

CITATION: 1552443 Ontario Inc. v. Nipissing Vacant Land Condominium Corporation No.
41, 2019 ONSC 3715
COURT FILE NO.: CV-19-73
DATE: 2019/06/14

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

1552443 ONTARIO INC.

Applicant

- and -

NIPISSING VACANT LAND
CONDOMINIUM CORPORATION NO. 41

Respondent

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) *Puja Walia*, for the Applicant
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) *Megan Mackey*, for the Respondent
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) **HEARD:** June 13, 2019
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ELLIES R.S.J.

REASONS FOR DECISION

OVERVIEW

[1] 1552443 Ontario Inc. (“155”) applies for an order under s. 31 of the *Mortgages Act*, R.S.O. 1980, c. M.40 for an order declaring that Notices of Sale issued by Nipissing Vacant Land Condominium Corporation No. 41 (the “Corporation”) to enforce Certificates of Lien registered against 155’s condo units are null and void. 155 contends that the notices fail to comply with the *Condominium Act, 1998*, S.O. 1998, c. 19 (the “Act”), the declarations of the Corporation, and its by-laws.

- [2] Pursuant to the Notices of Sale, the units in question will be sold on June 24, 2019 if the amounts the liens secure are not paid on or before that date.
- [3] By my calculation, a total of over \$118,000 was owing on 155's units as of May 10, 2019 and that amount has increased because 155 has not contributed its proportionate share of the common expenses since the Notices of Sale were issued.
- [4] For the following reasons, the application is dismissed.

FACTS

- [5] 155 was the declarant at the time the Corporation was created in 2006. The Corporation was created for the purpose of controlling, managing and administering vacant land located on Premier Road in the City of North Bay. The land consists of 32 lots ("units", to use the terminology of the Act). 155 originally owned all of the units.
- [6] By early 2012, 155 had sold over one-half of the 32 units. It is not disputed that, at that point in time, 155 was required to turn over control of the Corporation to the purchasers of those units. However, that did not happen. As a result, acrimony developed between 155 and a number, if not all, of the unit owners. 155 finally turned over control of the Corporation in late 2017.
- [7] It is also not disputed that, at the time control of the Corporation was ceded, the Corporation's operating account contained only \$56.48 and its reserve account contained only \$11.61. The budget for 2017 showed that operating expenses for that year were estimated at approximately \$45,000, and revenues at \$50,000.
- [8] Pursuant to s. 94 of the Act, the amount of the reserve fund for the Corporation was to be determined by a third party professional of a prescribed class, usually an engineer. For 2017, the amount of the reserve fund had been set at \$36,610.
- [9] On December 22, 2017, after the owners assumed control of the Corporation, the Corporation registered Certificates of Lien against 155's units. It is not clear from the evidence exactly how much 155 owed in common expense payments at the time. In November 2018, 155 made a common expense payment, allegedly for the period of November 1, 2017 to October 31, 2018. The payment was made on a without prejudice basis with respect to legal proceedings between the parties. Nonetheless, 155 does not dispute that the Corporation was entitled to register Certificates of Lien.
- [10] In January 2018, 155 received a written Notice of Special Assessment in respect of each of its units. The notice advised that a special assessment of \$147,000 had been made, to be shared by all 32 units. The amount was due from each unit owner by February 6, 2018. 155 did not pay any of the special assessment.
- [11] Pursuant to s. 85(1) of the Act, the Corporation is entitled to enforce the certificates of lien referred to above in the same way as a mortgage may be enforced. Accordingly, on May 10, 2019, the Corporation issued the Notices of Sale that are the subject of this

application. The amount due under the notices includes the unpaid special assessment, as well as unpaid monthly common expense payments due for three months prior to the issuance of the Notices of Sale, continuing to the present time.

- [12] According to 155, the amount of the special assessment constitutes approximately one-third of the total amount it presently owes.

ISSUES

- [13] 155 submits that the Notices of Sale are invalid for four reasons, some of them related. 155 argues:
- (1) that the special assessment was not levied in accordance with the by-laws of the Corporation because the Corporation had no budget in place at the time it was made;
 - (2) that the Notice of Special Assessment failed to provide the information required by s. 10.3 of the by-law;
 - (3) that the information the notice of special assessment did contain was misleading; and
 - (4) that the specially assessed funds were spent improperly.
- [14] I will deal with each of the issues raised by these arguments in the order in which I have listed them.

ANALYSIS

- [15] Pursuant to s. 85(6) of the Act, the Corporation's liens against 155's units are enforceable in the same way as a mortgage. Section 31 of the *Mortgages Act*, R.S.O. 1990, c. M.40 governs the content of the required notice of the exercise of a power of sale. Courts have interpreted that section to require that the amount owing be accurately set out in the notice and free from serious error: *Allesandria Real Estate Investments Ltd. v. Toronto-Dominion Bank* (1991), 6 O.R. (3d) 536. The same principle has been applied to Notices of Sale issued by condominium corporations under the Act: *Carleton Condominium Corp. No. 396 v. Burdet*, 2014 ONSC 7411.

No Budget

- [16] Sections 10.1(b) and 10.3 of the Corporation's by-law provide:

10.1 Assessment of Common Expenses

- (b) The Board shall from time to time and at least annually, prepare a budget for the property and determine by estimate the amount of common expenses for the ensuing fiscal year or

remainder of the current fiscal year as the case may be. The Board should allocate and assess the common expenses as set out in the budget, for that period (*sic*) amount the owners, according to the proportions in which they are required to contribute to the common expenses as set out in the declaration.

10.3 Extraordinary Expenses

Any expenditures not contemplated in the budget and for which the Board shall have not have sufficient funds may be assessed at any time during the year in addition to the annual assessment, by the Board serving notices of the further assessment on all owners. The notice shall include a written statement setting out the reasons for the extraordinary assessment.

[17] 155 submits that the Corporation failed to comply with these provisions because the Corporation had no budget in place at the time the special assessment was made on January 9, 2018. I disagree.

[18] I am not satisfied that the Corporation had no budget. On behalf of the Corporation, Susan Laperle deposed in an affidavit sworn May 28, 2019 (para. 16):

I am advised by Dan Selin and Christine Lackmanec, and I do believe, that when the new owner-elected board took over, Mr. Silveri [the principal of 155] did not hand over the Condominium's documentation. The Board had no idea what bills to expect or what bills were outstanding. Therefore, the Condominium's board of directors kept using the same budget that Mr. Silveri had previously implemented. The Condominium's owner-elected board adopted Mr. Silveri's most recent budget and kept collecting common expenses at the same level as had been done when Mr. Silveri was in charge.

A copy of the budget is attached to Ms. Laperle's affidavit.

[19] There is nothing in the record to refute this evidence. 155 does not contest the allegation, notwithstanding the fact that it contested a number of other allegations made by Ms. Laperle.

Written Statement

[20] I am also unable to accept 155's submission that the Notices of Special Assessment failed to comply with the requirements of s. 10.3 of the by-law. The notices all state as follows:

The Board of Directors is forced to levy a special assessment against all units due to the fact that the previous Board left \$56.48 in our operating account and \$11.61 in our reserve fund account as of December 4, 2017, the date the current Board was elected and the previous Board resigned. Our Reserve Fund account should have had a balance of \$36,610.00 according to the reserve fund study. The previous Board has not handed over any prepaid common expense fees or the remainder of the December 2017 common expense fees paid. NVLCC No. 41 has ongoing operating expenses and existing liabilities that must be paid; however we have no money in our account to pay our liabilities or ongoing expenses. As such, the Board of Directors has no option but to levy a special assessment.

- [21] I cannot agree with 155's submission that this statement fails to meet the provisions of sec. 10.3 of the by-law. That section requires only a statement of the reason for the levy, not a line-by-line statement of exactly how the amount of the special assessment was arrived at.

Misinformation

- [22] It seems to me that 155's real complaint about the information in the Notice of Special Assessment is that it was not accurate. 155 submits that the Corporation never used the specially assessed funds to bring the balance of the reserve account to \$36,610, as set out in the notice.
- [23] The Corporation does not dispute that it did not manage to bring the reserve fund up to the level contemplated. However, I accept the submission of counsel for the Corporation, who makes the simple point that the Corporation could not bring the reserve fund up to the contemplated level because, even though every other unit owner paid its proportionate share of the special assessment, 155 did not. Based on the submissions of counsel for 155, its proportionate share of the \$147,000 have been roughly \$41,000.
- [24] The audited financial statement for the Corporation for the fiscal year end ending October 31, 2018 shows that the reserve fund was at \$9,614 and had a credit owing to it from the operating fund in the amount of \$8,410. Using these figures, it is clear that the Corporation could have managed to bring the reserve fund up to the required level had 155 paid its proportionate share of the special assessment.

Misappropriation

- [25] Finally, in a submission related to the previous issue, 155 submits that the Corporation misappropriated the funds it did receive by way of a special assessment by using some of them to reimburse condominium owners for expenses that were not incurred on behalf of the Corporation. 155 focuses, in particular, on a copy of a cheque stub issued by the Corporation to Hodis Law, a law firm, in the amount of \$14,503.21 and to redacted

copies of statements of account from that firm issued to Dan Selin, a condominium owner. As 155 points out, the accounts all relate to services rendered prior to Mr. Selin becoming a director of the Corporation.

- [26] I am not satisfied that any of the amounts paid to any condominium owner was improper. As Ms. Laperle deposes (para. 15):

The special assessment money did not come in until February, 2018 (because owners had to be given time to pay). Because we had no money and bills to pay, four owners came together and put their own personal money together to pay our bills and obligations: Marg Shannon, Dan Selin, June Campbell and Christine Lackmanec. I was grateful to those owners for stepping up. When the special assessment was collected, we reimbursed those owners. I am confident that all of the money paid to owners was to reimburse those owners for their own personal money they spent on (*sic*) for Condominium expenses.

- [27] I see nothing in the evidence to lead me to conclude that the payments were for legal services rendered personally to Mr. Selin and not on behalf of the Corporation. The accounts were all related to a file called “Nipissing Condominium Corporation #41”. The account number set out on the invoices is “14-0009-001”. The cheque stub to which I refer to earlier includes that account number, and one other account number. As counsel for 155 conceded, virtually all of the \$14,503.21 went to the accounts rendered in connection with file 14-0009-001. While I have no information about the other account number, the very small amount involved does not cause me to doubt Ms. Laperle’s evidence in any way. Nor would it justify declaring the Notices of Sale invalid.

- [28] Further, all of the services referred to in the accounts were rendered in the period during which the owners were fighting for the control of the Corporation to which they were legally entitled. This is consistent with the assertion that the legal fees were incurred for purposes related to the Corporation.

CONCLUSION

- [29] For the foregoing reasons, the application is dismissed.
- [30] If the parties are unable to agree on the issue of costs, they may make written submissions, limited to five typewritten pages, excluding attachments, as follows:
- (1) by the respondent, within 20 days of the date of the release of these reasons; and
 - (2) by the applicant, within 20 days thereafter.

Ellies R.S.J.

Released: June 14, 2019

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