CONDOMINIUM AUTHORITY TRIBUNAL

DATE: May 13, 2019
CASE: 2018-00373R
Citation: Kai Sin Yeung v Metropolitan Toronto Condominium Corporation No. 1136, 2019 ON CAT 11

Order under section 1.44 of the *Condominium Act, 1998.*

Adjudicator: Marc Bhalla, Member

The Applicant
Kai Sin Yeung — Self-Represented

The Respondent
Metropolitan Toronto Condominium Corporation No. 1136 — Tony Bui, Counsel

Hearing: Written online hearing, February 8 to April 29, 2019

REASONS FOR DECISION

A. OVERVIEW

[1] The Applicant is a unit owner of Metropolitan Toronto Condominium Corporation No. 1136 ("MTCC 1136") and requested, pursuant to s.55 of the *Condominium Act, 1998* (the "Act"), email correspondence in relation to the renewal of a gas contract (the "Emails") referenced in MTCC 1136's Board Meeting minutes of January 19, 2017 (the "Minutes"). The Applicant also seeks a penalty against MTCC 1136 for failing to reply to the Applicant's Request for Records within 30 days and costs of this hearing before the Condominium Authority Tribunal (the "Tribunal").

[2] The Respondent claims that the Emails do not exist and states that if the Emails existed, the Applicant would not be entitled to them. The Respondent does not believe that the Emails would constitute records to which the Applicant is entitled. The Respondent concedes that it did not reply to the Applicant's Request for Records within 30 days and claims this was done inadvertently, as the condominium corporation was transitioning between property managers at the time. The Respondent believes no penalty or costs should be awarded in this case.

[3] Both the Applicant and the Respondent's Representative, Tony Bui, were model users of the CAT-ODR system. They were responsive, respectful and demonstrated understanding of the aims of the Tribunal to provide an efficient and fair hearing. I commend both Kai Sin Yeung and Tony Bui for their behaviour and engagement throughout the hearing.

[4] After reviewing the evidence and submissions, I find that the Emails, whether they existed or not, are not records that the Applicant is entitled to under the Act. Notwithstanding, I find that the Applicant is entitled to recover their costs of bringing this matter before the Tribunal and award costs of $200 to be paid by the Respondent to the Applicant.

B. PRELIMINARY ISSUES

[5] The Applicant proposed five witnesses for the hearing – all members of MTCC 1136's Board of Directors. The Respondent objected with a claim that the testimony would not be relevant to the issues involved in this case. I asked the Respondent to offer one director as a witness to the hearing to testify on behalf of the condominium corporation. The Respondent agreed to do so.

[6] In accordance with Section 15(1) of the *Statutory Powers Procedure Act, 1990*, I accepted witness testimony by way of written replies to questions. The Applicant and the Respondent had opportunity to propose and object to questions, following which a final list of questions was provided to each witness to complete honestly, independently and as fully as possible.

C. ISSUES

[7] The Tribunal identified three main issues to be decided in the hearing as follows:

Issue 1: The Emails
1A: Are or were the Emails records of the condominium corporation as prescribed by the *Condominium Act, 1998* (the "Act")?
1B: Is the Applicant entitled to examine the Emails pursuant to the Act?
1C: Was the Respondent obligated to keep a copy of the Emails pursuant to the Act?
1D: If the Respondent was obligated to keep a copy of the Emails and neglected to do so, will the Tribunal award a penalty against the Respondent?
Issue 2: Response to Request for Records
2A: Was the Respondent required to reply to the Applicant's Request for Records within 30 days of receiving the request?
2B: If the Respondent failed to reply to the Applicant's Request for Records within 30 days, will the Tribunal award a penalty against the Respondent?
Issue 3: Costs
3A: Will the Tribunal order an award of costs to either of the Users

D. ANALYSIS

<u>1A: Are or were the Emails records of the condominium corporation as prescribed by the Act?</u>

[8] The Minutes state that the renewal of the gas contract "has already been approved by the Board via e-mail". This differs from other business referenced in the Minutes, whereby motions were brought, seconded, and carried. I note that an investment decision by the Board is referenced in the Minutes as ratifying earlier Board approval by email. There is no reference to any similar ratification, any director making or seconding any motion in respect of the gas contract renewal or any vote of directors recorded regarding the renewal of the gas contract in the Minutes.

[9] The Applicant believes that the Emails constitute records pursuant to the Act. The Applicant claims that the Respondent is required to keep adequate records and that the Respondent's Board of Directors "shall not transact any business of the corporation except at a meeting of directors at which a quorum of the board is present". As the Minutes suggest that the Respondent approved the gas contract renewal by email, the Applicant asserts that such approval took place in a meeting and the Emails represent the minutes of such meeting.

[10] The Respondent states that the Emails are not records as prescribed by the Act. The Respondent claims that "mere mention of emails within the minutes does not make these emails a record of the Corporation" and that informal discussion and approval of the gas contract by way of email would not constitute the transaction of business by the Respondent. The Respondent states that the gas contract renewal was approved at the January 19, 2017 Board meeting and that the Emails are not part of the Minutes or otherwise a record of the Respondent.

[11] The Minutes cause confusion as they inconsistently reference email correspondence between directors outside of Board meetings. This is further complicated by the Respondent's submissions contradicting the Minutes in explaining how the gas contract renewal was approved at the January 19, 2017 Board meeting.

[12] The testimony offered by the Respondent's chosen witness, Pobre Pereira (the Respondent's Treasurer), required that I pose follow-up questions as the witness failed to adequately answer their questions initially. The witness contradicted the evidence before me with a claim that the Emails never did exist and a suggestion that the gas contract renewal was approved by a show of hands and a vote at the Board meeting. The evidence before me does not support this as being the case. The testimony of the witness does not lend itself to being considered credible or support the Respondent as a result.

[13] The Applicant suggests that directors communicate between Board meetings to improve efficiency at the meeting. To that end, it does not appear to be the Applicant's position that all email correspondence between directors constitutes condominium records. Rather, it appears that the Applicant is taking the position that the Emails are records in view of how they were addressed in the Minutes.

[14] The Respondent suggests that the Emails, if they existed, were informal and constituted an "agreement to agree" rather than formal approval, claiming that formal approval of the gas contract renewal was given at the Board meeting. Unfortunately, the Minutes are not clear, and the Respondent has offered a contradictory explanation of how the gas contract renewal was approved.

[15] The issue before me is whether the Emails are records of the Respondent, not if the Respondent documented approval of the gas contract renewal adequately.

[16] Section 55(1)(2) of the Act speaks to condominium corporations keeping a minute book containing the minutes of owners' meetings and board meetings. It does not require a condominium corporation to keep a transcript of discussions (oral or by email) between directors within or beyond duly constituted Board meetings.

[17] If the Minutes intended to affix the Emails as a schedule thereto, that might have qualified them as records of the Respondent; however, there is insufficient evidence to support that being the intention.

[18] Notwithstanding the lack of clarity offered in the Minutes, reference to the Emails in the Minutes is insufficient to qualify the Emails as records of the Respondent. Based upon the evidence before me, I find that the Emails do not qualify as records prescribed by the Act.

1B: Is the Applicant entitled to examine the Emails pursuant to the Act?

[19] As I have determined that the Emails do not constitute records of the Respondent, the Applicant is not entitled to examine them.

[20] I appreciate that the wording of the Minutes gave rise to the Applicant's request for the Emails, as the Applicant sought to understand how the Respondent approved the gas contract renewal.

1C: Was the Respondent obligated to keep a copy of the Emails pursuant to the Act?

[21] As the Emails do not constitute records of the Respondent, the Respondent was not obligated to keep a copy of the Emails.

1D - If the Respondent was obligated to keep a copy of the Emails and neglected to do so, will the Tribunal award a penalty against the Respondent?

[22] As the Respondent was not obligated to keep a copy of the Emails, a penalty will not be awarded against the Respondent for that reason.

2A – Was the Respondent required to reply to the Applicant's Request for Records within 30 days of receiving the request?

[23] The Respondent admits that it should have responded to the Applicant within 30 days of receiving the Applicant's Request for Records and failed to do so.

[24] Section 13.3(6) of *Ontario Regulation 48/01* clearly states that condominium corporations are required to respond to a Request for Records within 30 days.

2B – If the Respondent failed to reply to the Applicant's Request for Records within 30 days, will the Tribunal award a penalty against the Respondent?

[25] The Applicant submits that a penalty should be awarded as the Respondent failed to reply to the Request for Records made within 30 days or with the prescribed form.

[26] The Applicant submitted a Request for Records form dated September 19, 2018 and an email to the Respondent's property manager of October 25, 2018 referencing requests for records of September 7, 18 and 27, 2018. On October 25, 2018, the Respondent's property manager replied with an apology for the delay and a commitment to reply the following week. However, the Applicant submits that further follow-up was required and that ultimately it was necessary to bring this case to the Tribunal to receive a reply from the Respondent.

[27] The Respondent submits that the Respondent's property manager was transitioning into the role when the Applicant made their records request. The Respondent claims that its property manager acknowledged the request and took steps to attempt to address it, including looking for the Emails on computers that the property manager had access to. The Respondent submits that there was no malice or ill intent surrounding the lack of reply and that both the delay and failed use of the correct form were inadvertent. This is supported by the testimony of Willie Chan, the Respondent's property manager. I find this testimony to be credible.

[28] I accept the Respondent's submissions surrounding the reasons for the failure to reply within 30 days or with the prescribed form. Yet, the Applicant should not have needed to bring this case before the Tribunal in order to receive a reply to their records request.

[29] The fact is that a timeline prescribed by law to reply to a Request for Records was not met. To allow this to take place without consequence risks taking the intention behind such a timeline for granted and encouraging others to ignore this deadline. Condominium corporations should be encouraged to meet their legal obligation to reply to a Request for Records within 30 days.

[30] The Applicant referred to a prior Small Claims Court case involving the Respondent as evidence of a pattern of behaviour where the Respondent prevents the Applicant from accessing records. I do not accept that this shows a pattern of

behaviour by the Respondent, particularly in view of the efforts that were undertaken by the Respondent's property manager to find the records requested.

[31] While I appreciate that the Respondent's property manager took steps to reply to the request, including by conducting investigations to attempt to find the Emails, there can be consequences for failing to reply within the legislated 30 day timeline to a Request for Records. However, the extent of any such consequence must be balanced against the impact of the delayed reply on the Applicant.

[32] The Respondent's representative likens the situation to the case of *Clyde Rogers v. Niagara North Condominium Corporation No. 131 2018 ONCAT 13*, wherein a settlement agreement deadline was missed without consequence as "best efforts" were made to comply and as there was no prejudice as a result of the delay. Additionally, the Respondent suggests that the Applicant was not prejudiced by the delay and "as he would not have received the emails he requested because they did not exist".

[33] I do not accept as fact the claim that the Emails never existed as there is insufficient evidence to support this in view of the content of the Minutes. However, for the purposes of this case, it is irrelevant if the Emails existed and were deleted or never existed, as they do not qualify as records of the Respondent prescribed by the Act.

[34] The Respondent's representative suggests that the Applicant has been provided with the information that they requested about the renewal of the gas contract. While I accept that the Applicant would not have been entitled to information contained in the Emails, it remains that the wording of the Minutes contributed to confusion and the escalation of this matter. It was reasonable for the Applicant to seek further information about the gas contract renewal based upon the way such is presented in the Minutes and unfair to the Applicant to experience the delays encountered.

[35] The Minutes gave rise to confusion and the delayed reply to the Applicant's Request for Records prolonged the Applicant's uncertainty surrounding the renewal of the gas contract. By not replying within the legislated timeline, the Respondent further contributed to the Applicant's concern.

[36] I will not award a penalty against the Respondent for the delayed reply given these particular facts; however, I will take the delay into account when considering costs as I find it to be more appropriate to consider how such contributed to the Applicant's costs of pursuing this matter before the Tribunal.

3A – Will the Tribunal order an award of costs to either of the Users

[37] Rules 32.1 and 33.1 of the Tribunal's Rules of Practice speak to the recovery of fees and expenses, with legal fees generally not being recoverable.

[38] The Applicant has requested costs of $200 against the Respondent, citing the delayed reply to the Applicant's Request for Records and stating that the lack of reply gave rise to the Applicant filing this case with the Tribunal.

[39] The Respondent has submitted that costs should not be awarded and each of the Applicant and the Respondent (collectively, the "Users") should bear their own costs in this circumstance. I appreciate the Respondent demonstrating awareness of the Tribunal's legal cost recovery practice and taking steps not to introduce inefficiency into the hearing by making a claim for costs where there are clearly not exceptional reasons to warrant such.

[40] While the Applicant was ultimately unsuccessful in their claim that the Emails constitute a record of the Respondent, the delayed reply to the Applicant's Request for Records ultimately prompted the Applicant to incur fees totalling $200 to bring this matter before the Tribunal.

ORDER

[41] The Tribunal orders that:

1. The Respondent is to pay the Applicant's cost of $200 for pursuing this case. In the event that such is not provided to the Applicant within 30 days of this Order, the Applicant is entitled to set-off this amount against the common expenses attributable to the Applicant's unit(s) in accordance with Section 1.45(3) of the Act.

2. In order to ensure that the Applicant does not have to pay any portion of this cost award, the Applicant shall also be given a credit toward the common expenses attributable to the Applicant's unit(s) in the amount equivalent to the Applicant's proportionate share of such costs.

3. No other costs relating to this case may be recovered by either of the Users, in any manner.

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Marc Bhalla
Member, Condominium Authority Tribunal

Released on: May 13, 2019