CITATION: Toronto Standard Condominium Corporation No. 1466 v. Weinstein, 2021 ONSC 1306
COURT FILE NO.: CV-20-00636863 & CV-20-00651703
DATE: 20210222

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: TORONTO STANDARD CONDOMINIUM CORPORATION NO. 1466, Applicant/Respondent by Counter-Application

AND:

STUART WEINSTEIN, Respondent/Applicant by Counter-Application

BEFORE: Davies J.

COUNSEL: *Joseph Ryan* and *Francesco Deo*, for the Applicant/Respondent by Counter-Application

Stuart Weinstein, acting in person

HEARD at Toronto: December 17, 2020

REASONS FOR DECISION

A. Overview

[1] Stuart Weinstein owns and lives in a unit in the building belonging to Toronto Standard Condominium Corporation No. 1466. The Condominium was constructed using Kitec pipes, which are known to be defective. The Condominium retained two experts who both recommended that the Kitec pipes be replaced in all units and common areas. The Condominium Board passed a resolution requiring unit owners to replace the Kitec pipes in their unit by February 1, 2018.

[2] Mr. Weinstein did not replace the Kitec pipes in his unit as required. As a result, the Condominium notified Mr. Weinstein that it would replace the pipes in his unit at his expense on October 1, 2018. Mr. Weinstein refused to allow the contractors into his unit that day.

[3] The Condominium commenced mediation proceedings in an effort to secure Mr. Weinstein's cooperation to replace the pipes. Mr. Weinstein did not participate in the mediation. The Condominium then commenced arbitration proceedings to compel Mr. Weinstein to replace the pipes in his unit. Mr. Weinstein objected to the jurisdiction of the arbitrator, arguing that the Condominium was required to bring an application in the

Superior Court for a compliance order rather than pursuing arbitration. Mr. Weinstein also argued that the arbitrator was biased. The arbitrator dismissed Mr. Weinstein's motion and ordered the arbitration would proceed. Mr. Weinstein did not participate further in the arbitration.

[4] On October 10, 2019, the arbitrator issued an award ordering Mr. Weinstein to permit the Condominium to replace the Kitec pipes in his unit and to indemnify the Condominium for the costs incurred in connection with replacing the pipes. The Arbitrator also ordered Mr. Weinstein to pay $60,599.53 in costs within 30 days.

[5] Mr. Weinstein continues to deny the Condominium access to his unit to replace the pipes and has not paid the costs award. On December 24, 2019, the Condominium registered a lien on Mr. Weinstein's unit for the unpaid costs award plus interest.

[6] The Condominium now seeks an order enforcing the arbitration award under s. 50 of the *Arbitration Act, 1991*, S.O. 1991, c. 17. Mr. Weinstein has brought an application to set aside the arbitral award under s. 46 of the *Arbitration Act* or, in the alternative, to remove the lien registered on his property. The Condominium argues that Mr. Weinstein's application should be dismissed because it is out of time.

[7] There are four issues for me to decide to resolve these applications:

i. Is Mr. Weinstein's application to set aside the arbitral award out of time?

ii. If not, should the arbitral award be set aside?

iii. If the application is out of time or if the arbitral award is upheld, should judgment be granted enforcing the award?

iv. Even if an enforcement judgment is granted, should the lien be removed?

[8] For the reasons that follow, I find that Mr. Weinstein's application to set aside the arbitral award is out of time. I also find the Condominium is entitled to judgment enforcing the award. Finally, I find that the lien is valid.

B. Is Mr. Weinstein's application to set aside the arbitral award out of time?

[9] Mr. Weinstein makes three arguments in his application to set aside the arbitral award under s. 46 of the *Arbitration Act*. First, he argues that the arbitrator did not have jurisdiction to conduct the arbitration. Second, he argues that the arbitrator was biased. Third, he argues the arbitrator engaged in fraud or corruption.

[10] Appendix 4 to the Condominium's By-Law No. 4 provides that the *Arbitration Act* will govern any arbitration between the Condominium and a unit owner. The Condominium argues that under s. 47 of the *Arbitration Act*, Mr. Weinstein had just 30 days from when the arbitrator issued his award to file an application to set it aside and,

as a result, his application is out of time. Different provisions of the *Arbitration Act* apply to each ground raised by Mr. Weinstein, including different timelines to apply to set aside the award.

i. Objection to the arbitrator's jurisdiction

[11] Mr. Weinstein argues that the arbitrator did not have jurisdiction to conduct the arbitration. Mr. Weinstein raised this issue as preliminary motion before the arbitrator. On August 12, 2019, the arbitrator dismissed Mr. Weinstein's motion, ordering that he had jurisdiction and the arbitration would proceed. The arbitrator did not give reasons for dismissing the motion at the time. Rather, he included his reasons for dismissing Mr. Weinstein's motion in his final award, which was released on October 10, 2019.

[12] An arbitrator has the authority to rule on his own jurisdiction: *Arbitration Act*, s. 17(1). Section 17(8) of the *Arbitration Act*, says that if the arbitrator rules on a jurisdictional objection as a preliminary question, a party may bring an application to the Court to decide the matter within 30 days of receiving notice of the ruling. If the arbitrator rules on a jurisdictional objection in the final award, a party can appeal the ruling under s. 45 of the *Arbitration Act* or bring an application to set aside the award under s. 46(1) of the *Arbitration Act*.

[13] Mr. Weinstein sent an email to the arbitrator on August 22, 2019 challenging the arbitrator's August 12, 2019 ruling. Mr. Weinstein did not bring an application to the Court within 30 days of receiving the arbitrator's August 12, 2019 ruling.

[14] Even if the time for commencing an application to set aside the arbitrator's jurisdictional ruling did not start until the arbitrator released his reasons for dismissing the motion on October 10, 2019, Mr. Weinstein only had 30 days from that date to initiate his application: *Arbitration Act*, s. 47(1).

[15] The Condominium issued its Notice of Application seeking an enforcement order on February 25, 2020. Mr. Weinstein first raised his concerns with the Court about the arbitrator's decision and sought a hearing to set aside the lien in May 2020. His request for a hearing and his materials in support were not in the proper form. Mr. Weinstein did not issue a proper Notice of Application until November 20, 2020. Even if I accept Mr. Weinstein's May 2020 request for a hearing as the date on which he filed his application to set aside the arbitrator's order that was well outside the 30-day time limit, which would have expired on November 9, 2019.

[16] The *Arbitration Act* does not provide for an extension of the 30-day time period for an appeal or application to set aside an arbitral award. In *R & G Draper Farms (Keswick) Ltd. v. 1758691 Ontario Inc.*, 2014 ONCA 278 at paras. 17 – 21, the Court of Appeal held that this Court has no inherent jurisdiction to extend the 30-day appeal period either. Mr. Weinstein's application to set aside the arbitral award on jurisdictional grounds is, therefore, out of time.

ii. Reasonable apprehension of bias

[17] In addition to his jurisdictional objection, Mr. Weinstein argues that the arbitrator was biased. Mr. Weinstein raised this issue in his preliminary motion to the arbitrator and asked the arbitrator to recuse himself. On August 12, 2019, the arbitrator dismissed Mr. Weinstein's bias motion as well but did not give reasons for his decision. The arbitrator included his reasons on this issue in his final award.

[18] A party to an arbitration can challenge the arbitrator on the basis that there is a reasonable apprehension of bias. The arbitrator has jurisdiction to decide the challenge. If the arbitrator dismisses a challenge and refuses to resign, a party can bring an application to the Court to have the arbitrator removed within 10 days of being notified of the arbitrator's decision: *Arbitration Act*, s. 13(6). Mr. Weinstein did not apply to the Court to have the arbitrator removed after receiving the arbitrator's August 12, 2019 decision.

[19] Under s. 46(1), this Court can also set aside an arbitral award if there is a reasonable apprehension of bias. Even if I accept that Mr. Weinstein was not required to bring an application to Court until he received the arbitrator's reasons on October 10, 2019, his application to set aside the arbitration decision on the basis of a reasonable apprehension of bias had to have been brought within 30 days under s. 47 of the *Arbitration Act*.

[20] Mr. Weinstein first raised his concerns about bias, albeit in the wrong form, at the same time he raised the jurisdictional concerns in May 2020. For the reasons set out above, I have no jurisdiction to extend the 30-day period for commencing an application to set aside the arbitrator's decision. Mr. Weinstein's application to set aside the arbitral award for bias is also out of time.

iii. Allegations of corruption of fraud

[21] Mr. Weinstein also claims the arbitration was tainted by fraud or corruption and relies on s. 47(2) of the *Arbitration Act*, which says that the 30-day time limit for commencing an application to set aside an arbitral award does not apply if there is an allegation of corruption or fraud.

[22] Allegations of fraud or corruption are extremely serious. An arbitral award will not be set aside on the grounds of fraud or corruption without clear evidence. Fraud requires proof that a false statement was made during the arbitration process and that the person making the false statement knew it was false, or was reckless or careless about its truth: see *Vale v. Sun Life Assurance Co.*, 1998 CanLII 14823 (ONSC). Corruption requires proof of dishonesty or an abuse of power on the part of the arbitrator for personal gain.

[23] There is no evidence the arbitrator engaged in corruption or that the arbitration was tainted by fraud. In his notice of application, Mr. Weinstein repeatedly asserts that the arbitrator colluded with counsel for the Condominium. If there was evidence of

collusion, that might be a basis to make a finding of fraud or corruption. However, the only details provided by Mr. Weinstein in support of his claim are the following:

i. the arbitrator spoke on a panel with a member of the firm representing the Condominium at a conference (that was also hosted by the firm) in November 2017, almost two years before the arbitration;

ii. the arbitrator retweeted a tweet sent out by the firm representing the Condominium about the November 2017 conference; and

iii. the arbitrator liked a tweet from a lawyer in the firm representing the Condominium in August 2019, after the arbitrator was appointed to arbitrate the dispute between Mr. Weinstein and the Condominium.

[24] Mr. Weinstein argues the August 2019 tweet amounts to *ex parte* communication between the arbitrator and the Condominium during the arbitration.

[25] Mr. Weinstein made these same allegations and arguments in his bias motion before the arbitrator. The arbitrator considered Mr. Weinstein's arguments and dismissed the motion, finding as follows:

> Mr. Weinstein raised social media connections and participating in condominium industry conference panel discussions as evidence of bias. In some cases it may be so, but it is not in this arbitration.
>
> Today, in the absence of evidence to the contrary, merely having online connections or making comments on social media, do not imply the level of relationship enough to imply bias.
>
> This is not a similar case to a recent British Columbia Court of Appeal case involving private communications between one party's lawyer and an arbitrator set aside the arbitrator's decision due to bias perceptions.

[26] It is not sufficient for Mr. Weinstein to simply allege there was corruption or fraud to avoid the 30-day limit for commencing an application to set aside an arbitral award. As this Court held in *Calabrese v. Weekes*, 2003 CanLII 3311 (ON SC) at para. 22, it would be "contrary to the purpose of the legislation to have a party avoid the thirty day period by making a mere allegation of corruption or fraud." Mr. Weinstein has simply repeated allegations he made earlier that the arbitrator was bias but now claims that those allegations amounts to fraud or corruption. There is no basis to find that the arbitrator committed a corrupt act or that the arbitral award is the product of fraud. Mr. Weinstein cannot rely on s. 47(2) of the *Arbitration Act* to avoid the 30-day time limit for commencing an application to set aside the award.

[27] Mr. Weinstein's application, therefore, is out of time and is dismissed.

C. The Merits of Mr. Weinstein's application

[28] Even if I were wrong that Mr. Weinstein's application is out of time, I would dismiss it on its merits.

[29] Mr. Weinstein argues that the arbitrator did not have jurisdiction because the Condominium should have sought a compliance order from this Court rather than pursuing mediation and arbitration. Section 132(4) of the *Condominium Act, 1998,* S.O. 1998, c. 19 provides that every condominium declaration is deemed to contain a provision that the condominium and unit owners "agree to submit a disagreement between the parties with respect to the declaration, by-laws or rules to mediation and arbitration." Mr. Weinstein argues that the dispute about the Kitec pipes is really a dispute over the interpretation of s. 117 of *Condominium Act*, not a dispute with respect to the declaration, by-laws or rules.

[30] Section 117 of the *Condominium Act* prohibits unit owners from permitting a condition to exist that is likely to cause property damage. Mr. Weinstein does not accept the expert opinions obtained by the Condominium that the Kitec pipes are likely to fail and cause significant damage. He argues that keeping the Kitec pipes in his unit is not creating a condition that is likely to cause property damage. Mr. Weinstein argues that because this case is really about the proper interpretation of s. 117 of the *Act*, the Condominium was required to seek a compliance order from the Court under s. 134(1) of the *Condominium Act* rather than pursuing mediation and arbitration. I disagree.

[31] Section 134(1) of the *Condominium Act* allows the condominium or a unit owner to apply to the Court for an order enforcing compliance with the Act or with the condominium's declaration, by-laws or rules. However, s. 134(2) of the *Condominium Act* stipulates that if mediation and arbitration are required under s. 132, a court application cannot be brought until the mediation and arbitration processes have been exhausted without success.

[32] The purpose of s. 132 of the *Condominium Act* is to encourage the resolution of disputes through a quicker, more informal, less expensive process. In *McKinstry v. York Condominium Corporation No. 472*, 2003 CanLII 22436 (ON SC) at para. 19, the Court held that the phrase "with respect to the declaration, by-laws or rules" should be given a generous interpretation to promote the legislative objective of informal dispute resolution.

[33] I agree with Mr. Weinstein that his refusal to replace the Kitec pipes in his unit engages s. 117 of the *Condominium Act.* But that does not mean the dispute falls outside the scope of s. 132(4). Virtually every dispute between a condominium corporation and a unit own will engage some provision of the Condominium.

[34] This dispute also engages the provisions of the Condominium's Declaration. Article V of the Declaration requires all unit owners to maintain their unit. If a unit owner does not carry out necessary maintenance work, the owner is deemed to have consented to Condominium completing the work at the owners' expense. The Condominium Board

passed a resolution requiring all unit owners to replace the Kitec pipes in their units. The replacement of the Kitec pipes, therefore, became “necessary maintenance work” under the Declaration. Mr. Weinstein has not complied with the Board’s resolution and is in violation of the Declaration. In my view, the fact that the Condominium is concerned about the property damage that might be caused by the Kitec pipes does not take this dispute out of the mediation and arbitration provisions of the *Condominium Act*. This is a dispute about whether Mr. Weinstein is complying with the Condominium’s Declaration and is properly the subject of mediation and arbitration. The arbitrator, therefore, had jurisdiction to proceed with the arbitration.

[35] Turning to Mr. Weinstein’s other arguments, there is also no evidence of a reasonable apprehension of bias, fraud or corruption. The arbitrator carefully considered Mr. Weinstein’s preliminary objections to the arbitration process and ruled on them. Mr. Weinstein was sent a copy of the arbitrator’s decision dismissing his motion. In the decision, the Arbitrator states that the arbitration would proceed on September 11, 2019. On August 22, 2019, Mr. Weinstein sent an email repeating his claims that the arbitrator lacked jurisdiction and was biased. Mr. Weinstein also stated, “I did not want the arbitration, nor will I participate in it.”

[36] The arbitrator sent an email to Mr. Weinstein and counsel for the Condominium on August 27, 2019 acknowledging receipt of Mr. Weinstein’s August 22, 2019 email and confirming the arbitration would proceed on September 11, 2019. The arbitrator scheduled a pre-hearing conference and invited written submissions from the parties on any procedural matters. The arbitrator encouraged Mr. Weinstein to retain counsel and said he would be inclined to grant an adjournment of the hearing to allow counsel to prepare. Mr. Weinstein did not participate in the pre-hearing conference, he did not provide submissions on the procedure and he did not participate in the arbitration.

[37] In my view, there is no basis to find that the arbitrator was biased or that there was a reasonable apprehension of bias. Mr. Weinstein was given every opportunity to participate in the hearing. The fact that the arbitrator ruled against Mr. Weinstein’s preliminary objections is not evidence of bias, corruption or fraud.

[38] Even if Mr. Weinstein’s application to set aside the arbitral award were not out of time, I would dismiss it on its merits.

D. Should a judgment be granted enforcing the arbitral award?

[39] The Condominium is entitled to bring an application to this Court for a judgment enforcing the arbitral award. Section 50(3) of the *Arbitration Act* says that the court *shall* give a judgment enforcing an arbitral award unless the 30 day period for commencing an application to set aside the award has not elapsed or there is an application to set aside the award pending or the award has been set aside. Given that I have dismissed Mr. Weinstein’s application to set aside the award, I am required to grant a judgment enforcing the arbitral award.

E. Should the lien registered on Mr. Weinstein's unit be removed?

[40] The arbitrator ordered Mr. Weinstein to pay the Condominium's costs on a substantial indemnity basis – which he fixed at 90% of the full costs – in the amount of $49,259.53. The cost order included legal fees incurred by the Condominium for the mediation as well as the arbitration. The arbitrator also ordered Mr. Weinstein to pay the full costs of the arbitrator's fee in the amount of $11,300. The arbitrator's total costs award was $60,559.53. The arbitrator ordered that if Mr. Weinstein failed to pay the costs order within 30 days, "all such costs shall be added to the common expenses for his unit and shall be recoverable in the same manner as common expenses under section 134(5) of the *Condominium Act*, *1998*."

[41] Mr. Weinstein did not pay the costs order. The Condominium added the costs to his common expenses. On December 24, 2019, the Condominium registered a certificate of lien on his unit in the amount of $61,475.45, which consists of the $60,559.53 in unpaid common expenses plus interest plus an addition $410.04 in legal costs associated with the Condominium's efforts to collect the common expenses.

[42] Mr. Weinstein argues that the arbitrator did not have jurisdiction to order him to pay the Condominium's costs associated with the failed mediation or to order that the costs could be treated as a common expense and, as a result, the lien registered by the Condominium is not valid. The Condominium argues that the arbitrator awarded costs in accordance with the *Arbitration Act* and the lien is, therefore, valid.

[43] The arbitrator had jurisdiction to make a costs order under s. 54 of the *Arbitration Act*. The arbitrator also had discretion to order Mr. Weinstein to pay costs on a substantial indemnity basis. The arbitrator gave lengthy reasons for his decision. The arbitrator recognized that full indemnity costs are rare. However, he found that Mr. Weinstein was "deliberately obstructionist" and was creating a risk to the safety of the Condominium community. In the end, the arbitrator concluded that Mr. Weinstein's conduct justified costs above substantial indemnity but not full indemnity.

[44] The arbitrator also had authority to order that the costs be treated as common expenses if Mr. Weinstein did not pay within 30 days. Section 134(5) of the *Condominium Act* states that if a condominium obtains an award of damages or costs against a unit owner, "the damages or costs, together with any additional actual costs to the corporation in obtaining the order, shall be added to the common expenses for the unit." The arbitrator recognized that s. 134(5) applies only to court orders, not arbitral award. Nonetheless, the arbitrator found that the principles underlying s. 134(5) should inform his cost award. The purpose of s. 134(5) of the *Condominium Act* is to shift the financial burden of enforcing compliance from the corporation, which is funded by innocent unit owners, to the non-compliant unit owner and to provide a mechanism for the condominium to recover those costs: *Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc.*, 2005 CanLII 13778 (ON CA) at para. 40.

[45] The arbitrator also relied the Condominium's Declaration and By-Laws, which expressly provide that the costs are recoverable as a common expense. Article V of the Declaration deals with maintenance and repairs. It provides that the Corporation "shall make any repairs that any owner is obligated to make and that he does not make within a reasonable time after written notice is given to such owner by the Corporation." Article V goes on to say that the owner shall "reimburse the Corporation in full for the cost of such repairs including any legal fees and collection costs incurred by the Corporation in order to collect the costs of such repairs." Finally, Article V says that the costs of the repairs will be treated and recoverable as common expenses.

[46] Article 14.01 of By-Law No. 4 provides that each owner will indemnify the Condominium for any "loss, cost, damages, injury or liability" resulting from the owner's acts or omissions that are not covered by insurance. Article 14.02 enumerates the types of losses covered by the indemnification provision, including repair charges and all legal costs incurred by the Corporation as a result of a breach of the Declaration, by-laws or rules of the Condominium. Finally, Article 14.03 states that any costs shall be recoverable as common expenses.

[47] Given the language of the Declaration and By-Law No. 4, the arbitrator was entitled to order that his cost award be treated as a common expense and be recoverable as such. In fact, the Condominium would have been entitled to treat the arbitrator's cost order as a common expense under the Declaration and By-Law No. 4 even if the arbitrator had not made an order to that effect.

[48] The remaining issue is whether the lien is valid because it includes costs associated with the mediation process. The arbitrator ruled that mediation and arbitration are "separate phases of a single mandated process" under the *Condominium Act*. The arbitrator included in the costs award "legal costs of both phases along with any other properly incurred cost of bringing about compliance."

[49] The Court of Appeal dealt with the same issue in the context of an appeal from an arbitral award in *Italiano v. Toronto Standard Condominium Corporation No. 1507*, 2008 CanLII 32322 (ON SC). The Court held that the arbitrator erred in ordering Mr. Italiano to pay costs associated with the mediation, which preceded the delivery of the Notice of Arbitration. The Court allowed the appeal and reduced the cost award. The Court also reduced the value of the lien registered on Mr. Italiano's unit.

[50] Section 54 of the *Arbitration Act* gives the arbitrator discretion to award costs, which are defined as "the parties' legal expenses, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration." Section 54 does not make any reference to the costs of mediation that precedes the arbitration.

[51] The mediation failed in this case because Mr. Weinstein did not attend. Section 132(6)(b) of the *Condominium Act* deals with the cost of a failed mediation. If mediation fails, the mediator can specify how much of the mediator's fees and expenses each party will pay. Section 10 of Appendix 4 to the Condominium's By-Law No. 4 says

that the mediator's fees "shall be borne equally between the parties, unless a settlement agreement (if any) between the parties, or the mediator specifies otherwise." On April 1, 2019, the mediator issued a Notice of Failed Mediation in which he states, "each party shall pay half of the undersigned fees and expenses." There is no mention of costs in the mediator's Notice.

[52] In my view, the arbitrator did not have authority to order Mr. Weinstein to pay legal fees associated with the failed mediation. However, that does not necessarily render the lien invalid. Under the Declaration and By-Law No. 4, the Condominium is entitled to treat all its legal fees and all its costs related to Mr. Weinstein's breach of the Declaration as common expenses. This would include all fees and all costs from the failed mediation and the arbitration.

[53] If a unit owner fails to pay common expenses, the Condominium is required under Article XII of By-Law No. 4 to register a lien on the unit. The Condominium added $60,599.53 to Mr. Weinstein's common expense account. This reflects 90% of the Condominium's fees for the arbitration and mediation and 100% of the arbitrator's fees. It does not include any amount for Mr. Weinstein's share of the mediator's fees, which the mediator also ordered him to pay. The common expenses assessed against Mr. Weinstein are, therefore, less than the total amount the Condominium is entitled to treat as common expenses under its Declaration and By-Law No. 4. And the lien, which was properly registered under s. 85 of the *Condominium Act*, is also for less than the Condominium was entitled to collect as common expenses.

[54] As a result, I find that notwithstanding the error made by the arbitrator in ordering costs for the mediation as part of other arbitration process, the lien is valid.

F. Conclusion

[55] Mr. Weinstein's application to set aside the arbitral award is dismissed. Mr. Weinstein's application to set aside the lien is also dismissed. The Condominium's application is granted. A judgment will be issued enforcing the arbitral award.

[56] If the parties cannot agree on costs for these applications, they can each submit costs submissions of no more than 5 pages plus supporting documentation no later than March 12, 2021. The parties are to be served and filed the costs submissions in accordance with the most recent practice direction and send an electronic copy to my assistant.

_____

Davies J.

Date: February 22, 2021