b) states:

> "recreation space" means an area or areas within a lot provided *exclusively* for the use of the residents of such buildings and located on such lot for the purpose of personal recreation space or shared recreation space.
>
> [Emphasis added]

[21] And section 8(d) notes:

> "shared recreation space" means recreation space provided within or outside a building for the use of the residents of such a building for recreational or social purposes, and includes a landscaped area, a garden, a terrace, an outdoor swimming pool, an outdoor games or play area, a tot lot, a covered sitting area, an indoor swimming pool, a sauna, a shower and change room, an exercise room, a hobby room, a workshop or a meeting room.

[22] The by-law requires that the condominium provide recreational space for the "exclusive" use of the residents. Properly interpreted the Declaration demonstrates compliance with this obligation.

[23] Finally, I return to the idea that if the Applicant is refused access to the recreational facilities, its share of the costs of maintaining and operating the common elements should be reduced accordingly. There is nothing that prevents a condominium corporation from requiring payments that are not directly related to the actual costs:

> While section 7(2)(d) of the *Condominium Act, 1998* provides that the Declaration must contain a statement, expressed in percentages allocated to each unit, of the proportions in which the unit owners are required to contribute towards the common expenses, it sets no guideline as to how the percentage contributions towards common expenses are to be determined, nor is there any requirement under the Act that such percentages have any direct correlation with the actual

> cost of maintaining and repairing the common element areas of the condominium.[4]

[24] This is confirmed in the case law:

> It is clear that, as set out in the Declaration, the contribution to the common expenses of the commercial units is greater than their interest. The contribution to the common expenses of the residential units is less than their interest. While the commercial owners feel that this is unfair, it is clear from the case law that there is a strong presumption of validity of declarations, and that courts generally expect that unit holders should be able to rely on the terms of the declarations as long as the disclosure provisions of the Act as set out above have been met.
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> In the Ontario Court of Appeal decision of *York Region Vacant Land Condominium Corp. No. 968 v. Schickedanz Bros. Ltd.* (2006), 151 A.C.W.S. (3d) 536 (Ont. C.A.) [2006 CarswellOnt 5724 (Ont. C.A.)] 2006 CanLII 32596, the Court relied on the fact that the fee formula at issue in that case had been created before the unit holders purchased their properties. The Court of Appeal found that the fact that condominium fees favour some unit owners or others does not necessarily mean that the conduct is oppressive or prejudicial. It held that in light of the commercial realities of the condominium industry each purchaser had the option of deciding whether or not to purchase based upon the terms disclosed in the Declaration and concluded that if the unit owners could not rely on the terms of a Declaration that is in compliance with the Act, the destabilizing effect on the industry would be significant.[5]

[25] For the reasons reviewed herein the application is dismissed.

[26] At the conclusion of the submissions counsel and the court discussed costs. Pursuant to the submissions of counsel and the ruling of the court made at that time, costs are to be paid by the Applicant to the Respondent in the amount of $11,000 inclusive of fees, disbursements and HST. These costs represent an award on the substantial indemnity scale. This is appropriate. It is generally recognized that the remaining unit holders should not be saddled with costs associated with unsuccessful application made by one of them.

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[4] Audrey Loeb, *Condominium Law and Administration*, loose-leaf, 2017-Release 2, (Toronto: Thomson Reuters Canada, 2017) at p. 8-26 where reference is made to *Re Peel Condominium Corporation No. 195 v. Kerbel Developments Ltd.* (February 16, 1984), Shapiro Co. Ct. J. (Ont. Co. Ct.)

[5] *Walia Properties Ltd. v. York Condominium Corp. No. 478* (2007) 60 R.P.R. (4th) 203 (S.C.J.) at para. 10-11 var'd (2008) 67 R.P.R. (4th) 161 Ont. C.A.

Lederer J.

Released: July 28, 2017

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Applicant

– and –

METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 561

Respondent

REASONS FOR JUDGMENT

Lederer J.

Released: July 28, 2017