

COURT OF APPEAL FOR ONTARIO

CITATION: 1552443 Ontario Inc. v. Nipissing Vacant Land
Condominium Corporation No. 41, 2020 ONCA 74

DATE: 20200131
DOCKET: C67173

Pepall, Pardu and Paciocco JJ.A.

BETWEEN

1552443 Ontario Inc.

Applicant (Appellant)

and

Nipissing Vacant Land Condominium Corporation No. 41

Respondent (Respondent in Appeal)

Michael Spears, for the appellant

Megan Mackey, for the respondent

Heard & released orally: January 28, 2020

On appeal from the judgment of Justice M. Gregory Ellies of the Superior Court
of Justice, dated June 14, 2019.

REASONS FOR DECISION

[1] 1552443 Ontario Inc. appeals from the dismissal of its application for a
declaration that the respondent Condominium Corporation's [Nipissing's] notices
of sale against the appellant's units were null and void.

[2] The appellant has refused to pay common expenses and a special assessment levied by Nipissing to enable it to pay its ongoing expenses and restore a reserve fund to the appropriate level.

[3] The appellant was the developer of the condominium, consisting of 32 vacant lots. It was obliged to turn over control of the Corporation to the owners after it ceased to be the owner of the majority of the units in early 2012. It failed to do so until forced by legal action in December 2017. Although the other owners had been paying common expense charges for years, there was only \$56.48 in the operating account and \$11.61 in the reserve fund when they took over on December 4, 2017. The appellant had been taking money from the Corporation's accounts for many years and paying it to his own corporation. He even removed the December common expense payments before turning over control. The appellant continues to be in default of payment of the monthly common expense charges. He undertakes to pay any arrears following release of this court's decision.

[4] A reserve fund study prepared by an engineer in 2017, before the change in control of the Corporation, indicated that the reserve fund should have had a balance of \$36,610.

[5] When the new board assumed control of the Corporation it had an immediate problem. It had bills to pay for ongoing expenses such as electricity

and snow removal and no money to pay those expenses. It levied a special assessment in the total amount of \$147,000 against all 32 units on January 9, 2018.

[6] The appellant refuses to pay its share of that special assessment, as well as ongoing common expenses. It now owes over \$118,000 of which approximately one third represents its share of the special assessment.

[7] Nipissing issued notices of sale on May 10, 2019 which the appellant unsuccessfully contested.

[8] The appellant made four arguments to the motion judge to support its argument that the notices of sale were invalid:

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 levied;
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.

[9] The application judge made factual findings that led to the rejection of each of these arguments.

[10] Before this court, the appellant raises the following grounds of appeal:

I. THE ALLEGED ABSENCE OF A BUDGET

[11] The general operating by-law required Nipissing to prepare a budget each year. The fiscal year ended on October 31. The appellant controlled Nipissing on November 1, 2017, when the new fiscal year began and continued using a previous budget to collect common expense charges on November 1, 2017 and December 1, 2017. When the owner elected board took over on December 4, 2017, it continued using the same budget.

[12] The application judge noted that there was nothing to refute this evidence and that the appellant did not contest that Nipissing did continue to operate using this budget. The application judge concluded that Nipissing adopted the budget the appellant had implemented for the year beginning November 1, 2017. In light of the urgency of the situation, some unit holders were having to personally pay for expenses of the condominium and given the state of the records, it was reasonable for the application judge to conclude that the Corporation had adopted a budget for the relevant time.

II. THE REASONS FOR THE SPECIAL ASSESSMENT

[13] By-law 10.3 required the notice to include a statement “setting out the reasons for the extraordinary assessment.”

[14] The respondent reported to unit holders that the bank accounts were close to empty and explained that Nipissing had ongoing operating expenses and

existing liabilities as well as a reserve fund obligation with no ability to pay any of these.

[15] The application judge reasonably concluded that the statement was sufficient, in the circumstances.

III. DID THE CORPORATION MISREPRESENT THE USE TO WHICH IT WOULD APPLY THE SPECIAL ASSESSMENT?

[16] The appellant argued that the notice of special assessment misrepresented the use to which the funds would be applied, because Nipissing did not apply \$36,610 to the reserve fund.

[17] The application judge reasonably accepted Nipissing's argument that it could not replenish the reserve fund until the appellant paid his approximate \$40,000 of the special assessment.

CONCLUSION

[18] The appellant did not advance other arguments in oral argument that were raised in its factum and in any event, we do not see merit in them. The appellant has not identified any legal or palpable and overriding error on the part of the application judge and the appeal is therefore dismissed, with costs payable to the respondent in the agreed sum of \$8,000.00 inclusive of taxes and disbursements.

“S.E. Pepall J.A.”
“G. Pardu J.A.”

“David M. Paciocco J.A.”