CITATION: Perrault v. Toronto Standard Condominium Corporation No. 2298, 2020 ONSC 1011
COURT FILE NO.: CV-19-006298390000
DATE: 20200213

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N :	
JAMES PERRAULT Applicant	*Jonathan Fine* and *Jake Fine* for the Applicant
– and –	
TORONTO STANDARD CONDOMINIUM CORPORATION NO. 2298 Respondent	*Carol Dirks and Rachel Fielding* for the Respondent **HEARD:** January 27, 2020

JUSTICE GILLIAN ROBERTS:

[1] James Perrault applies, pursuant to rules 14.05(2), 3(d), (g), (h) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, and s. 58 of the *Condominium Act 1998*, R.S.O. 1998, c. 19 (the *Condominium Act*), for a declaration that rule 19, which was enacted by the board of directors of Toronto Standard Condominium Corporation 2298 (TSCC 2298) in August of 2019, is invalid because it is inconsistent with article 4.9(e) of TSCC 2298's declaration. Mr. Perrault also argues that even if the substance of rule 19 is not inconsistent with article 4.9(e), paragraph 7 of rule 19 is inconsistent with the declaration and the Condominium Act.

[2] I conclude that the new rule 19 is invalid because it is inconsistent with TSCC 2298's declaration. In addition, paragraph 7 of the new rule, which deems any person involved in short-term or transient use of a unit to be a trespasser, is also inconsistent with the *Condominium Act*, which provides that every owner may access their unit and the common elements.

Background facts and circumstances

[3] The respondent TSCC 2298 is a non-profit condominium corporation created in 2013 to manage and administer the condominium at 8 Charlotte Street in Toronto (near King and Spadina) that consists of a 36-story high-rise building containing 314 dwelling units.

[4] A condominium corporation comes into existence when a developer registers a declaration, which is a type of foundational document similar to a constitution. The condominium corporation is governed by the *Condominium Act*, its declaration, 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 "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 applicant James Perrault owns unit 304 in TSCC 2298. He does not live in the unit. He purchased the unit in 2016 in order to lease it, which he has been doing. He explains in his affidavit that he relied on the fact that the declaration contained no restrictions on short-term leasing when he decided to purchase his unit. Specifically, he interpreted article 4.9(e) to permit short-term leasing.

[7] TSCC 2298's declaration includes the following:

Article 4.1 Occupation and Use

The occupation and use of the Units shall be in accordance with the following restrictions and stipulations:

(a) No unit shall be occupied or used by any Owner or anyone else, in such a manner as is likely to damage or injure any person or property…or in a manner that will unreasonably interfere with the use or enjoyment by other Owners of the Common Elements or their respective Units…or that may increase any insurance premiums…or in such a manner as to lead to a breach by an Owner or by the Corporation of any provisions of this Declaration, the By-laws, and/or any agreement authorized by By-law.

Article 4.2 Residential Units

(a) Each Residential Unit shall be occupied and used only for those purposes permitted in accordance with the applicable zoning by-laws pertaining to the Property and for no other purpose whatsoever…

Article 4.9 Leasing of Units

(e) No provision contained in this Declaration shall in any way be deemed or interpreted in a manner that limits or restricts an Owner, including the Declarant, from leasing or renting such Owner's Residential Unit for any period of time whatsoever.

[8] The declaration contains no single family residence restriction.

[9] Around January 2016, the board of directors at TSCC 2298 (the board) passed rule 19, "Rules Regarding Transient or Short-Term Rental Accommodation," which placed conditions on how short-term stays (defined as less than 60 days) were to take place in the building, and provided consequences for non-compliance.

[10] The respondent asserts that since enacting rule 19, the residents of TSCC 2298 have experienced difficulty with short-term stays. In January of 2019 the board began to monitor incident reports relating to short-term stays. The respondent has provided information that the difficulties associated with short-term stays include noise complaints; underage drinking and/or smoking; security concerns, including the creation of black market key fobs; damage and mess, requiring extra cleaning and repairs; increased costs and wear and tear resulting from less than 10% of the units in the building. The board also canvassed the views of unit owners about short-term stays. Ariel Neuer, the current secretary of the board, asserts that those who responded were in favour of banning short-term stays.

[11] Mr. Neuer explains in his affidavit that as a result of the difficulties associated with short-term stays, and the feedback from owners, in July 2019, the board repealed the January 2016 version of rule 19 and replaced it with a new rule 19, "Rules Regarding Tenancy and Occupation of Units," which, among other things, prohibited any lease less than six months. The new rule includes the following:

19. Short Term Rentals

No residential unit shall be used for any short-term or transient use, including, but without limiting its general meaning, any of the following:

(i) hotel, boarding or lodging house use, or dormitory use, including the use of a unit for short term leasing or stays, whether through companies such as Airbnb, VRBO, HomeAway, FlipKey or any similar short-term and/or vacation rental platform or otherwise;

(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; and

(iii) the lease, license, use or occupancy of a unit for any period of less than six (6) months.

2. No lease arrangements shall be entered into with a corporation, partnership or other business entity, whether as owner or as tenant, except where the occupant of the unit under the lease will be residing in the unit for the minimum lease term set out in Rule 19.4.

3. No one shall advertise, list and/or rent a residential unit for any commercial and/or transient use, through any platform, including without limitation, Airbnb, FlipKey, VRBO, HomeAway and/or any similar short-term and/or vacation rental platform.

4. The initial term of any lease shall be for a period of not less than six (6) months. All tenancies for units shall be in writing and comply with Rule 8(a) in the Corporation's existing rules.

5. [grandfathering provision]

6. Within ten (10) days of entering into a lease or a renewal thereof, and in any event prior to the commencement of the tenancy, the Owner shall deliver to:

   (iii) the tenant, copies of the Declaration, By-laws, and Rules of the Corporation;

   (iv) the Corporation, the name of the tenant;

   (v) the Corporation, the Owner's address for service of notices; and the Corporation a copy of the lease, amendments to the lease or renewal of the lease.

7. Any person who is engaged in the operation of a commercial or transient use anywhere on the Corporation's property, which is prohibited by these Rules, shall be deemed a trespasser and entry to or upon the common elements may be expressly denied by the Corporation.

8. [enforcement provision no longer in issue]

[12] The parties did not address what, if anything, is the difference between "leasing" and "renting". However, there does not appear to be any dispute that "leasing" is different from

"licensing". The difference being that a lease gives the renter an interest in the property, gives rise to a landlord tenant relationship, and engages the *Rental Tenancies Act, 2006*, S.O. 2006, c. 17. Whereas a license simply gives the licensor the right to use the property in a manner that would otherwise be a trespass, does not give the licensor any interest in the property, and does not engage the *Rental Tenancies Act*: Anger & Honsberger, *Law of Real Property*, 3rd, ed (Toronto: Thomson Reuters, 2006), Vol 1, at 7:10, p. 7-2; *Semmler v. The Owners*, Strata Plan NES3039, 2018 BCSD 2064, at para. 46. The parties also agree that Airbnb, for example, appears to be an example of licensing. The excerpt from its terms of use, provided by the respondent, indicate that an "accommodation booking" is a limited license:

> granted to you by the Host to enter, occupy and use the Accommodation for the duration of your stay, during which time the Host (only where and to the extent permitted by applicable law) retains the right to re-enter the Accommodation, in accordance with your agreement with the Host.

[13] The current Toronto zoning by-law permits the "short-term rental" of a dwelling unit by an *owner* only in relation to their *primary residence* for up to 180 nights a year. A "short-term rental" is defined as "all or part of a dwelling unit that is used to provide sleeping accommodation for any rental period less that 28 consecutive days", and "is the principal residence of the short-term rental operator." Dwelling units that are not the principal residence of the operator may not be offered for short-term rental. In other words, "dedicated" short-term rentals are not currently permitted under the city's zoning by-law. The by-law was upheld on an initial appeal to the Local Planning Appeal Tribunal, and is in force, but I am told that there is a further appeal pending to the Divisional Court. The appeal decision considers Airbnb, for example, to be a type of short-term rental.

Position of the Parties

[14] The applicant complains that the prohibition against short-term leasing in the new rule 19 conflicts with article 4.9(e) of the declaration, and is therefore invalid. He agrees that the board can place conditions on short-term leasing, but asserts that they cannot prohibit it altogether. In addition, he complains that paragraph 7 of the new rule, which deems anyone engaged in short-term leasing to be a "trespasser," is inconsistent with the *Condominium Act* insofar as it includes owners, and is therefore invalid.

[15] The applicant objects to the admissibility of some of the evidence that the board relies on to explain why it enacted the new rule. However, he does not argue that the board did not have the right to enact rules around the short-term and transient use of units. Rather, he argues that the rule is invalid because it is inconsistent with the declaration and the *Condominium Act*. Thus I do not need to resolve the evidentiary dispute to decide this case. I simply need to decide whether the rule is inconsistent with the declaration and/or the *Condominium Act*.

[16] The respondent argues that article 4.9(e) of the declaration does not explicitly permit short-term use of units. It was thus open to a board to subsequently enact rules prohibiting short-term

or transient uses of units, including short-term leasing. The current iteration of rule 19 is consistent with the declaration, and this court should not interfere with the board's judgment in enacting it.

Legal principles

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

[17] 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: 1) 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] O.J. No. 2784 (Ont. Sup. Ct.), at para. 36 [*Zeidan*]. 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.

[18] However, the hierarchical structure does not prevent a rule "from dealing with a subject matter that could have been dealt with elsewhere in the hierarchy:" *Zeidan*, at 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*, at para. 39.

The business judgment rule and the need for deference to decisions by condominium boards, including when interpreting their declarations

[19] 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, [2016] O.J. No. 4526, at para. 47 [*Carleton Condominium*]. In *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, at paras. 40 and 111-112 (quoted in *Carleton Condominium*), the Supreme Court of Canada 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.
>
> …
>
> 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.

[20] In *Carleton Corporation*, the Court of Appeal concluded that the business judgment rule applies to decisions made by boards of condominium corporations, explaining that the rationale for the rule applies equally in the context of condominium corporations:

> [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 interests 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. (See also *York Condominium Corp. No. 382 v. Dvorshik*, [1997] O.J. No. 378 (C.A.))

[21] In *London Condominium Corp. No. 13 v. Awaraji*, 2007 ONCA 154, 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 intervene. The Court of Appeal concluded, at para. 6, 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.

[22] 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 a rule prohibiting transient uses of units in the face of a declaration which provided both: "There are no restrictions on the minimum or maximum length of lease of a residential unit;" and "each residential unit shall be occupied and used as a private, single-family residence and for no other purpose". She concluded that it was not unreasonable for the board to interpret its declaration so as to prioritize how units were used, thus it was not appropriate for the court to intervene.

Analysis

[23] The applicant argues that article 4.3(e) of the declaration is clear: it prohibits any limitation on the ability of an owner to lease or rent their unit for any period of time whatsoever. In so far as

the meaning of the section is ambiguous, however, he argues that I must adopt a "strict construction" approach that restricts or interferes with the property rights of the unit owner as little as possible. I do not agree that "strict construction" should inform the interpretation of article 4.9(e) of the declaration. Rather, I conclude that the business judgment rule applies to decisions made by a board of directors of a condominium corporation, including a board's interpretation of its declaration. So long as the interpretation is not unreasonable, a court should not interfere.

[24] The respondent argues that s. 4.9(e) of the declaration is ambiguous and does not expressly permit leasing or renting for any period of time. I disagree. The wording of article 4.9(e) does not make sense if it does not mean that an owner may lease or rent their unit for any period of time. Once again, it reads:

> No provision contained in this Declaration shall in any way be deemed or interpreted in a manner that limits or restricts an Owner, including the Declarant, from leasing or renting such Owner's Residential Unit for any period of time whatsoever.

[25] The respondent argued that it may well be that the developer did not want to restrict short-term leasing when marketing the condominium project, but also wanted to leave it open to the board to subsequently do so depending on what was happening in the building. That may well be the case, but the fact remains that the declaration appears to provide that an owner may lease or rent their unit for any period of time whatsoever. As a result, I conclude that the board's interpretation of article 4.9(e) as not expressly permitting leasing or renting of any length of time is not a reasonable interpretation.

[26] It is common ground that the board cannot enact a rule that is inconsistent with a declaration. Given my conclusion that it is not reasonable to interpret article 4.9(e) as not expressly permitting leasing or renting for any period, and that article 4.9(e) does in fact permit leasing or renting for any period, I find that the current iteration of rule 19 is inconsistent with the declaration in so far as it prohibits short-term leasing, and places a minimum time period on permissible leasing. As a result, I find the rule to be invalid.

[27] I note that the declaration is silent on short-term or transient uses of units. It appears open to the board to enact a rule to address that situation. But the rule as currently drafted goes beyond short-term or transient uses when it also prohibits all short-term leasing, and requires any lease to be at least six months in length.

[28] In addition, the zoning by-law appears to have changed since the declaration was registered. It also appears open to the board to enact a rule addressing the new zoning by-law. But, again, the current version of rule 19 goes beyond the new zoning by-law in prohibiting all short-term leasing, and requiring any lease to be at least six months in length.

[29] Also, the applicant agrees that nothing in the declaration prevents the board from placing conditions on leasing or renting. The board simply cannot prohibit outright short-term leasing or renting.

[30] Paragraph 7 of the rule, which deems "any person" engaged in the "commercial or transient use" of a unit to be a trespasser, also contradicts ss. 11(2) and 116 of the *Condominium Act*. These sections provide that all owners are tenants in common of the common elements and may make reasonable use of the common elements. The respondent agrees that owners cannot be deemed trespassers, acknowledging the right of every unit owner to access their unit and the common elements, but argues that it would never interpret this part of the rule to apply to an owner. However, that is not what the rule says. Any person includes owners. Were this the only problem with the new rule, both parties agree that this part of the rule could be severed and declared invalid. However I have found the essence of the rule invalid in so far as it includes leasing situations in its prohibition of short-term or transient use of units.

[31] If the parties are unable to agree on costs, they shall make their costs submissions in writing as follows: the applicant's submissions shall be delivered by February 28, 2020, and the respondent'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.

GILLIAN ROBERTS J.

RELEASED: February 13, 2020

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REASONS FOR JUDGMENT

GILLIAN ROBERTS J.

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