

Metropolitan Toronto Condominium Corp. No. 1328 v. 2145401 Ontario Inc., [2019] O.J. No. 965

Ontario Judgments

Ontario Superior Court of Justice

J. Kimmel J.

Heard: January 21, 2019.

Judgment: February 20, 2019.

Court File No.: CV 18 00607764 0000

[2019] O.J. No. 965 | 2019 ONSC 733

Between Metropolitan Toronto **Condominium** Corporation No. 1328, Applicant, and 2145401 Ontario Inc. and Paul Starkman, Respondents

(45 paras.)

Counsel

Spencer Toole, for the Applicant.

Paul Starkman, appearing in person for himself and for the Respondent 2145401 Ontario Inc.

REASONS FOR DECISION

J. KIMMEL J.

1 The applicant, Metropolitan Toronto **Condominium** Corporation No. 1328 ("MTCC 1328") seeks an order permitting it or its authorized personnel to enter on one or more occasions, upon 24 hours' written notice, the **condominium** unit known municipally as Penthouse 2, 993 Queen Street West, Toronto Ontario M6J 1H2, legally described as Unit 2, Level 5, MTCC 1328 and its appurtenant interest (the "Unit") in order to conduct an inspection.

2 The Unit is owned by the respondent 2145401 Ontario Inc. ("2145401", or the "Owner") and is occupied by the respondent Paul Starkman ("Starkman", or the "Occupant"). Starkman is the sole director, officer, and shareholder and the directing mind of 2145401. The respondents oppose this application, have refused to voluntarily permit entry and have issued a notice dated July 26, 2018 under s. 3 of the *Trespass to Property Act, R.S.O. 1990, c.T.21* (the "Trespass Notice"), purporting to prohibit MTCC 1328 from entering the Unit.

3 Starkman is a barrister. His firm is on the record for the respondents in this proceeding. He has sworn the responding affidavit and sought leave to appear in person (not gowned as counsel) to represent himself personally and to represent 2145401. The Applicant did not object to Starkman appearing in these capacities (or to him appearing on his own affidavit) and I granted leave pursuant to Rule 15.01(2) of the *Rules of Civil Procedure, R.R.O. 1990, Reg. 194*, ("Rules") for him to appear on behalf of 2145401. A question was raised by the applicant

about whether Starkman acting in these various roles was compliant with the Law Society's *Rules of Professional Conduct* but no specific rule or commentary was referred to. I indicated that this was something that Starkman would have to satisfy himself about.

4 For the reasons that follow, I am granting the relief sought in paragraph 1(a) of the Notice of Application to permit MTCC 1328 to enter the Unit on one or more occasions in order to inspect and investigate whether there are noises or vibrations emanating from the staircase in the Unit that could unreasonably interfere with the use and enjoyment of unit 402, or any condition of the staircase that may affect the structural integrity of the floor of the Unit or the ceiling of unit 402 or any appurtenant common elements. For clarity, this order grants MTCC 1328 a right or authority conferred by law to enter the Unit and overrides the Trespass Notice. The corollary of this is that the respondents should not interfere with this lawful entry. The respondents are not required to, but may at their option, be present at the appointed time(s).

Background

5 2145401 purchased the Unit in August of 2010 and Starkman has occupied it since then.

6 This dispute arises out of concerns raised by Ms. Franklin ("Franklin"), the owner/occupant of unit 402 immediately below the Unit, dating back to earlier than August of 2010 about noise and vibrations emanating from a spiral staircase that connects the two floors of the Unit. There are similar staircases in all of the penthouse units in the building that were part of the original structure and design and installed at the time of original construction.

7 Prior to the most recent complaint from Franklin contained in a letter dated June 26, 2018 addressed to the board of directors of MTCC 1328, Franklin had raised concerns on a number of previous occasions about the staircase in the Unit. The early complaints that pre-dated the August 2010 purchase of the Unit by 2145401 appear to have been investigated. This was documented after the fact in a letter dated June 7, 2011 from counsel for MTCC 1328 that references two reports about the stability of the staircase, one dated October 5, 2009 and one dated June 11, 2010. Starkman responded to that letter on July 21, 2011 (apparently having been provided with the engineering reports at that time) disputing that these reports indicated any structural problem with the staircase in the Unit. I was advised that none of the parties have retained copies of these reports given the time that has elapsed since they were commissioned. These communications about the stability of the staircase in the spring and summer of 2011 appear to have arisen in connection with some renovations to the Unit being done at the time that were eventually inspected and approved.

8 The concerns about the stability of the staircase went dormant after that, with the exception of one complaint to the City of Toronto that Starkman was notified about in 2016 that appears not to have been pursued. Unrelated to the staircase, in September of 2016 and then again in May and June of 2017, Starkman was asked to inspect unit 402 in connection with claims about water damage allegedly sustained to the floors, walls, and ceilings of unit 402. In both instances, Starkman's inspections did not disclose any visible water damage to unit 402.

9 In June of 2017, 2145401 got into a dispute with MTCC 1328 about a charge/lien issued for the alleged water damage to unit 402 that was added to the Owner's mortgage with the TD Bank (according to the respondents, improperly). This led to a small claims court action (initially issued on February 12, 2018 and amended on August 14 and December 19, 2018) in which the respondents dispute and deny responsibility for the cost of repairs to unit 402 that the applicant has (according to the respondents, improperly) charged to the common expenses for the Unit. There was a mandatory mediation in the small claims court action in June of 2018 but it did not settle.

10 Unbeknownst to the respondents, Franklin attended a meeting of the board of directors of MTCC 1328 on September 25, 2017 to provide details and documentation about the issues of noise and vibration emanating from the staircase and to advise them of her assessment of the gradual instability of the staircase over several years. Franklin apparently made various suggestions about things that could/should be done to investigate this at the board meeting. Franklin sent a follow up letter to the board of directors of MTCC 1328 on June 26, 2018 in anticipation of their June 26, 2018 board meeting. There is nothing in the record to indicate that the board of

directors did anything in furtherance of Franklin's complaints in the intervening period from September, 2017 to June, 2018.

11 The first notification that the respondents received (since the exchange in July of 2011 referenced above) that the complaints to MTCC 1328 about the noise emanating from the staircase in the Unit had been renewed was not until an email dated July 23, 2018 in which access was requested to inspect the staircase and the plumbing in the Unit. After being advised of the respondents' position denying access on July 25, 2018 MTCC 1328 sent a further email request for access to the Unit to inspect the staircase. This is what led to the Trespass Notice that was issued the following day.

12 After a further exchange of correspondence between counsel for MTCC 1328 and Starkman in August of 2018, the board of directors resolved on October 1, 2018 to retain counsel to commence an application to enforce compliance with [s. 19 of the Condominium Act, 1998, S.O. 1998, c. 19](#) (the "Act") and the Corporation's declaration, by-laws, and rules, based on the respondents' interference with MTCC 1328's right and duty to inspect the Unit in furtherance of its investigation of Franklin's complaints.

Positions of the Parties

Applicant's Position

13 MTCC 1328 claims that the respondents are in breach of the Act (as well as the corporation's declaration and by-laws) by their refusal to allow an inspection of the Unit. MTCC 1328 claims that it has both a right and a duty to enter the Unit on reasonable notice in order to determine if the staircase is interfering with Franklin's use and enjoyment of her unit 402 and to abate any nuisance, and, if it is determined to be unstable, to carry out the necessary repairs and maintenance of the staircase in the Unit if the Owner is not willing to do so. They seek the court's assistance under s. 134 of the Act for an order enforcing compliance with the Act and/or the declaration and by-law.

14 MTCC 1328 maintains that because a breach of the Act is alleged, this is not a matter that is required to go to mediation and arbitration under s. 132 of the Act as a precondition to the relief sought (which would only apply to a dispute about the declaration, by-laws, and/or rules of the corporation). MTCC 1328 also maintains that there is no limitation period applicable to the enforcement of the Act but, in any event, this is a continuing cause of action that most recently arose as a result of complaints made by the owner of unit 402 in September of 2017 and July of 2018, less than two years prior to the commencement of this proceeding.

15 MTCC 1328 seeks an order for access to the Unit, and for full indemnity costs.

Respondents' Position

16 The respondents counter that the rights and duties of MTCC 1328 under the Act and declaration that might give rise to a right to inspect the Unit only arise in connection with the repair and maintenance of the common elements, or matters that might affect the common elements, or an emergency situation, and the complaints about the stability of the staircase in the Unit do not fall into these categories. They also maintain that the request to inspect must be reasonable and have a reasonable basis, and that the request in this instance does not have a reasonable basis given the history of complaints and MTCC 1328's inaction in response to them, and also given the lack of any direct or admissible evidence about an unreasonable level of noise or vibration being experienced in unit 402.

17 The respondents go further and allege that, not only is the request to inspect not reasonable, it is made in bad faith and with the ulterior purpose of pressuring the respondents to settle the pending small claims action.

18 The respondents also say that MTCC 1328 has known about these complaints about the staircase since 2010 and is statute barred from seeking to enforce any right or duty to access and inspect the Unit to investigate complaints that date back over more than eight years. They assert that the purported right or duty to access and

inspect the Unit does not arise under the Act but rather under the declaration and is therefore not shielded from the running of the two-year limitation period under s. 5 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B. Further, the enforcement of such is not exempted from the pre-condition under s. 134 of the Act that this dispute first be mediated and arbitrated under s. 132 of the Act. They argue that it would be a red herring for the applicant to say that s. 132 does not apply in a dispute involving an occupant because, for all intents and purposes, Starkman (who is the Occupant) is one and the same as his company, 2145401 (which is the Owner). The respondents also complain that not all of the sections of the Act relied upon were referenced in the Notice of Application.

19 For these reasons, the respondents ask that the application be dismissed with costs. The respondents also argue that if any order is made it should not include any declaratory relief and should be limited only to the relief sought in the Notice of Application for an order that the Owner provide access to the Unit and/or cause the Occupant to provide access to the Unit for the stated purposes.

Analysis

The Relevant Provisions of the Act and the Declaration

20 The duties and obligations (objects) of MTCC 1328 under the Act include:

- a. to manage the property and assets of the corporation (s.17(1)); to control, manage, and administer the common elements and assets of the corporation (s. 17(2));
- b. to maintain the units or any part of them that the declaration requires it to do (s. 91(d)) [note I was not referred to any such obligations in the MTCC 1328 declaration];
- c. to do the work necessary to carry out any obligation that an owner has under the declaration to repair their unit after damage that the owner fails to carry out (s. 92(1) which also corresponds with section 26(c) of the declaration); and
- d. to do the work necessary to carry out any obligation that an owner has under the declaration to maintain their unit if the failure presents a potential risk of damage to the property or assets of the corporation or a potential risk of personal injury to persons on the property (s. 92(3)).

21 Furthermore, the combination of sections 17(3) and s. 119(3) of the Act give MTCC 1328 not only the right but the duty to require the Owner to comply with its obligations under the Act, the declaration, the by-laws, and the rules. They also establish the Owner's obligation to take all reasonable steps to ensure that the Occupant does so as well.

22 Section 19(a) of the declaration prohibits the occupation or use of a unit in a manner that is likely to damage or injure any person or property (including any other unit or portion of the common elements), in any manner that will unreasonably interfere with the use or enjoyment by the other owners of the common elements or their respective units, or in any manner that may affect the structural integrity of any unit and/or the common elements.

23 Under s. 19 of the Act, MTCC 1328 has a right to enter the Unit upon giving reasonable notice at any reasonable time to perform its objects and duties or to exercise its powers.

24 Section 35(a) of the declaration provides that MTCC 1328 and its employees and authorized representatives shall be entitled to enter any unit at all reasonable times and upon giving reasonable notice for the purpose of making inspections, making repairs, or remedying any condition that might result in damages to the Lands [defined to include all of the property except the units] or any condition which violates any public health or safety code legislation. It also provides MTCC 1328 with a right of entry (on the same terms) for the purpose of carrying out any duty imposed on it.

25 Section 134(1) of the Act provides that MTCC 1328 may make an application to the court for an order enforcing compliance with the Act, the declaration, the by-laws, or the rules.

Application of the Act and the Relevant Provisions in this Case

26 A series of complaints have been made by Franklin about the stability of the staircase in the Unit which indicate that, from her subjective perspective, it is unreasonably interfering with her use and enjoyment of her unit 402. The fact that there have been ongoing complaints does not diminish the potential interference with her use and enjoyment, but rather reinforces it. It has also been suggested by Franklin (but not established on the evidence in the record before me) that the use of the staircase in the Unit may affect the structural integrity of the Unit (or the floor/ceiling below it which may form part of the common elements).

27 While Franklin's complaints are not determinative of the question of whether the respondents are in breach of the Act or the declaration, MTCC 1328 has a right and a duty under s. 17(3) and s. 119(3) of the Act to take all reasonable steps to ensure that the Owner and the Occupant of the Unit are in compliance with them. In this case, that duty includes ensuring that the Unit is not being occupied or used in a manner contrary to s. 19(a) of the declaration that will unreasonably interfere with Franklin's use or enjoyment of her unit 402, or in any manner that may affect the structural integrity of the Unit and appurtenant common elements (floor/ceiling below the staircase). I do not agree with the respondents' position that all MTCC 1328's duties and objects under the Act are limited to the common elements, property, and assets of the corporation. While ss. 17(1) and (2) only refer to these, s. 17(3) of the Act speaks to duties and rights that are not expressly tied to the common elements, property, and assets of the corporation.

28 Under s. 19 of the Act, MTCC 1328 has a right to enter the Unit upon giving reasonable notice at any reasonable time to perform its duties and objects or to exercise its powers. Section 35(a) of the declaration provides a similar right of entry to MTCC 1328, on reasonable notice, for the purposes of making an inspection or to carry out any duty imposed on it.

29 MTCC 1328 did provide written notice on July 23, 2018 and then again on July 25, 2018 of the need to enter the Unit in order to investigate the complaint about the noise emanating from the staircase and proposed to do so the following week. MTCC 1328 initially asked for the Occupant to respond within two days with some convenient dates. A further notice was provided on August 8, 2018 requesting that the Occupant provide within one week some dates for entry in order to enable MTCC 1328 to assess the noise caused by the use of the staircase. All requests were for access during regular business hours.

30 In my view, the notice provided by MTCC 1328 seeking entry into the Unit to investigate the Franklin complaints was given in furtherance of the performance of its duties and obligations and in furtherance of the exercise of its rights and powers, under ss. 17(3) and 119(3) of the Act. It was reasonable notice for entry at reasonable times in compliance with both s. 19 of the Act and s. 35(a) of the declaration.

31 The corollary of MTCC 1328's right to enter the Unit on reasonable notice under both the Act and the declaration is an obligation on the part of the Owner and Occupier not to interfere with its access. In the face of Starkman's position in response to these notices, which was to deny any entry or access and to issue the Trespass Notice, MTCC 1328 is within its rights to seek the court's assistance under s. 134(1) of the Act, which is exactly what it has done.

32 The fact that there are overlapping provisions in both the Act and the declaration does not render the recourse to the court under s. 134 unavailable. The precondition of mediation and arbitration under s. 132 of the Act only applies to disagreements between the Owner and MTCC 1328 with respect to the declaration, by-laws, or rules, not with respect to the Act. (See *Toronto Common Element Condominium Corp. No. 1508 v. Stasyna*, [2012 ONSC 1504](#), [18 R.P.R. \(5th\) 15](#), at paras. 50-52, citing *McKinstry v. York Condominium Corp. No. 472 (2003)*, [68 O.R. \(3d\) 557](#) (S.C.)). Furthermore, it would not be efficient to require only part of the dispute to be mediated and

arbitrated, nor would it be just or efficient, after this application has already been fully briefed and argued, for it to be put on hold pending an alternative dispute resolution process that may not entirely dispose of the matter.

33 The fact that s. 17 of the Act is not expressly referenced in the Notice of Application and was only mentioned in the applicant's factum is not fatal to the relief sought, particularly given the overlap between ss. 17 and 119 of the Act (the latter of which is referenced in the Notice of Application). The respondents were clearly on notice of the substance of the relief sought, even if every potentially relevant section of the Act was not referenced at the time this application was commenced.

The Application is not Out of Time

34 This application is not statute barred by virtue of s. 5 of the *Limitations Act*, for among other reasons:

- a. the claim for the immediate relief requested, which is to permit entry into the Unit, arose in July of 2018 when entry was denied and the Trespass Notice was issued;
- b. further, the underlying dispute about what duties, obligations, rights, or powers of enforcement MTCC 1328 has under the Act as a result of Franklin's complaints is not subject to the *Limitations Act* by virtue of s. 31 of the Act; (See *Stasyna* at paras. 40 and 41 and *Waterloo North Condominium Corp. No. 37 v. Silaschi*, [2012 ONSC 5403](#), at para. 16)
- c. in any event, even if the underlying dispute is tied to whether the use and occupation of the Unit is contrary to s. 19(a) of the declaration (in other words, whether it is interfering with Franklin's use and enjoyment of her unit 402), which is an ongoing and continuing allegation that was made by Franklin most recently in 2017 with a follow up in 2018, in both instances less than two years before the application was commenced.

The Allegations of Bad Faith on the Part of the Board

35 Starkman has questioned the motivation of the board of directors of MTCC 1328 in having waited until now to investigate Franklin's complaints, and their history of inaction following the initial engineering reports that were obtained dating back to prior to 2010 when 2145401 purchased the Unit.

36 The steps taken by MTCC 1328 and its board in furtherance of the performance of MTCC 1328's duties and obligations and in the exercise of its rights and powers must be reasonable. However, the court should accept the board's decisions about MTCC 1328's exercise its rights and powers unless it is shown to have acted capriciously or unreasonably. (See for example *York Condominium Corp. No. 26 v. Ramadani*, [2011 ONSC 6726](#), [13 R.P.R. \(5th\) 137](#), at paras. 40, 41, 44-47 and *Metropolitan Toronto Condominium Corp. 946 v. J.V.M. (Public Guardian and Trustee of)* [\(2008\)](#), [79 R.P.R. \(4th\) 20](#) (Ont. S.C.), at para. 76)

37 Mere speculation about the coincidence of the timing of the board's resolution to pursue this in the summer of 2018 when the small claims court matter did not settle does not amount to bad faith, nor is it enough to lead to a finding that their decision to inspect the Unit was capricious or unreasonable.

38 The board has not made any determination based on what Franklin has said, other than the determination that it has a duty and obligation and right or power to inspect the Unit. That is within the range of reasonable decisions for the board to make in the circumstances and is to be afforded deference. The eventual determination about whether the respondents are in breach of s. 19(a) of the declaration or s. 119 (or any other provision) of the Act can only be made after the inspection. This is important because it also answers one of the respondents' other arguments, that the evidence about the Franklin complaints is inadmissible hearsay and should be struck or ignored. The applicant argued that this evidence was not being introduced for its truth but rather for the fact that the complaints were received by MTCC 1328 and that they were taken into account in the decision of MTCC 1328 to inspect. It is not a contentious fact (within the meaning of Rule 39.01(5)) that Franklin made these complaints. Franklin's complaints are not inadmissible hearsay when referred to for that purpose.

39 While there might be another case where the evidence of bad faith on the part of the board of a condominium corporation is sufficient to displace the deference otherwise given to their decisions and could lead to a finding that the board and the condominium corporation are not acting reasonably in the manner in which they are carrying out their duties and objects and exercising their rights and powers, that has not been established on the record before me in this case.

Disposition

40 In summary, the issues raised and decided on this application are as follows:

- a. Does MTCC 1328 have duties and obligations that extend beyond the common elements, property and assets of the corporation? *Yes, pursuant to ss. 17(3) and 119(3) of the Act.*
- b. Does MTCC 1328 have a right and power to enter the Unit in order to inspect it in furtherance of the performance of aforementioned duties and obligations? *Yes, by virtue of, inter alia, s. 19 of the Act and s. 35(a) of the declaration.*
- c. If so, was reasonable notice given at reasonable times for such access? *Yes.*
- d. Does MTCC 1328 have to satisfy the respondents and/ or the court that Franklin's complaints are justified or that there has been interference with Franklin's reasonable use and enjoyment of her unit 402 in order to gain the right of entry to the Unit? *No. The request for entry must be reasonable but that assessment may be predicated on the fact of the complaint (or in this case, series of continuing complaints) and need not be predicated on an assessment of whether there has, in fact, been a breach of the declaration or the Act at this stage.*
- e. Did the board of directors of MTCC 1328 act in bad faith or for an ulterior motive (or capriciously or unreasonably) in requesting access to the Unit? *This has not been established on the record before me.*
- f. Do the parties have to mediate and arbitrate under s. 132 of the Act as a precondition to the relief sought in this application? *No, because the dispute is about whether or not MTCC 1328 has the duty, obligation, right or power to enter the Unit and it arises in connection with efforts to seek compliance with the Act.*
- g. Is the application out of time? *No, because there is no limitation period for seeking compliance with the Act, and also because of the continuing nature of the complaints.*

41 As indicated previously in these reasons, I am granting the application and ordering that MTCC 1328 is entitled, and be permitted, to enter the Unit on one or more occasions. Although the applicant asked for access upon giving 24 hours' notice, I am extending this to require the applicant to give 48 hours' notice of each entry to take place on a weekday between the hours of 9:00 a.m. to 5:00 p.m. (unless otherwise agreed by the parties) for the purposes of inspecting and investigating the noise level and stability of the staircase. I am also ordering the respondents not to interfere with that lawful entry. (See s. 134(3)(a) and (c) of the Act) The respondents are not required to, but may at their option, be present at the appointed time(s) to observe.

Costs

42 At the conclusion of the hearing only MTCC 1328 had a costs outline. I directed that the parties exchange costs outlines by January 29, 2019, which I assume has occurred. I was advised by counsel for MTCC 1328 that they would like the opportunity to make submissions on costs in light of the indemnity provisions in the Act, the declaration, and the by-laws that are all clearly intended to avoid the common expenses and fees contributed by other unit holders being used to fund disputes between individual unit holders and MTCC 1328. I agreed that I would allow an opportunity for costs submissions after my decision is released.

43 I encourage the parties to attempt to reach a resolution of the issue of costs. I am concerned that so much time and effort has been devoted to what should have been a relatively straightforward request. Although I have granted the relief sought in the application neither party is blameless here. MTCC 1328 has been less than diligent and transparent in its consideration and assessment of the concerns raised by the owner of unit 402 (even though I have found the decision to inspect the Unit to have been in furtherance of the performance of its duties and obligations and the exercise of its rights and powers under the Act). This lack of diligence and transparency raised the suspicions of Starkman on behalf of the respondents. However, Starkman has been unduly aggressive and technical in his response to these concerns and quick to infer ulterior motivations on the part of MTCC 1328 that have not been substantiated.

44 If an agreement can be reached on costs, the parties should advise the court of such by March 1, 2019 and provide a draft order.

45 If no agreement is reached on costs, then the applicant may provide the court with brief written submissions on costs (not to exceed 3 pages double spaced) and its costs outline by March 8, 2019, the respondents may provide written responding submissions on costs (not to exceed 3 pages double spaced) and their costs outline (as previously delivered to the applicant) by March 15, 2019. The applicant may provide a brief reply submission on costs (not to exceed 2 pages double spaced) by March 20, 2019. All costs submissions should be served on the opposing parties and delivered to my attention at Judges' Administration, Superior Court of Justice at 361 University Avenue (Room 170), Toronto, Ontario M5G 1T3.

J. KIMMEL J.