CITATION: Zaman v. Toronto Standard Condominium Corporation No. 1643
2020 ONSC 1262
COURT FILE NO.: CV-19-624668
DATE: 2020-02-27

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: SOBIA ZAMAN, Applicant

AND:

TORONTO STANDARD CONDOMINIUM CORPORATION NO. 1643, Respondent

BEFORE: Schabas J.

COUNSEL: Shawn L. Pulver, for the Applicant

Andrea C. Lusk, for the Respondent

HEARD: February 13, 2020

ENDORSEMENT

Introduction

[1] Sobia Zaman (the "applicant") lives in a condominium unit on Lakeshore Boulevard West in Toronto. For years, she has endured noise from her neighbour, particularly from the balcony next to Ms. Zaman's balcony, late at night, and has repeatedly complained of it to the manager and the Board of Directors of her condominium corporation, Toronto Standard Condominium Corporation No. 1643 (the "respondent" or the "corporation"), seeking help. The respondent says it has acted reasonably in response to Ms. Zaman's complaints and is enforcing the rules of the condominium to reduce the noise from the neighbours. It says that, as a condominium dweller, Ms. Zaman must accept some degree of noise from neighbours.

[2] Ms. Zaman is dissatisfied with the steps taken by the respondent and wants more done to ensure she will not be disturbed. She seeks a declaration pursuant to s. 135 of the *Condominium Act, 1998*, S.O. 1998 c. 19 (the "Act"), that the respondent has acted oppressively towards her by unfairly disregarding her interests over the interests of her neighbour. She seeks damages and an order "rectifying" the problem. For the reasons that follow, while I have no doubt that Ms. Zaman has been disturbed and she has good reason to be frustrated with the situation, I find that the respondent has acted reasonably in the steps it has taken, including, recently, entering into an agreement with the neighbour to ensure that Ms. Zaman is not disturbed late at night, and dismiss the application.

Background

[3] Ms. Zaman purchased her condominium, unit number 423, in 2006. It is on the fourth floor of a modern condominium complex overlooking Lake Ontario. In 2010, Ms. Zaman began to experience noise disturbances from her neighbour in the unit next door, unit 401, who had moved into the unit in 2009. Beginning in 2011, Ms. Zaman made complaints to the management and Board of the respondent. Many of the complaints related to loud conversations on the balcony late at night. The two units share a common wall and a balcony separated by a partition that does not provide a sound barrier. Other complaints dealt with loud music and loud conversations which Ms. Zaman could hear through the walls.

[4] Ms. Zaman is an English professor who values her peace and quiet. She often finds it difficult to work, or sleep, as a result of the noise from her neighbours. As the balcony noise seems to have largely occurred during the warmer months when people like to get fresh air, she has had to close her door in order to reduce the noise, and because the bedroom in her unit is next to the neighbour's unit, she has sometimes resorted to sleeping on the sofa in another room. There is evidence that Ms. Zaman has developed anxiety over this problem, and is being treated for it by a psychotherapist.

[5] From 2011 to 2019, Ms. Zaman has made numerous complaints. While the summary below does not cover all complaints, or incidents, it provides a brief history of the facts, including the significant periods when no complaints were made.

[6] In 2011, following complaints in September of loud conversations on the balcony after midnight, and after verifying them, the respondent sent two demand letters to the neighbour, referring to "numerous noise complaints lodged by several of your neighbours", and complaints ceased. In June and early July 2012, Ms. Zaman made at least two complaints of loud, late-night conversations on the balcony. Security was involved, but there was no follow-up by the respondent and no letter was sent. However, the corporation heard nothing further from Ms. Zaman in 2012.

[7] One year later, after Ms. Zaman complained of late night parties and loud noise in July 2013, which stopped after security was called, the respondent issued a new demand letter to the neighbour on July 12, 2013. This letter stated that there have been many complaints about "extremely disruptive" behaviour "at very late hours of the night directly affecting the quiet enjoyment and rest of others." It referred to the length of time over which these incidents had continued and stated that the conduct of the residents of unit 401 "shows deliberate inconsideration for your community/neighbours and non-compliance of management's requests." The letter quoted the condominium rule which provides that "no Owner or Resident shall create, permit or suffer the creation, causing or continuation of any sound, noise or nuisance which, in the sole opinion of the Board, disturbs or interferes with the comfort or quiet enjoyment of the property by any Owner or Resident", and advised the neighbour that this was the "last request…prior to providing all documentation to the Corporation's solicitor."

[8] It is noteworthy that the respondent posts notices in common areas, such as elevators, reminding residents of "quiet enjoyment hours" between 11PM and 7AM, noting that "sound

travels easily on balconies." However, the notice does not state a rule, and the respondent has no specific policy or rule on noise beyond that stated above.

[9] Despite the letter of July 12, 2013, there was a further complaint of loud conversations on the balcony after 11PM in late August, 2013, and Ms. Zaman sent a number of emails to the Board about her situation, asking that it direct her neighbour not to have any conversations on the balcony after 11 p.m.

[10] The Board of the respondent considered Ms. Zaman's request, and decided that it would be unreasonable to impose that restriction on the neighbour. It considered the rule quoted above, and advised Ms. Zaman as follows:

> On September 5, 2013, the Board of Directors met to discuss the issue of your noise complaints. After consultation with the Board and the Corporation's legal counsel, it has been determined that the neighboring unit does not appear to be breaching any condo rules as per the Declaration.
>
> As you are aware, Management had previously drafted several letters to the Residents of unit 401. You have advised us that although the parties and loud music have ceased, there continues to be loud conversations on the balcony which is disturbing your study and sleep due to the layout of the suites. While it is unfortunate that the level of sound from their conversations may be a disturbance to you, the Corporation cannot prohibit a Resident/Owner from having conversations on their balcony, regardless of the time of day. [emphasis added]

[11] The respondent suggested that Ms. Zaman keep her balcony door closed, and speak to the neighbour directly. It also offered to have the corporation's lawyer send a warning letter, but it would be at Ms. Zaman's expense.

[12] There were no complaints from Ms. Zaman in 2014 or 2015. However, in July 2016, three years after the last demand letter, there were several complaints by Ms. Zaman about loud conversations on the balcony between 11PM and 3AM, keeping her awake most of the night. The respondent issued a new demand letter to the neighbour, and there were no more complaints that year, or in 2017.

[13] In the summer of 2018, however, things got worse, leading, ultimately, to this court application. Following verified complaints of loud conversations on the balcony after 11 p.m. on several occasions, the respondent sent a new demand letter to the neighbour in July 2018, although no copy of that letter is in the record. More excessive noise followed, including noise that could be heard through the common wall. The complaints of excessive noise were verified by security, and confirmed by other neighbours. Ms. Zaman complained that the respondent was not adequately addressing the issue. On September 1, 2018, Ms. Zaman found a potted plant that had been thrown on to her balcony, presumably by her neighbour. She also expressed concern that she was intimidated from complaining and had received angry words when she had asked the neighbour to be quiet.

[14] The respondent sent a further demand letter to the neighbour on September 5, 2018, and then engaged counsel who sent a compliance letter to the neighbour on October 1, 2018. This letter referred to "many complaints" and also raised concern about improper storage of a bicycle on the balcony, contrary to the condominium rules. It demanded that the neighbours in unit 401 "cease and refrain from creating and transmitting noise from the Unit or the exclusive-use common element balcony", and threatened invocation of the mediation and arbitration provisions of the Act, in which the corporation would seek damages and costs under s. 134 of the Act.

[15] Following renovations in unit 401 completed in November, 2018, Ms. Zaman has heard loud clicking from hard shoes walking on a hardwood floor that the neighbour installed. Ms. Zaman also raised this with the respondent, as there are rules regarding carpeting and padding of floors to reduce such noise.

[16] Communications continued with the applicant, who had also retained counsel, and the dispute between Ms. Zaman and her neighbour, and the respondent, was submitted to mediation in January 2019.

[17] The mediation did not proceed right away, but following more complaints in February, March and April, 2019, the mediation process moved forward. Unit inspections were made to assess the noise, including sound going through the walls, the noise from footsteps on the floor, and noise from the balcony. Although the nature of the tests and inspections was the subject of some disagreement, I accept that the noise from hard shoe footsteps in the neighbouring unit disturb Ms. Zaman, and that conversations on the neighbour's balcony can be heard in Ms. Zaman's unit, especially when balcony doors are open or the voices are loud.

[18] No resolution was reached at a mediation session in June 2019. On July 11, Ms. Zaman's counsel, Mr. Pulver, wrote to the corporation insisting that it commence a court application or arbitration proceeding against the owner of unit 401, failing which Ms. Zaman would commence an oppression application. In his letter, Mr. Pulver referred to the fact that his client has been affected by these issues since 2011. He stated that "[i]nstead of taking proper enforcement steps against the owner of unit 401, who has continued to breach the Rules and Regulations and Declaration, the Board has decided instead to challenge my client's evidence and unreasonably expects her to continue collecting evidence of noise that has already been well documented and proven."

[19] On July 29, 2019, however, the respondent advised Ms. Zaman that it had reached an agreement with the neighbour which it believed would resolve matters. However, the terms of the agreement were not disclosed to Ms. Zaman, as the respondent asserted they were privileged. Ms. Zaman then commenced this application on July 30, 2019.

[20] The respondent subsequently advised Ms. Zaman that two of the terms of the agreement with the neighbour are to not wear hard-soled shoes inside the unit, and to not conduct loud conversations on the balcony after 11PM, but continued to refuse to disclose the entire agreement. Only during argument of the motion, when the respondent was attempting to rely on the agreement to support its submission that it had acted reasonably and not oppressively, did the respondent disclose the entire agreement. It provides that the owner of unit 401 shall comply

with the corporation's rules "by ensuring that no further noise or nuisance is transmitted from the Unit or exclusive-use common element balcony". More specifically, the owner and occupiers of unit 401 "shall play no music and shall not speak loudly on the Balcony after 11 p.m.", but "may play music and speak at a reasonable volume on the Balcony before 11 p.m.; and shall not wear hard soled shoes in the Unit." The agreement also provides that if there are any violations of the agreement then the corporation can proceed directly to arbitration and seek complete indemnity for all costs arising from it from the owner of unit 401.

[21] I have no doubt that Ms. Zaman has, from time to time, been subjected to loud noise from her neighbours in unit 401, who appear to show a lack of consideration for Ms. Zaman's right to have a quiet home, particularly during the night. It also appears that disturbances have continued since April, 2019, and have continued following the commencement of the application. However, recent complaints have been conveyed through her counsel, making timely verification difficult, and I am not aware of any further steps having been taken by the corporation.

Issues

[22] The issues to be decided in this case are:

(a) Has the respondent acted in an oppressive manner against the applicant in breach of s. 135 of the Act?

(b) If so, what remedies follow?

Analysis

Legal Framework

[23] Pursuant to s. 135(1) and s. 135(2) of the Act, an owner may apply to the Superior Court for a determination of whether a condominium corporation has acted, or is threatening to act, in a manner that is "oppressive or unfairly prejudicial" to the applicant. If such a finding is made, the court "may make an order to rectify the matter" and, under subsection (3), may make an order prohibiting the conduct and for the payment of compensation.

[24] Unlike other disputes under the Act, which must be submitted to mediation and arbitration, it is common ground that an owner may apply directly to the court for an order under s. 135. The remedy is broad and flexible; the court must balance the objectively reasonable expectations of an applicant and the welfare of all owners and the condominium's assets. In *McKinstry v. York Condominium Corp. no. 472* (2003), 68 O.R. (3d) 557 (S.C.) , Juriansz J. (as he then was) reviewed the purpose of the section and its commonality with the oppression remedy in corporate law, and stated at para. 33:

> This new creature of statute should not be unduly restricted but given a broad and flexible interpretation that will give effect to the remedy it created. Stakeholders may apply to protect their legitimate expectations from conduct that is unlawful or without authority, and even from conduct that may be technically authorized and

> ostensibly legal. The only prerequisite to the court's jurisdiction to fashion a remedy is that the conduct must be or threaten to be oppressive or unfairly prejudicial to the applicant, or unfairly disregard the interests of the applicant. Once that prerequisite is established, the court may "make any order the judge deems proper" including prohibiting the conduct and requiring the payment of compensation. This broad powerful remedy and the potential protection it offers are appropriately described as "awesome". It must be remembered that the section protects legitimate expectations and not individual wish lists, and that the court must balance the objectively reasonable expectations of the owner with the condominium board's ability to exercise judgment and secure the safety, security and welfare of all owners and the condominium's property and assets. [emphasis added]

[25] In determining whether conduct is oppressive, the court applies a two-part test in which the applicant must demonstrate there has been a breach of her reasonable expectations, and that the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard": *Hakim v. Toronto Standard Condominium 1737,* 2012 ONSC 404, at paras. 40-42. It has been stated that "oppression" involves conduct that is coercive, harsh or an abuse of power. "Unfair prejudice" is conduct that limits or adversely affects a party's rights and constitutes inequitable treatment relative to others, and "unfair disregard" means to ignore without cause or to treat legitimate interests as being of no importance: *Weir v. Peel Condominium Corporation No. 485,* 2017 ONSC 6265 at paras. 11-13; *Metropolitan Toronto Condominium Corp. No. 1272 v. Beach Development (Phase II) Corp*., [2011] O.J. No. 4677.

[26] Factors to consider include the history of the conduct, the type of interest affected, the nature of the relationship between the parties, the extent to which the acts or conduct were foreseeable, and consideration of the relative interests of the parties: *1240233 Ontario Inc. v. York Region Condominium Corp. N. 852,* [2009] O.J. No. 1 at para. 37.

[27] One must have regard to the context of condominium ownership, and the realities of living in a condominium complex. Owners of condominium units buy them knowing that the corporation has a Declaration, by-laws and rules that govern unit holders and their use and ownership of their units and the common elements. They are entitled to expect that the rules will be upheld and enforced; indeed, that obligation is specifically provided for in the Act: s. 17(3). Where a condominium corporation fails in this duty to enforce its governing documents, the conduct may be unfairly prejudicial to an owner and amount to oppression.

[28] However, a condominium corporation must balance many competing interests. As was very recently observed by Stinson J. in *Metropolitan Toronto Condominium Corporation No. 933 v. Lyn,* 2020 ONSC 196, at para. 28, "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." Expectations of privacy and quiet may also be diminished somewhat due to the nature of apartment living in which some noise from neighbours must be expected, and tolerated. Indeed, the applicant, Ms. Zaman, acknowledges on this application that she is not entitled to, or seeking, complete silence.

[29] As a result of the need to balance competing interests in the unique context of each condominium development, courts have granted considerable deference to condominium boards in how they apply and enforce their rules. The test is one of reasonableness, not of correctness or perfection. As Strathy J. (as he then was) summarized in *York Condominium Corp. No. 26 v. Ramadani*, 2011 ONSC 6726, 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:
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> > 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.
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> [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:
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> > 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. Kreutzweiser]* 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.).
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> [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.[emphasis added]

[30] More recently, in *3716724 Canada Inc. v. Carleton Condominium Corporation No. 375*, 2016 ONCA 650, at paras. 51 – 53, the Court of Appeal has confirmed that deference must be shown to boards of 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." Consequently, "courts should be careful not to usurp the functions of the boards of condominium corporations" and therefore "[t]he 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." [emphasis added]

[31] In *Lyn*, after quoting from *Ramadani*, Stinson J. stated, at para. 33, that "[t]he 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." The same must be true where a corporation has decided, as here, that some noise must be tolerated by residents.

Application of Law to this Case

[32] The respondent's position has been clear since 2012. While it will enforce the rules in response to a verified complaint, and says it has done so, it will not prohibit an owner from having a conversation in normal voices on a balcony at any time. While at times the respondent may have also taken the position that it could not restrict how people use their balconies at all, this is clearly not correct – there are rules regarding storage on balconies, and the corporation can impose restrictions to ensure compliance with the general rules of the condominium.

[33] This has not satisfied the applicant, who argues that the neighbour should not be permitted to have any conversations on her balcony after 11PM. Further, the applicant also complains that the respondent has failed to appropriately escalate matters to force the neighbour's conduct to change; in particular, no legal costs incurred by the respondent arising from her verified complaints have been passed on to the neighbour, who continues to flaunt the condominium rules.

[34] As is often the case in these situations, no one is free of blame.

[35] The neighbour does not appear to be considerate of Ms. Zaman's desire for a quiet residence, and has been inconsiderate on many occasions over the past decade, during the day and late at night, in making too much noise.

[36] Ms. Zaman has complained – aggressively, and sometimes with hostility towards the staff and Board. But she has also put up with the noise without complaining, as there have been long multi-year gaps where there were no complaints. While Ms. Zaman has recognized on this application that she is not entitled to silence, and that living in a condominium complex means putting up with sounds from neighbours, she is entrenched in her position that there should be no talking on balconies after 11PM, as shown in her cross-examination, in which she was argumentative and not responsive to, or willing to accept, other perspectives. Nor is there evidence that she has taken steps to mitigate the disturbances, which have been irregular, other than to sometimes sleep on her sofa in another room. While admittedly not ideal, she could consider wearing earplugs on the infrequent nights that the balcony is used, or acquire a

humidifier or other item that provides "white noise" to reduce other sounds, or move her bed, as was attempted in *Lyn* (para. 6).

[37] Nevertheless, in my view, prior to 2018, the respondent ought to have done more to escalate matters, such as putting economic pressure on the neighbour for her to behave more appropriately late at night, such as by charging her for the condominium's legal fees associated with the complaints. However, the respondent did respond to the complaints promptly and given the long gaps in time during which there were no complaints, I am not prepared to say that the respondent, up to 2018, unfairly disregarded the interests of the applicant, or has acted in bad faith.

[38] Similarly, I cannot conclude that the respondent's position that it cannot tell people how to live in their units, and therefore that it will not prohibit conversations in normal voices on balconies late at night, to be unreasonable. It is not my role to second-guess an approach to the application of the condominium's rules that is within a range of reasonable options.

[39] When the disturbances became more frequent in 2018, the respondent did not ignore the complaints, but responded promptly. Demand letters were sent, followed by a lawyer's letter. The matter was referred to mediation, which proceeded in 2019, following additional complaints and noise testing.

[40] Where I do find fault with the respondent, however, is in their failure to disclose the settlement with the neighbour to Ms. Zaman. This settlement achieves much of what Ms. Zaman seeks – no walking in hard or high heels in the unit, and no loud conversations on the balcony after 11 p.m.. While she would like to have a complete ban on conversations on the balcony after 11 p.m., the respondent has, not unreasonably, rejected imposing a rule of that kind.

[41] The settlement agreement, which was ultimately disclosed at the urging of the court during the hearing of the application, now provides for serious consequences to the neighbour if she breaches its terms. The agreement does not go as far as Ms. Zaman would like, as she may say this does nothing more than restate the rules, but the sanctions are serious and should lead to behaviour modification by the residents of unit 401.

[42] Ms. Zaman's counsel argues that the settlement demonstrates that the respondent has been acting in bad faith for years: having taken the position since 2011 that it cannot regulate how people use their units, or balconies, the respondent has now taken the opposite position, requiring the neighbour to not speak loudly after 11PM. I do not agree that this is indicative of bad faith, or even that the respondent's position has changed. The corporation has been responsive to Ms. Zaman's complaints, and has made requests, and demands, of the neighbour to be less noisy, especially at night. There is no inconsistency in its position; rather, the actions of the respondent, especially in now reaching an agreement with the neighbour, demonstrate that it is being reasonably responsive to Ms. Zaman's requests, in accordance with the condominium rules and the Board's obligation to balance the interests of the corporation and all residents.

[43] This is not a case like *Wu v. Peel Condominium Corporation No. 245*, 2015 ONSC 2801, where the respondent failed to do anything in the face of overwhelming evidence of noise,

including an engineering report, or *Dyke v. Metropolitan Toronto Condo. Corp. No. 972*, 2013 ONSC 463, where the condominium corporation failed to take steps to enforce its rules in preventing a resident from operating a dance studio in a residential unit. Nor is it analogous to *Lyn*, where the court deferred to the corporation's decision to take a resident to court to stop her from making noise which the corporation determined was in breach of its rules. Rather, this is a case more like *Mohamoud v. Carleton Condominium Corporation No. 25*, 2019 ONSC 7127, in which the condominium corporation has reasonably addressed the complaints of the resident.

[44] Accordingly, Ms. Zaman has not satisfied me that the respondent has acted oppressively towards her. It has responded to and investigated her complaints and has demanded compliance by the neighbour. While it might have been more aggressive in the past, since a series of complaints in 2018 the corporation has actively addressed the issue, engaging in mediation which has resulted in an agreement with the neighbour which, should it be breached, will have serious consequences for her.

Conclusion

[45] Although this application is dismissed, I have stated my concern that the respondent ought to have done more in earlier years. In addition, had the terms of the settlement agreement been disclosed by the respondent in July 2019 and the parties then focused on its enforcement, this application might have been avoided. Should the parties be unable to agree on costs within 30 days, the respondent shall provide me with written submissions not to exceed 3 pages, double-spaced (not including supporting materials), and the applicant shall provide a response with the same limitations 14 days later.

Schabas J.

Date: 2020-02-27