

CITATION: Metropolitan Toronto Condominium Corporation No. 933 v. Lyn,
2020 ONSC 196

COURT FILE NO.: CV-19-614659

DATE: 20200113

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 933,
Applicant

AND:

LILLIAN DOREEN LYN and SASKIA ANYARA KALICHARAN,
Respondents

APPLICATION UNDER sections 119(3), and 134(1) of the *Condominium Act*,
1998

BEFORE: Stinson J.

COUNSEL: *John De Vellis* and *Luis A. Hernandez*, for the Applicant

Marshall Reinhart, for the Respondent Lillian Doreen Lyn

Saskia Anyara Kalicharan, in person

HEARD: April 12 and December 3, 2019, at Toronto

REASONS FOR DECISION

Factual Background

[1] Saskia Kalicharan and Laura Rosenstrom are next-door neighbours. They live in adjacent apartments on the NNth floor of a high-rise condominium building in downtown Toronto, Ms. Kalicharan in Unit NNN1 and Ms. Rosenstrom in Unit NNN2. (I have anonymized their floor and unit numbers to protect their privacy.) Metropolitan Toronto Condominium Corporation No. 933 owns the common elements of the building and manages its operations, including providing concierge services.

[2] Both Ms. Kalicharan and Ms. Rosenstrom are tenants and not owners of their respective units. Ms. Rosenstrom has lived in Unit NNN2 since June 2014. The owner of Unit NNN2 is not a party to this proceeding. Ms. Kalicharan moved into Unit NNN1 in May 2017. It is owned by the respondent, Lillian Lyn.

[3] Ms. Rosenstrom's bedroom shares a common wall with Ms. Kalicharan's apartment. That wall is not a loadbearing or concrete wall and it is not soundproof. The living room in Ms. Kalicharan's apartment is on the opposite side of the wall from Ms. Rosenstrom's bedroom.

[4] According to Ms. Rosenstrom, before Ms. Kalicharan moved into Unit NNN1, she was a sound sleeper who was not particularly sensitive to outside noises. She had no issues with noise negatively impacting her life or her sleep.

[5] Beginning in approximately mid-July 2017, Ms. Rosenstrom began to experience noise issues originating from Ms. Kalicharan's unit. These included what she described as extremely loud music with the bass turned up, loud television shows, and yelling and screaming, both in the unit and in the hallway outside the unit. She was awakened from her sleep on repeated occasions by the noise. These incidents occurred at various times of the night, between midnight and dawn, including at 4:50 AM, 2:15 AM, 2:40 AM, 1:00 AM, 2:00 AM, and between 3:00 AM and 4:00 AM.

[6] In light of the noise problems that she was experiencing from her next-door neighbour, Ms. Rosenstrom took several measures to try and minimize the extent to which her sleep was disturbed. She moved her bed away from the common wall. She began to wear earplugs. She began to take sleeping medication to help her sleep. She utilized "white noise" machines and humidifiers to offset the noise. From time to time, she would sleep in her living room, which is further away from the source of the noise. Despite the foregoing, she continued to experience difficulties sleeping by reason of the noise emanating from the adjacent unit.

[7] Ms. Rosenstrom complained about the noise from Unit NNN1 to the management of MTCC 933 by way of an email sent July 31, 2017. Over the course of the next year-and-a-half, Ms. Rosenstrom sent at least 14 email complaints about the problem to building management. She also made numerous calls to the concierge desk at various times of night. On some occasions, Ms. Rosenstrom was successful in speaking with someone at the concierge desk. As a result, an employee of MTCC 933 would attend at the door of the adjacent unit. During such attendances, the concierge was able to hear noise emanating from Unit NNN1. On those occasions, the concierge would knock on the door and request Ms. Kalicharan or her guests to stop making noise because it was bothering other occupants. Sometimes the concierge would telephone Ms. Kalicharan to ask her to reduce the noise. Despite the foregoing interventions, Ms. Rosenstrom continued to experience noise emanating from Unit NNN1.

[8] For her part, Ms. Kalicharan concedes that, on at least seven occasions, there may have been excessive noise emanating from her unit. She maintains, however, that these were isolated instances when an unexpectedly loud noise would emanate from the television set while a movie was playing, or sometimes when she was having guests over to celebrate a birthday or to watch a football game. She maintains, however, that in a building such as this in the downtown core occupants cannot expect complete silence.

[9] Although Ms. Kalicharan says the noisy incidents were isolated instances, Ms. Rosenstrom kept an ongoing log of the various occasions upon which she was

disturbed by noise or music originating from Unit NNN1. Her log reflects at least 25 separate noise problems between July 2017 and March 2019, most of which occurred during the period between 11 PM and 6 AM. The log records numerous contacts with the concierge and at least one call to the police.

[10] In addition to the late-night attendances by the concierge at the door of Unit NNN1, the management of MTCC 933 addressed Ms. Rosenstrom's complaints in a more formal fashion. On three separate occasions between August and November, 2017, MTCC 933 wrote to the owner of the unit, Ms. Lyn, informing her that her tenant was breaching the Rules and Regulations of the condominium corporation by making excessive noise. For unexplained reasons, the first letter was sent to Ms. Lyn at Unit NNN1 (where she does not reside) and was not received by her. The letter was so addressed despite MTCC 933 having on record a document indicating Ms. Lyn's actual residence while she leased her unit to Ms. Kalicharan. The second letter was hand delivered to Ms. Kalicharan, but was not received by Ms. Lyn. Only the third such letter, written by the lawyers for MTCC 933, dated November 17, 2017, was sent to Ms. Lyn's home address and was actually received by her. It recited a number of noise complaints and threatened legal action. It also demanded payment of legal costs incurred by MTCC 933 in addressing the noise complaints, which Ms. Kalicharan and Ms. Lyn paid.

[11] Following the November 17, 2017 letter, the noise issues abated for a period of time. They continued intermittently in December 2017 and again in February, May, and June 2018, leading Ms. Rosenstrom to complain to MTCC 933 management again. The June problems prompted management to write a further letter to Ms. Lyn, again raising the issue of excessive noise by her tenant. Following this letter, the noise issues again abated for a period of time. They then resumed in October, November and December 2018 and continued into early 2019.

[12] MTCC 933 also sent out two building-wide email notices reminding residents of the condominium's Rules with respect to noise. The notices reminded occupants that no person may create or shall permit the creation of any noise which may or does disturb the quiet enjoyment of the condominium's property.

[13] Following the continued noise complaints in late 2018 and early 2019, MTCC 933 instructed its lawyers to commence this application and they did so on February 19, 2019. It seeks a declaration that, by creating excessive noise, the respondents breached the *Condominium Act, 1998*, S.O. 1998, c. 19, as well as MTCC's Declaration and its Rules and Regulations. It also seeks an order requiring the Respondents to comply with the *Act* and the Rules. As drafted, the application sought an order terminating Ms. Kalicharan's tenancy if she failed to comply with the order to stop creating excessive noise; in argument before me counsel advised that MTCC 933 was not seeking that relief at this time.

[14] Counsel for Ms. Lyn (the owner of Unit NNN1) informed the court that his client did not oppose the remedies sought against Ms. Kalicharan. Ms. Lyn does, however, oppose any claim for costs that may be made as against her.

[15] The application first came on for hearing before me on April 12, 2019, but there was insufficient time for all parties to complete their submissions. The case was therefore adjourned to resume on a date to be fixed. Following the initial hearing the parties engaged in some settlement discussions, but they could not agree on terms. The hearing resumed on December 3, 2019. MTCC 933 and Ms. Kalicharan filed additional evidence. The MTCC evidence described additional noise issues in August and September 2019. The evidence from Ms. Kalicharan largely concerned her inability to come to settlement terms with the other parties. Following an objection from counsel for MTCC 933, I ruled those specific aspects of her supplementary affidavit inadmissible on the ground that the matters she described were the subject of settlement negotiation privilege.

Legal Framework, Issues and Analysis

What is the authority for the creation and enforcement of condominium rules and regulations?

[16] None of the parties made specific submissions to me regarding the court's authority to make the orders sought. Nonetheless, in order to place my decision in context, I will briefly review the applicable legal regime under which the court resolves these kinds of disputes.

[17] Section 58 of the *Condominium Act, 1998* authorizes condominium corporations to make, amend or repeal rules respecting the use of common elements and units to promote the safety, security or welfare of the owners and of the property and the assets of the corporation, or to prevent unreasonable interference with the use and enjoyment of the common elements, the units or the assets of the corporation. [underlining for emphasis]

[18] Pursuant to this authority, MTCC 933 has enacted Rules that include the following:

1(d) No owner or occupant of a dwelling unit shall create or permit the creation of or continuation of any noise or nuisance which, in the sole discretion of the Board, may or does disturb the comfort or quiet enjoyment of the property by other owners or occupants or their families, guests, visitors and persons having business with them. [underlining for emphasis]

[19] The Declaration of MTCC 933 (its foundational document) states in section 4 as follows:

4(1)(e) The owner of each Unit shall comply and shall require all tenants, occupants and visitors to such Unit to comply with the Act, the Declaration, the by-laws and the rules of the corporation.

4.2(c) Any owner leasing a Unit shall not be relieved thereby from any obligation with respect to the Unit, which shall be joint and several with any tenant of the Unit.

[20] Section 119 of the *Condominium Act, 1998* requires owners and occupiers of condominium units to comply with the *Act* and the Rules of a condominium corporation. Owners are required to take all reasonable steps to ensure that an occupier of the owner's unit complies with the *Condominium Act* and the Rules.

[21] It is trite law to say that once rules have been established, a unit owner is expected to abide by them, and the condominium corporation is obliged to enforce them. Section 17(3) of the *Condominium Act, 1998* requires condominium corporations to take all reasonable steps to ensure that owners and occupiers of units comply with the *Condominium Act* and the Rules. To the same effect is MTCC 933's By-law No. 8, which states that the duties of the corporation include:

(o) consistent and timely enforcement of the provisions of the Act, the declaration, the by-laws and the rules of the Corporation;

...

(s) the carrying out of the duties of the Corporation and/or the Board as required by the Act, the Corporation's declaration and by-laws or existing agreements.

[22] Section 134(1) of the *Condominium Act* provides that a condominium corporation may make an application to the Superior Court of Justice for an order enforcing compliance with any provisions of the Act, the declaration, the by-laws, or the rules. Section 134(1) reads as follows:

Subject to subsection (2), an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of a leasehold condominium corporation or a mortgagee of a unit may make an application to the Superior Court of Justice for an order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules or an agreement between two or more corporations for the mutual use, provision or maintenance or the cost-sharing of facilities or services of any of the parties to the agreement.

[23] On such an application, the court may make any of the following orders enumerated in s. 134(3)(b) of the *Act*:

(a) grant the order applied for;

(b) require the persons named in the order to pay,

(i) the damages incurred by the applicant as a result of the acts of non-compliance, and

(ii) the costs incurred by the applicant in obtaining the order; or

(c) grant such other relief as is fair and equitable in the circumstances.

[24] Section 134(2) of the *Act* imposes a pre-condition to bringing such an application: a person must have first tried to obtain compliance through mediation and arbitration. Despite this requirement for mediation and arbitration, s. 132(2) of the *Act* restricts mandatory mediation and arbitration to disputes between condominium corporations and owners. There is persuasive case law to suggest that where the disagreement involves both a tenant and an owner, then the mandatory mediation and arbitration provisions of the *Act* do not apply. See: *Peel Standard Condominium Corporation No. 767 v. 2069591 Ontario Inc.*, 2012 ONSC 3297 at paras. 34-37, and *MTCC No. 596 v. Best View Dining Ltd.*, 2017 ONSC 5655, at para. 4. Thus, in the present case, while mediation might have been a preferred approach to solving the noise problem, it was not mandatory and was not formally proposed by any party.

[25] On the basis of the above analysis I conclude that I have the power to make the declarations sought by MTCC 933, with the exception of a declaration terminating the tenancy of Ms. Kalicharan in the event she breaches any other order I might make. Since hers is a residential tenancy, it may be terminated only via a proceeding brought before the Landlord and Tenant Board: *Residential Tenancies Act, 2006*, S.O. 2006, c. 17, s. 168(2); *Beach v. Moffatt* (2005), 75 O.R. (3d) 383 (C.A.), at para. 15.

Did Ms. Kalicharan's conduct violate the Rules?

[26] MTCC 933 Rule 1(d) (quoted above) states that no occupant may “create ... any noise or nuisance which, in the sole discretion of the Board, may or does disturb the comfort or quiet enjoyment of the property by other ... occupants.” MTCC 933 asserts that Ms. Kalicharan has breached this rule repeatedly. Ms. Kalicharan asserts that any breaches were minor and intermittent only and that she has done her best to comply. She points to the fact that, since the April 2019 hearing, there have been very few noise complaints. She also objects to the approach followed by MTCC 933 in failing to identify the complaining neighbour to her, in failing to pursue a negotiated or consensual resolution, and instead proceeding to court.

[27] Living in a condominium has been described as living in a small community, where the regulation of the community is more akin to the governance of a town than it is to the governance of a corporation. In *Shaw Cablesystems Ltd. v. Concord Pacific Group Inc.*, 2007 BCSC 1711, at para. 10, Justice Leask of the British Columbia Supreme Court wrote that:

[Living in a condo] combines many previously developed legal relationships. It is also something new. It may resemble living in a small community in earlier times. The council meeting of a [condo] corporation, while similar in some respects to a corporate annual general meeting, also resembles the town hall meeting of a small community. [Condos] are small communities, with all the benefits and the potential problems that go with living in close collaboration with former strangers.

[28] As with living in any community, condominium owners and their guests must enter a social contract which relinquishes their absolute interests to do as they please with their real property, and instead balance their interests with those of the other owners and tenants. In an early and much-quoted condominium case (*Hidden Harbour Estates, Inc. v. Norman*, 309 So.2d 180 (Fla. 4th DCA 1975) at p. 181-182), a court in Florida described these restrictions to the liberty which an owner of private property otherwise enjoys as follows:

[I]nherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization. The Declaration of Condominium involved herein is replete with examples of the curtailment of individual rights usually associated with the private ownership of property.

[29] More recently, in *Ciddio v. York Region Condominium Corp. No. 730*, [2002] O.J. No. 553 (at para. 33), Justice Stong of this court reflected that the *Condominium Act* exists to regulate the smooth interaction between the owners of units seeking to live together in a co-operative lifestyle:

It is a trite observation that the *Condominium Act* exists to make for smooth interaction between the owners of units in a condominium project. Such a project is based on a co-operative life style, and the *Act* sets out procedures designed to assure that owner's concerns are addressed. No one owner can run amok or impose his designs unilaterally on an unwary or ill informed ownership.

[30] To summarize the foregoing principles, where someone chooses to live in a condominium community – whether as an owner or a tenant – they do not enjoy unlimited freedom to do as they please. Rather, they must conduct themselves in accordance with the rules of the community and with due respect and consideration for their neighbours and fellow residents. Further, they must govern and limit their personal activities taking into account the impact of those activities upon other residents, as regulated by the condominium rules. Examples of limits that govern all residents include refraining from playing loud music or television shows or otherwise creating noise that may disturb fellow residents during times in the late evening and night when most residents would be expected to be enjoying peace and quiet and be resting or asleep.

[31] In the present case, the complaint against Ms. Kalicharan is that she violated the condominium noise bylaw. That bylaw and this proceeding are classic examples of the exercise by a condominium corporation of its power to enact and enforce a rule to prevent unreasonable interference with the use and enjoyment of the units by other owners and occupants. I turn now to the legal framework for deciding that issue.

[32] Case law precedent establishes that, where a condominium corporation enforces its rules, it is not for the court to determine whether the corporation was correct in exercising its enforcement discretion and substitute its own opinion for that of the corporation. The law was accurately summarized by Justice Strathy (as he then was) in *York Condominium Corp. No. 26 v. Ramadani*, 2011 ONSC 6726, as follows (at paras. 45 to 47):

[45] Where the corporation enforces its rules, the Court is entitled to ask “whether that discretion was exercised properly, rather than capriciously”: *York Condominium Corp. No. 216 v. Nalekva* (Co. Ct., Judl. District of York, File M73379 (1982)). It is interesting to note that in that case, also involving a pet, Haley Co. Ct. J., as she then was, also stated:

It is not my function to consider whether I would have found the dog should be deemed a nuisance on the evidence, but rather whether the Board properly did so and I so find that it did.

[46] The approach has been stated more recently by Allen J. in *Chan v. Toronto Standard Condominium Corp. No. 1834*, [2011] O.J. No. 90, 2011 ONSC 108 (CanLII) at para. 5:

Courts have addressed the standard of review on a condominium application. The role of the court hearing an application is not to substitute its own opinion for that of the Board of Directors, but to ensure the Board has acted in good faith and in compliance with the Act, declaration, bylaws and rules. In deference to the rules, the court should not pronounce on the propriety of a rule except where the rule is clearly unreasonable or contrary to the legislative scheme. The court should accept the board's decision unless it has acted capriciously or unreasonably. *Muskoka, [Muskoka Condominium Corp. No. 39 v. Kreuzweiser]* supra, at para. 9; *York Condominium Corporation No. 382 v. Dvorchik*, [1997] O.J. No. 378 (Ont. C.A.) and *Metropolitan Toronto Condominium Corporation No. 781 v. Reyhanian*, unreported decision of Mesbur, J, released December 30, 1999, (Ont. S.C.J.).

[47] This Court has jurisdiction to make an order enforcing compliance with the provisions of the declaration, the by-laws and the rules of the condominium corporation. If owners or occupiers of condominium units refuse to comply with their obligations under the statute, and refuse to comply with reasonable and lawful requests by the condominium corporation, the corporation, and other unit owners, are entitled to expect that the Court will enforce their rights.

[33] Thus, the court will show deference to the condominium corporation's decision making, provided that the discretion was exercised properly rather than capriciously, in good faith, and in compliance with the Act, declaration, bylaws, and rules. The enforcement of a rule regulating noise and nuisance will be properly exercised where the corporation holds the opinion that an owner or occupant is creating, or permitting the creation, of a noise which may or does disturb the comfort of others, and that opinion is reasonably held. See, for example, *York Region Condominium Corp. No. 622 v. Pisman*, [2001] O.J. No. 2913 (Epstein J.), at para. 35, affirmed on appeal [2002] O.J. No. 105 (C.A.).

[34] On the evidence in this case, I find as a fact that, on repeated occasions, complaints of excessive noise from Unit NNN1 were investigated by representatives of MTCC 933 (the concierge employees) and found to be substantiated. In making that finding, I am aware that Ms. Kalicharan presented unsworn statements from other occupants on the same floor to the effect that they had not been disturbed by noise from Unit NNN1. Their units are in other locations on the floor, however, and unlike Unit NNN2, they are not directly adjacent to Unit NNN1. In any event, the mere fact that they were not bothered by noise emanating from Unit NNN1 does not negate the impact on Unit NNN2, nor do their statements address or rebut the evidence regarding the findings of the concierge personnel.

[35] I further note that Ms. Kalicharan herself conceded that a number of the noise complaints were justified.

[36] The evidence regarding the visits by the concierge desk employees corroborates many of the complaints by Ms. Rosenstrom and listed in her log. I accept Ms. Rosenstrom's evidence that the log accurately records occasions upon which she was disturbed by noise emanating from Unit NNN1.

[37] This is not a case where one occupant was overly or unduly sensitive to the kinds of sound that one would ordinarily expect to hear when living in a building such as this. This conclusion is supported by the fact that, during the three previous years in which Ms. Rosenstrom lived in Unit NNN2, she was never disturbed by noise from Unit NNN1. The problems arose only after Ms. Kalicharan moved in next door.

[38] I find as a fact that Ms. Kalicharan created excessive noise at various times of the night when most occupants would expect to be sleeping or engaged in relatively quiet activities. I further find that this noise was a disturbance to her neighbour, Ms. Rosenstrom. In turn the noise was, quite reasonably, found by MTCC 933 to be a breach of its rule that prohibits the creation of noise which disturbs the comfort or quiet enjoyment of the property by other occupants. The fact that the noise complaints subsided from time to time (in particular when formal notices or court proceedings were served) does not detract from the fact that the noise rule was repeatedly breached by Ms. Kalicharan.

[39] In summary, I find that Ms. Kalicharan breached Rule 1(d), the noise bylaw. I further find that the discretion of MTCC 933 to enforce its bylaw against Ms. Kalicharan was exercised reasonably and in good faith and not capriciously. I conclude that the

other occupants of the building are entitled to expect the court to enforce their rights under the *Act* and the Rules of MTCC 933.

Remedy

[40] In the circumstances MTCC 933 is entitled to a declaration that, by creating excessive noise, Ms. Kalicharan breached MTCC's Rule 1(d). MTCC 933 is also entitled to an order requiring Ms. Kalicharan to comply with the *Act* and the Rules of MTCC 933.

Costs

[41] In relation to the costs of the proceedings in the Superior Court of Justice, the parties agreed that submissions on this topic should await my decision on the main points of the application, and could be made in writing, if required. Now that the result is known, I encourage the parties to reach agreement. Should they be unable to do so, I direct as follows:

- (a) MTCC 933 shall serve its Bill of Costs on the respondents, Ms. Lyn and Ms. Kalicharan, accompanied by written submissions, within 30 days of the release of these reasons.
- (b) The respondent Lyn shall serve her response on MTCC 933 and Ms. Kalicharan within 15 days thereafter.
- (c) Ms. Kalicharan shall serve her response on MTCC 933 and Ms. Lyn within 15 days thereafter.
- (d) MTCC 933 may, but is not obliged to, serve a reply within 15 days thereafter.
- (e) In all cases, the written submissions shall be limited to six double-spaced pages, plus Bills of Costs.
- (f) I expressly invite the respondents to submit the Bill of Costs they would have presented had they been successful on the application.
- (g) I direct counsel for MTCC 933 to collect copies of all parties' submissions and arrange to have that package delivered to me in care of Judges' Administration, Room 140 at 361 University as soon as the final exchange of materials has been completed. To be clear, no costs submissions should be filed individually: rather, counsel for MTCC 933 will assemble a single package for delivery as described above.

Date: January 13, 2020