CITATION: Kumar v. Toronto Standard Condominium Corporation No. 2492, 2020 ONSC 956
COURT FILE NO.: CV-19-00614201-0000
DATE: 20200211

ONTARIO SUPERIOR COURT OF JUSTICE

B E T W E E N :	)	
	)	
VARUN KUMAR AND HEATHER ELISE BANNISTER	)	*Benjamin Rutherford* and *Joy Mathews* for the Applicants
	)	
Applicants	)	
	)	
	)	
	)	
– and –	)	
	)	
TORONTO STANDARD CONDOMINIUM CORPORATION NO.2492	)	*Megan Mackey* for the Respondent
	)	
	)	
Respondent	)	
	)	
	)	**HEARD: January 15, 2020**

JUSTICE GILLIAN ROBERTS:

[1] Varun Kuman and Heather Bannister bring an application pursuant to sections 17(3), 119, 134 and 135 of the *Condominium Act 1998*, R.S.O. 1998, c.19, for the list of remedies set out in their Notice of Application and repeated in their factum. The list essentially boils down to the following: a declaration that short-term leasing is permitted at Toronto Standard Condominium Corporation 2492 (TSCC 2492); an injunction prohibiting TSCC 2492 from doing anything to prevent short-term leasing; and a declaration that TSCC 2492 has behaved in an oppressive, unfair or prejudicial manner in preventing short-term leasing, and damages resulting from this behavior, and costs. For its part, TSCC 2492 seeks to have the application dismissed.

[2] I agree with the respondent that the real question in this case is whether it was reasonable for the board of directors of TSCC 2492 (the board) to place the restrictions on short-term leasing that it did. I conclude that it was. I find that the board acted diligently and in good faith in interpreting TSCC 2492's declaration and rules, and it adopted a reasonable interpretation of TSCC 2492's declaration and rules, and it has applied its rules in a reasonable fashion. It follows that I also find that the board has not engaged in any oppressive conduct.

Background facts and circumstances

[3] TSCC 2492 is a non-profit condominium corporation created, through the registration of its declaration, for the purpose of managing and administering the condominium development comprised of 368 dwelling units and related space, including common elements, at 1830 Bloor Street West called "High Park Condominiums".

[4] A condominium corporation is governed by the *Condominium Act*, and its declaration (which is like a constitution), by-laws, and rules. Section 27(1) of the *Condominium Act* provides that a board of directors "shall manage the affairs of the condominium corporation".

[5] Section 58(1) of the *Condominium Act* permits a board to make, amend or repeal rules under this section "respecting the use of the units, the common elements or the assets, if any, of the corporation to,

> (a) promote the safety, security or welfare of the owners and of the property and the assets, if any, of the corporations; or
>
> (b) prevent unreasonable interference with the use and enjoyment of the units, the common elements or the assets, if any, of the corporation

Subsection (2) requires that the rules "be reasonable and consistent with this Act, the declaration and the by-laws."

[6] The developer turned control of TSCC 2492 over to the owners on February 3, 2016, at which time the owners elected a board of directors to run TSCC 2492.

[7] Varun Kumar is a former owner of a unit 39 in TSCC 2492. Apart from an initial period, he did not live in this unit, but rented it out. He sold his unit prior to this application being heard. Heather Bannister currently owns and lives in unit 16.

[8] In this case, the developer, Daniels, created both TSCC 2492's declaration and its first set of rules. Both documents were part of the disclosure package given to every prospective purchaser pre-construction, including Mr. Kumar and Ms. Bannister.

[9] TSCC 2492's declaration includes the following:

> PART 4 - OCCUPATION AND USE OF UNITS
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> …
>
> Section 4.1 - General Use
>
> The occupation and use of the units shall be in accordance with the following restrictions and stipulations:
>
> (a) Each Residential Unit shall be occupied and used as a *residential residence*, and for no other purpose, *in accordance with the provision of the applicable zoning by-law* of the City of Toronto pertaining to the Condominium…[emphasis added]

PART 5 - LEASING OF UNITS

…

Section 5.3 - Permitted Uses of Units

Some units in addition to any other uses permitted herein, may also be used for *business of providing residential accommodation* on a furnished and/or unfurnished suite basis (with or without ancillary maid, cleaning and/or laundry services) through daily, short-term or long term license/lease arrangements, in accordance with the provisions of the applicable zoning by-law(s) of any governmental authority, as may be amended from time to time in accordance with the *Condominium Act*, declaration, by-laws and rules and any other requirement of the municipality and any other authority having jurisdiction *and the foregoing* shall not in any way restrict any Owner, or a property manager acting on behalf of any owner, from leasing or renting any Residential Unit(s) in the Condominium from time to time, for any duration and on any number of occasions, and whether in a furnished or unfurnished state, with or without ancillary maid, cleaning and/or laundry services. [emphasis added]

[10] The rules include the following:

9. TENANCY OCCUPATION

(d) Subject to the provisions in the Declaration, each residential unit shall be used as a single family dwelling unit or as set out in the Declaration and for no other purpose.

(e) Subject to the provisions in the Declaration, no unit shall be used for any "transient" use, including, but without limiting its general meaning, any of the following:

(i) hotel or boarding or lodging house use; and

(ii) the disposition of an Owner's or tenant's right to occupy the unit whereby the party or parties acquiring such interest or right is or are entitled to use or occupy the unit on a *transient use basis* or under any arrangement commonly known as time sharing.

(f) Subject to the provisions in the Declaration, unless the prior written approval of the Board has been obtained, *no lease shall be for a period of less than six (6) months*. [emphasis added]

[11] The current zoning by-law permits short-term or transient use only by an owner in relation to their primary residence for up to 180 nights a year. Non-resident owners do not qualify for any short term or transient use.

[12] Ms. Bannister claims in her affidavit that she "was always under the impression that short-term leasing was permitted in the building, which is a right provided to all owners based on TSCC 2492's declaration and rules". For his part, Mr. Kumar claims that he was advised by his real estate lawyer, and the sales representative who worked for the developer Daniels, that short-term leasing would be permitted at TSCC 2492. At the same time, Ms. Bannister and Mr. Kumar

both acknowledged during cross-examination that, at the time they purchased their units, they were aware that rule 9(f) prohibited them from leasing their units for any period less than six months without prior approval from the board.

[13] From the outset, the board did not permit short-term leasing at TSCC 2492. It always applied and enforced rule 9(f). And continues to do so. The board has used a variety of methods to monitor short-term leasing at TSCC 2492, including at one point hiring a third-party company expressly for this purpose. The board has a consistent approach when confronted with information that a unit is being offered for rental on a short-term basis: initially management sends a letter to the owner asking the owner to comply with the rules; if the owner continues to engage in short-term leasing, the board's lawyer sends a letter, and the cost of that step is charged against the unit.

[14] When Allan Weinrib was elected President of the board and reviewed the declaration, he was puzzled by s.5.3 of the declaration, especially as no units in the condominium complex were part of any sort of leasing business. As a result, the board consulted with its lawyer and the developer, Daniels. Daniels responded that at one time it had intended to hold some units back for itself, and rent them out, but never did so. Section 5.3 was intended to cover this situation, but because it never happened, the section should have been removed from the declaration. It only remained in the declaration through inadvertence. Daniels provided an affidavit explaining this.

[15] The board interpreted s.5.3 of the declaration to permit short-term leasing, but not to require that it be permitted. Thus they read s.5.3 as compatible with rule 9(f) which forbids leasing for less than 6 months without the prior consent of the board.

[16] However, based on Daniels' explanation about s.5.3 of the declaration being included in error, and the desire to remove any doubt about how short-term leasing would be approached in the building, TSCC 2492 brought an application to Superior Court to correct the declaration by deleting s.5.3. The application was heard on March 23, 2018 at which time the application judge expressed concern that TSCC 2492 was not seeking a correction so much as an amendment, and the more appropriate route was for the condominium board of directors to seek approval from the unit holders for a change to the declaration. With the consent of the respondents (the applicants in the instant application), TSCC 2492 was permitted to abandon its application, without prejudice to bringing enforcement applications in future.

[17] The board decided to take the judge's advice, and set about seeking the approval of unit holders to amend the declaration by deleting s.5.3. At the same time, the board continued to enforce its rule against short-term leasing. It was transparent about both positions, announcing and discussing both to unit holders after the court hearing.

[18] Section 107 of the *Condominium Act* requires the board to obtain the approval of at least 80% of the units in order to delete s.5.3 from the declaration. The board currently has the approval of over 60 % of the units. The board believes that only a small number of owners object

to the change (specifically about 5 or 6 owners out of the 386 residential units) but, due to apathy, the board has not yet been able to achieve the required 80% approval. As the president of the board explained in his affidavit: "many owners feel the Condominium is working well and do not feel compelled to respond to the board's communications". The board's views in this regard are supported by Ms. Bannister's acknowledgment during cross-examination that one of the reasons that the board keeps getting re-elected is that "they have openly said that they are against short-term rentals". In addition, prior to the second Annual General Meeting on April 19, 2018, the board conducted a survey of owners about what they thought the minimum rental period should be. Apparently 92% of respondents preferred rentals to be limited to at least three months.

[19] On February 8, 2019 Mr. Kumar and Ms. Bannister commenced the instant application. They argue that s.5.3 of TSCC 2492's declaration permits short-term leasing, and the rules cannot contradict the declaration, thus rule 9(f) is invalid, and the board is behaving in an oppressive fashion in enforcing it.

[20] The respondent argues that the rules can be read consistently with the declaration, and the board is well within the reasonable range of options in applying the rules to prohibit short-term leasing.

[21] The respective application records include affidavits from Varun Kumar, Heather Bannister and Allan Weinrib. All three individuals were cross-examined on their affidavits.

Legal principles

A condominium corporation must follow the Condominium Act, its declaration, by-laws and rules

[22] In addition to rules of general applicability, such as city by-laws, there are four sources of specific provisions which may restrict or affect the use an owner can make of his or her condominium unit: the *Condominium Act*; 2) a condominium corporation's declaration; 3) its by-laws; and 4) rules passed by the condominium board: *Metropolitan Toronto Condominium Corp. No. 1170 v. Zeidan*, 2001 CarswellOnt 2495 (S.C.) at para.36. It is common ground that the four sources of possible restrictions on a condominium owner's rights are part of a hierarchy, "with the *Condominium Act* at the top and house rules at the bottom". No provision lower in the hierarchy can be inconsistent with a provision higher up.

[23] However, the hierarchical structure does not prevent a rule from dealing with a subject matter that could have been dealt with higher up in the hierarchy: *Zeidan*, para.36 Nor does it prevent a rule from imposing restrictions that go “beyond what is provided in the declaration, as long as those restrictions are consistent with what is in the declaration”: *Zeidan*, para.39.

The business judgment rule and the need for deference

[24] The "business judgment rule" is a well-established principle in corporate law that "recognizes the autonomy and integrity of corporations, and the fact that directors and officers are in a far better position to make decisions affecting their corporations than a court reviewing a

matter after the fact". And where the rule applies, "a court will not second-guess a decision rendered by a board as long as it acted fairly and reasonably": 3716724 *Canada Inc. v. Carleton Condominium Corporation No.375*, 2016 ONCA 650 at paras. 47-48. In *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, at paras.40 and 111-112, (quoted in *Carleton Condominium*) the Supreme Court explained the rationale for the rule, and the resulting need for deference, as follows:

> The "business judgment rule" accords deference to a business decision, so long as it lies within a range of reasonable alternatives. It reflects the reality that directors, who are mandated…to manage the corporation's business and affairs, are often better suited to determine what is in the best interest of the corporation. This applies to a decision on stakeholders' interests, as much as other directorial decisions.
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> …
>
> [The oppression remedy] claim must be considered from the perspective of the duty on the directors to resolve conflicts between the interests of corporate stakeholders in a fair manner that reflected the best interests of the corporation.
>
> …
>
> Provided that…the director's decision is found to have been within the range of reasonable choices that they could have made in weighing conflicting interest, the court will not go on to determine whether their decision was the perfect one.

[25] In *Carleton Corporation*, the Court of Appeal concluded that the rationale for the business judgment rule also equally applies in the context of condominium corporations, thus the rule should also apply in that context:

> [T]he rationale underlying the business judgement rule in the corporate law context is also applicable to condominium corporations. As representatives elected by the unit owners, the directors of these corporations are better placed to make judgments about their interest and to balance the competing interests engaged than are the courts….
>
> The *Condominium Act* provides that the directors are the ones responsible for managing the affairs of a condominium corporation: s.27(1). They are also required to act honestly and in good faith, and to exercise the care, diligence and skill that a reasonable prudent person would exercise in comparable circumstances: s.37(1). Like their counterparts in corporate statutes, these provisions suggest that courts should be careful not to usurp the functions of the boards of condominium corporations.
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> Therefore, to summarize, the first question for a court reviewing a condominium board's decision is whether the directors acted honestly and in good faith and exercised the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. If they did, then the board's balancing of the interests of a complainant under s.135 of the *Condominium Act* against competing concerns should be accorded deference. The question in such circumstances is not whether a reviewing court would have reached the same decision as the board. Rather, it is whether the board reached a

> decision that was within a range of reasonable choices. If it did, then it cannot be said to have unfairly disregarded the interests of a complainant.

[26] In *London Condominium Corp. No. 13 v. Awaraji*, 2007 ONCA 143, 155 A.C.W.S. (3d) 1238, the Court of Appeal held that the same deferential standard applies to a decision by a board about whether its rules are consistent with its declaration. In *Awaraji*, a unit holder complained that the board misinterpreted the condominium corporation's declaration in enforcing a rule against a unit holder buying their own satellite. Both the reviewing court, and the Court of Appeal on further review, declined to interven. The Court of Appeal concluded, at para.14, that deference was required:

> [W]e consider that it is for the Condominium Corporation to interpret its Declaration and By-laws and that so long as its interpretation is not unreasonable, the court should not interfere.

[27] More recently, in *Kapoor v. Toronto Standard Condominium Corporation No. 2450*, 2019 ONSC 3461 at para. 14, Justice O'Brien confirmed that this deferential standard of review applied to the question of whether a condominium board's rule is inconsistent with its declaration. She upheld the board's decision to pass a rule prohibiting transient or hotel-like use of units in the face of a declaration that provided "there are no restrictions on the minimum or maximum length of lease of a residential unit", concluding that the condominium corporation's interpretation of its declaration was reasonable, and it was not appropriate for the court to intervene.

Oppression remedy

[28] Section 135 of the *Condominium Act* provides that "[a]n owner, a corporation, a declarant or a mortgagee of a unit may make an application to the Superior Court of Justice" for an "oppression remedy" prohibiting named conduct, and requiring payment in compensation. In *Carleton Condominium*, at para.29, the Court of Appeal explained that in order to obtain an oppression remedy pursuant to s.135, a complainant must establish both elements of the following two-part test:

(i) A breach of their reasonable expectations; and

(ii) That the impugned conduct must be objectively oppressive, unfairly prejudicial or unfairly disregard their interests. (This test was recently confirmed in *Noguera v. Muskoka Condominium Corporation* No.22, 2020 ONCA 46 at para.17)

Application

[29] As noted at the outset, I find that the board acted diligently and in good faith, and it has adopted a reasonable interpretation of TSCC 2492's declaration and rules, and it has applied its rules in a reasonable fashion. It follows that I also find that the board has not engaged in any oppressive conduct.

[30] The board recognized that s.5.3 of the declaration was not clear, and sought advice from the developer, and from counsel, and ultimately brought a court application to try and remove any ambiguity. Nonetheless, I conclude that the board's interpretation of s.5.3 of the declaration as *permitting* short-term leasing, but not to *require* that it be permitted, or to *prohibit* any conditions being placed on short leasing, was a reasonable interpretation. Thus there is no basis for me to intervene.

[31] Even if I were to interpret s.5.3 afresh, however, I would reach a similar conclusion as the board. When s.5.3 is read as a whole, as it must be, it has two parts. The first part indicates that "some units" may be used for the "business of rental accommodation". It continues on to the second part, which provides "and the foregoing shall not in anyway restrict any Owner…from leasing…units…from time to time for any duration". When read as a whole, I conclude that the second part refers back to the first part of the provision, and provides that the fact that "some units" may be reserved for the business of rental accommodation does not affect the ability of an owner of an ordinary "Residential" unit, not so reserved, from leasing his or her unit for any duration. In short, as the board concluded, s.5.3 of the declaration is permissive, but does not expressly provide that units may be leased for any period, nor does it prohibit a rule from imposing conditions on how leasing is to take place, or even limiting certain forms of short-term leasing or use altogether.

[32] My conclusion is fortified by the fact that the declaration, including s.5.3, was implemented at the same time as the rules, including rule 9(f). This suggests that the two can be read so as to complement, not contradict, each other.

[33] It follows from my interpretation of s.5.3 of the declaration that I find that the rule placing conditions on how owners may lease their units is not inconsistent with the declaration. The declaration permits leasing of any duration, and the rule places conditions on how this leasing may take place, including forbidding leasing under 3 months without the prior approval of the board. Although in this case the declaration is permissive about leasing, and not merely silent, as was the case in *Zeiden*, I have found that it was reasonable for the board to interpret the declaration as not prohibiting limitations from being placed on leasing. Indeed, this is the interpretation I would independently come to if considering the matter afresh. Thus it is open to the rules to place limits on how leasing may occur without being inconsistent with the declaration.

[34] Based on my conclusion that the board acted diligently and in good faith, and reached a reasonable conclusion about the meaning and application of s.5.3 of the declaration and rule 9(f), it follows that the applicants are not entitled to an oppression remedy. They cannot meet the first branch of the test: in the circumstances they could not have a reasonable expectation that they could lease their units however they pleased.

[35] Assuming that the applicants could meet this first branch of the test, however, they cannot meet the second branch: the board has not behaved in an oppressive, or unfairly prejudicial way, or unfairly disregarded the interests of the applicants. The fact that the board has not always

provided consistent explanations for its application of rule 9(f) does not mean that the board has behaved unreasonably. Let alone in an oppressive or unfair fashion. It is not surprising that the board's explanations would evolve as circumstances change. For example, an initial explanation the board provided for the rule, and how they were applying it, was that short-term leasing was contrary to the applicable city zoning by-law. This was consistent with advice the board received from its lawyer. At the April 19, 2018 Annual General Meeting (AGM), for example, the board's then lawyer, Denise Lash, noted "The property was created in zoning that doesn't permit short-term rentals, and the developer would not have created documents that contravene the zoning." However, the city apparently updated its zoning by-laws, and the applicants have subsequently provided an opinion from a planner that short-term rentals are not forbidden by the city's zoning by-laws. Not surprisingly, the board no longer relies on zoning as an explanation for rule 9(f). At the hearing before me, counsel for the respondent was candid that the current city zoning by-laws do not assist in resolving the case. (As noted above, it was common ground that the by-laws currently permit an *owner* to lease their *primary residence* from time to time on a short-term basis.)

[36] The applicants also complain that the board provided a misleading account of the March 23, 2018 application. I do not accept this complaint. The minutes of the April 19, 2018 AGM indicate that the president of the board explicitly noted that he was not present for the entire application and that the board had asked for the transcript (and eventually obtained it). The board's lawyer, Ms. Lash, indicated, correctly, that "The judge's ruling in this case, if he had made one, would not allow short-term rentals, it would only have rejected the specific application to edit the Declaration." The only thing the application judge ruled on was to permit the board to withdraw its application for an amendment, without prejudice to it continuing to bring enforcement applications. Whatever comments the application judge made during the hearing are not binding on anyone, or even relevant. The same is true about comments from observers about what he said, or what they believe he would have done.

[37] Similarly, the fact that the board does not always find out about all the short-term leasing that occurs in the building does not mean they are enforcing the rule in an unfair or oppressive fashion. There is no evidence of inconsistent enforcement. To the contrary, the board has been consistent and unequivocal that the rule applies to everyone: they take active steps to learn of any short-term leasing in the building, and they apply the same approach to every case they learn about.

[38] In all the circumstances, I agree with the respondent that the application should be dismissed in its entirely.

[39] If the parties are unable to agree on costs, they shall make their costs submissions in writing as follows: the respondent's submissions shall be delivered by February 28, 2020, and the applicant's submissions shall be delivered by March 11, 2020. Each side's written submissions shall be five pages or less in total, double-spaced, plus any costs outline.

JUSTICE GILLIAN ROBERTS

RELEASED: February 11, 2020

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TORONTO STANDARD CONDOMINIUM CORPORATION NO.2492

Respondent

REASONS FOR JUDGMENT

GILLIAN ROBERTS J.

RELEASED: February 11, 2010