CITATION: Wellington Condo. Corp. No. 31 v. Silberberg et al, 2019 ONSC 6594
COURT FILE NO.: CV-19-278
DATE: 2019 11 26

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
Wellington Condominium Corporation No. 31	)	Michelle Kelly and Evan Holt, for the Applicant
	)	
Applicant	)	
	)	
- and -	)	
	)	
Rami Silberberg and Linda Silberberg	)	W. Gerald Punnett, for the Respondents
	)	
Respondents	)	
	)	
	)	**HEARD:** November 12th, 2019

REASONS FOR DECISION

LEMAY J

[1] The Applicant, Wellington Condominium Corporation No. 31 ("the Condominium") is a mid-rise condominium in Guelph. The Respondents Rami and Linda Silberberg own a unit in the Condominium, which they purchased in 2012. They had rented the condominium prior to purchasing it.

[2] The Silberbergs are smokers. They purchased the condominium in part because they could smoke on the balcony attached to their unit. However, other condominium unit owners complained about the smoke. The condominium board ultimately passed a Rule prohibiting smoking on balconies ("the Rule").

[3] The Silberbergs have continued to smoke on their balcony. As a result, the Condominum brought this Application seeking a declaration that the Silberbergs have not complied with the Rule, an order prohibiting them from smoking on their balcony, and damages as a result of having to bring this application.

[4] The Silberbergs resist the Application on the basis that part of the balcony is owned exclusively by them, and the Rule does not apply to it. In the alternative, the Silberbergs argue that, if the balcony is covered by the Rule, the Rule was improperly passed and/or unreasonable and should not be enforced by the Court.

[5] For the reasons that follow, the Application is granted. The Silberbergs do not have sole ownership of any part of their balcony. Further, the Silberbergs have violated the Condominium's rule, which was reasonably passed and is a reasonable rule. An Order prohibiting the Silberbergs from smoking on their balcony is to issue effective immediately.

Background Facts

a) The Condominium and Unit

[6] The condominium is a low rise unit in the City of Guelph. It is composed of approximately seventy (70) units over 9 floors. Some of the units have balconies. The Silberbergs own unit 7, level 3 in the Condominium.

[7] As in all condominiums, there are some common elements as well as some exclusive use common elements. The Condominium's declaration states as follows with respect to exclusive use common elements:

> "2. Exclusive Use Common Elements
>
> i) Subject to the provision of the Act, this Declaration, the By-laws, and the Rules passed pursuant thereto, the Owner of each Unit shall have the exclusive use of that portion or portions of the Exclusive Use Common Elements as set out in Schedule "F" attached hereto.
>
> ii) The Corporation shall have access at all reasonable times to the Exclusive Use Common Elements in order to carry out any maintenance, repairs, additions, alterations or improvements."

[8] Schedule F, in its entirety, states:

> "The Owner of each Unit shall have the exclusive use of any balcony to which the Unit shall provide direct and sole access as shown on Parts 1, Sheets 2 and 3."

[9] From this evidence, it is clear that the balconies attached to specific units in the Condominium were exclusive use common elements. However, the Silberbergs claim that part of the balcony is exclusively owned by them. I will return to this argument below.

[10] The layout of the remainder of the Silberberg's unit is not in dispute in this matter. Therefore, it does not need to be described further.

b) The Events Giving Rise to the Rule

[11] The Silberbergs rented the Unit starting sometime in 2009. The Silberbergs obtained title to the unit in June of 2012.

[12] When the Silberbergs first rented the unit, they asked if there were any conditions relating to smoking, and were told that there were not. The only conditions were no pets and no barbecues.

[13] The Silberbergs smoked on the balcony of the unit from the time that they purchased it. Mr. Silberberg stated that they did not generally smoke inside the unit. Instead, he had a patio table set up on the balcony, and would smoke at that table while watching television.

[14] At the time the Silberbergs purchased their unit, the Condominium's rule regarding smoking was that it was permitted on balconies, but that it was prohibited within five (5) meters of any entrance to the Condominium.

[15] At some point, the Condominium began to receive complaints about smoking from other tenants. The scope and details of these complaints were not set out in the materials before me. In any event, however, the Condominium's Board of Directors discussed possible solutions and determined that a prohibition on smoking in the common elements and exclusive use us

[16] The proposed new rule on smoking ("the Rule") stated:

> "Smoking of any kind, including without limitation by using vaporizers or e-cigarettes is not permitted in any part of the common elements or exclusive use balconies at any time."

[17] The Rule was part of a larger package of changes to the Condominium's rules that was proposed by the Board of Directors. On April 23rd, 2018, the Condominium corporation circulated these new rules, including the Rule to the property owners. The Silberbergs acknowledged receiving the rules, which were scheduled to come into effect on May 24th, 2018.

[18] On May 23rd, 2018, the Condominium's Board of Directors received a requisition for a meeting of owners to discuss and vote on the proposed rules. The Silberbergs were one of the owners who signed that requisition. While the Condominium took the view that the requisition was not valid, the Board of

Directors determined that a meeting should be called so that owners could vote on the proposed changes.

[19] The meeting was held on June 21st, 2018. The Silberbergs did not attend in person, but sent a proxy in which they voted against the change to the Rule. According to Ms. Brown's Affidavit, the Rule was discussed at this meeting, and questions were permitted.

[20] The rules proposed by the Board of Directors were adopted with some small modifications. The Rule was not changed at all from what was proposed.

c) The Application

[21] In spite of the new rules, the Silberbergs continued to smoke on their balcony. The Condominium continued to receive complaints from other occupants. As a result, Christina Brown, the property manager, contacted the Silberbergs and reminded them of the new rule. According to Ms. Brown, Mr. Silberberg responded by saying that they will do what they want and that the Condominium cannot stop them from smoking on the balcony.

[22] As a result, the Condominium directed its lawyers to write to the Silberbergs. This correspondence made it clear that the Condominium had passed a rule regarding smoking, and that the Silberbergs were to cease and desist from smoking on their balcony.

[23] The Silberbergs asked for time to retain a lawyer to consider the matter. In the meantime, they continued to smoke on their balcony, and the Condominium continued to get complaints from other tenants. This situation continued throughout the summer and fall of 2018.

[24] Ultimately the Silberbergs retained their current counsel, who advised that the Silberbergs were taking the position, *inter alia*, that the Rule did not apply to them because they had been in the condominium prior to the promulgation of the Rule and, as a result, were grandparented.

[25] With the arrival of the cold weather in the fall of 2018, the complaints ceased. The complaints began again in the spring of 2009, and counsel for the Condominium wrote to the Silberbergs counsel again, asking that they cease and desist smoking on their balcony. No reply was received to this letter.

[26] As a result, this application was commenced on July 31st, 2019. There were difficulties in receiving the acknowledgement of service back from the Silberberg's counsel, but it was ultimately received in August of 2019, and a notice of appearance was filed by the Silberbergs.

[27] The application was originally scheduled for September 17th, 2019. It was adjourned to November 12th, 2019. Cross-examinations of both Ms. Brown and Mr. Silberberg were held, and the matter was argued before me on November 12th, 2019.

[28] The Application is brought pursuant to section 134 of the *Condominium Act, 1998* S.O. 1998, c. 19. The Condominium is seeking an Order under section 119 (1) requiring the Silberbergs to comply with the Condominium's Rules regarding smoking, and particularly the Rule.

Issues

[29] The facts outlined above show that there are three issues that need to be resolved in this case, as follows:

a) Is the balcony an exclusive use common element and, therefore, subject to the Rule?

b) If the balcony is an exclusive use common element, did the Condominium pass the Rule properly?

c) If the Rule was passed properly, is it a reasonable rule? Addressing this question will include discussion of whether grandparenting should have been built into the Rule.

[30] I will deal with each issue in turn. First, however, I should note that I raised the question of whether issues of credibility could be dealt with on an application. Specifically, I observed to counsel that they had conducted detailed cross-examinations on the Application Record and that, if credibility issues could not be determined on this Application, then it seemed likely that the Application would be converted into an action and the same materials would be used on a summary judgment motion.

[31] After some discussion, both counsel were content with me resolving issues of credibility, and treating this as a Rule 20 motion if necessary. Given my disposition of the issues, I am of the view that this matter can be dealt with by way of an Application.

[32] The only real credibility issue is whether the Court should accept Mr. Silberberg's assertion that the Silberbergs own part of the balcony outright. As will be seen, this assertion has no basis in either fact or law, and can easily be rejected. I turn to that issue now.

Issue #1- Is the Balcony an Exclusive Use Common Element?

[33] The Silberbergs argue that a portion of their balcony is owned by them exclusively and is not a common use element. They base this argument on the fact that their plans show a modestly larger amount of surface area for the balcony than is shown on the condominium's plans. On this basis, the Silberbergs suggest that a portion of the balcony is owned exclusively by them, and this portion is not an exclusive use common element.

[34] In support of this position, counsel for the Silberbergs points out that Mr. Silberberg has testified that a portion of the balcony is owned by him, and that there is no contradictory evidence before the Court. Mr. Silberberg also testified that the plans show dotted lines for common use elements and solid lines for items that are owned exclusively by one owner, and that part of his balcony is captured in a solid line.

[35] I reject these arguments for three reasons. First, there **is** contradictory evidence before the Court, and it governs. The Declaration reproduced at paragraph clearly states that the balconies are exclusive use common elements. There is nothing in the declaration set out at paragraph 7, above, that says part of the balcony is owned by the unit owner. Absent some modifying words in the agreement itself, balcony should be taken to mean the whole balcony.

[36] Second, my interpretation of the Declaration is supported by the design of the balcony. Mr. Silberberg himself acknowledged on cross-examination that the balcony was not enclosed and that there were no barriers on the balcony. In light of that fact, it is difficult to see how part of the balcony could be owned by the Silberbergs as their exclusive property while the rest was an exclusive use

common element. The only logical inference is that the entire balcony is an exclusive use common element.

[37] Third, there is nothing in writing that counsel for the Silberbergs could point to in order to illustrate that the Silberbergs had exclusive ownership of part of their condominium balcony. As a result, the following provisions in the *Statute of Frauds* apply:

> **1** (1) Every estate or interest of freehold and every uncertain interest of, in, to or out of any messuages, lands, tenements or hereditaments shall be made or created by a writing signed by the parties making or creating the same, or their agents thereunto lawfully authorized in writing, and, if not so made or created, has the force and effect of an estate at will only, and shall not be deemed or taken to have any other or greater force or effect.
>
> **2** Subject to section 9 of the *Conveyancing and Law of Property Act*, no lease, estate or interest, either of freehold or term of years, or any uncertain interest of, in, to or out of any messuages, lands, tenements or hereditaments shall be assigned, granted or surrendered unless it be by deed or note in writing signed by the party so assigning, granting, or surrendering the same, or the party's agent thereunto lawfully authorized by writing or by act or operation of law. R.S.O. 1990, c. S.19, s. 2.

[38] In this case, the writings that I do have suggest that the balcony was an exclusive use common element. If the Silberbergs want to advance a contrary position, it must be based on more than dotted lines on a plan.

[39] For the foregoing reasons, I conclude that the entirety of the Silberberg's balcony is an exclusive use common element. Therefore, the balcony is covered by the Rule.

Issue #2- Was the Rule Passed Properly?

[40] Counsel for the Silberbergs argues that the Rule may not have been passed properly as we did not have the documentation to show exactly what

went on at the meeting, and we did not have any information on how the Rule was passed.

[41] I reject that assertion. I start by noting that the Silberbergs were not present in person at the meeting. As a result, section 47(9) of the *Condominium Act 1998,* S.O. 1998, c.19. limits the objections that the Silberbergs may raise. This section states:

> **47** (9) An owner or a mortgagee who attends a meeting or who is represented by proxy at a meeting shall be deemed to have waived the right to object to a failure to give the required notice, unless the person expressly objects to the failure at the meeting.

[42] In this case, the Silberbergs attended the meeting by proxy and there is no evidence that they (or anyone else) raised any issues about the notice for the meeting. As a result, they cannot raise any of those issues at this point.

[43] In terms of the other potential deficiencies in the meeting, it is clear from the uncontradicted Affidavit of Ms. Brown that there was quorum at the meeting, that the owners present at the meeting had the opportunity to make comments on the Rule and ask questions about it, and that the Rule passed without amendment.

[44] Based on this evidence, I conclude that the Rule was properly passed.

Issue #3- If the Rule Was Passed Properly, is it a Reasonable Rule?

[45] Yes.

[46] There are two issues that arise in answering this question:

a) Did the Condominium have a reasonable basis for passing the Rule?

b) Did the Condominium properly reject grandparenting existing unit holders?

The Basis for the Rule

[47] The analysis of this question begins with the test for whether the Condominium's rule was reasonable. Courts have affirmed, on a regular basis, that judges should only interfere with a condominium's rule where it is clearly unreasonable. As noted in *York Condominium Corp. No. 382 v. Dvorchik* ([1997] O.J. No. 378 (C.A.)) at para. 5:

> 5. The condominium board was not obliged to hear evidence in reaching its conclusion that larger pets be prohibited. In making its rules, the board is not performing a judicial role. And no judicialization should be attributed either to its function or its process. In an application brought under s. 49(1), a court should not substitute its own opinion about the propriety of a rule enacted by as condominium board unless the rule is clearly unreasonable or contrary to the legislative scheme. In the absence of such unreasonableness, deference should be paid to rules deemed appropriately by a board charged with responsibility for balancing the private and communal interests of the unit owners.

[48] Counsel for the Silberbergs argues that the Rule is unreasonable because there is no direct evidence before me of any harmful effects from second hand smoke. He also argues that there is no direct evidence that there were complaints in this matter to the Condominium Board.

[49] Counsel for the Condominium responds by pointing out that section 12(2) of the *Smoke-Free Ontario Act 2017* (S.O. 2017 c. 26 Sched. 3) prohibits smoking in any indoor common area of a condominium. He also points out that the other residents have an entitlement to privacy, but that details of the complaints after the Rule was passed were provided in the Applicant's materials.

[50] I reject the Respondent's argument about the harmful effects from second hand smoke for two reasons. First, the *Smoke-Free Ontario Act* is not the only

act to regulate and/or control smoking in Ontario or to address the costs of smoking. In that regard, reference can be had to other statutes including the *Tobacco Damages and Health Care Costs Recovery Act 2009* S.O. 2009 c. 13. In this type of legislative environment, it is not unreasonable for the Condominium to impose further restrictions on smoking on the property.

[51] Second, it has long been accepted that odours can be grounds for a claim of nuisance at tort. On this point see the discussion in *Pyke v. Tri-Grow Enterprises Ltd.* (2001) 55 O.R. (3d) 257 (C.A.). Smoke from cigarettes produces an odour, and this could lead to a claim for nuisance in some circumstances. As a result, it is also not unreasonable for the Condominium to have regulated smoking in areas where the fumes could affect other units.

[52] I also reject the Sliberbergs' arguments about the absence of documented complaints in the Condominium's materials making the Rule unreasonable for three reasons, as follows:

a) Given the broader public context that the Rule was promulgated in, it is reasonable in and of itself.

b) There was, as discussed above, an opportunity for the Owners of the Condominium to discuss and vote on the Rule. This open discussion allowed for a consideration by all the owners of the Rule. In light of that consideration, the Condominium acted reasonably in passing the Rule.

c) It is clear from the materials that were filed that there had been complaints. In particular, there was an e-mail from one of the other residents about smoking after the Rule had been passed.

[53] For these reasons, I find the Condominium's Rule to be reasonable. I now turn to the question of grandparenting.

Grandparenting

[54] Counsel for the Silberbergs suggested that the Rule should have permitted current unit holders to smoke on their balcony. In other words, the Silberbergs should have been permitted to continue to smoke on their balcony for as long as they owned their unit. In the alternative, there should have been a reasonable period of grandparenting to allow the Silberbergs to consider selling their unit.

[55] In response, counsel for the Condominium argued that there was nothing in the *Condominium Act* that required grandparenting to be included in the Smoking Rule. Further, counsel for the Condominium pointed out that grandparenting would be difficult for the Condominium to monitor.

[56] I conclude that a period of grandparenting for the Smoking Rule was not necessary. As counsel for the Condominium correctly points out, grandparenting is not required by the *Condominium Act*.

[57] In this regard, I note the decision in *Thunder Bay Condominium Corporation No. 15 v. Ewen* (2015 ONSC 6611). In that case, the condominium corporation had passed a by-law in 2009 grandparenting people who smoked in their units. Subsequently, smoking was banned completely in the building. Fregeau J. held that the relevant by-laws and rules were reasonable, and that a complete ban (without grandparenting) was permitted.

[58] In this case, the Condominium Corporation did not go nearly so far. The Silberbergs are permitted to smoke in their own unit if they wish to do so. They are also at liberty to walk off the property a certain distance and smoke there. The limitations on smoking that the Condominium has imposed are entirely reasonable and do not leave the Silberbergs without options.

[59] In addition, I note that grandparenting would defeat the purpose of the Rule, which is to prevent smoking in areas where the fumes can reach other residents. As a result, the fact that the Rule does not contain any grandparenting provisions is neither unexpected nor unreasonable.

[60] For these reasons, I grant the Application.

Conclusion and Costs

[61] For the foregoing reasons, an Order will issue as follows:

a) The Condominium's Rule is a reasonable one, properly made.

b) The Silberbergs are in violation of the Rule.

c) The Silberbergs are prohibited from smoking on their balcony **effective immediately**.

[62] I acknowledge that the Condominium could seek damages other than costs in this proceeding, although I saw nothing in the materials that suggested that the Condominium had specific additional damages that it was pursuing. The Condominium is to advise, in writing, within seven (7) calendar days if it is seeking any damages other than costs from the Silberbergs, what those damages are, and what the basis for the damages claim would be. I will then consider whether (and how) additional submissions should be received.

[63] If no correspondence is received on this issue from the Condominium within seven (7) calendar days, I will assume that the only damages the Condominium is seeking are legal costs, and no further relief will be provided in this application.

[64] I have already received bills of costs from both parties. I encourage the parties to negotiate the issue of costs. However, if the parties are not able to agree on costs, the timetable I have set out below for costs submissions will apply.

[65] The Condominium is to file its costs submissions within ten (10) calendar days of today's date. Those submissions are to be no more than three (3) single-spaced pages, exclusive of case-law and offers to settle.

[66] The Silberbergs are to file their responding costs submissions within ten (10) calendar days after receiving the Condominium's submissions. Again, those submissions are to be no more than three (3) single-spaced pages, exclusive of case-law and offers to settle.

[67] A copy of both the costs submissions and the submissions on additional damages are to be provided electronically to my assistant, Sara Stafford. Her e-mail is sara.stafford@ontario.ca. There are to be no reply submissions without my leave. Finally, if I do not receive costs submissions within the timetable set out above, I will conclude that the parties have agreed on costs, and there will be no order as to costs.

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LEMAY J

Released: November 26, 2019

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- and -

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REASONS FOR JUDGMENT

LEMAY J

Released: November 26, 2019