

CITATION: Carleton Condominium v. Poirier, 2021 ONSC 3778
COURT FILE NO.: CV-19-79782
DATE: 2021/05/25

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
CARLETON CONDOMINIUM CORPORATION NO. 15)	Ms. Wood and Mr. Lu, for the Applicant
)	
)	
Applicant)	
)	
– and –)	
)	
)	
MARC POIRIER, SUZANNE POIRIER, AND SEBASIEEN GAUTHIER)	Respondents-Self-Represented
)	
Respondents)	
)	
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)	
)	
)	
)	HEARD: January 21, and 25 2021(Virtually)

2021 ONSC 3778 (CanLII)

APPLICATION DECISION

KANE J.

[1] Carleton Condominium Corporation No. 15 (“CCC 15”) brings this application against the three respondents pursuant to the *Condominium Act*, 1998, SO 1998, c 19 (the “Act”) as well as its condominium Declaration, By-laws and Rules.

[2] The respondents have not brought a cross-application against CCC 15 but have brought a motion that this application be converted into an action and proceed to trial as they submit that there are material, relevant facts in dispute which require determinations as to credibility which must occur in a trial.

[3] CCC 15 on this application seeks:

1. A Declaration that the Respondents are in breach of sections 19, 98, 117 and 119 of the Act, Articles IX(1)(d), X, and XX of CCC 15's Declaration, its By-laws and its Rules;
2. An order that the Respondents comply with the Act, the Declaration and Rules of CCC 15.
3. An order that CCC 15 be granted immediate and continuing access to unit PH2-158B McArthur Avenue, Ottawa, (the "Unit") by the Respondents, for all purposes related to the Corporation's objects and duties under the Act, and the Applicant's Declaration, By-Laws and/or Rules (collectively, the "governing documents"), including but not limited to the purpose of completing inspections of the Unit and the appurtenant common elements;
4. An order that the Respondents immediately provide CCC 15 with working keys and/or the codes for all locks to the entry door to the unit owned by the Poiriers and occupied by Mr. Gauthier in order to ensure the Corporation has access to the unit in accordance with its right to access under the Corporation's governing documents and the Act;
5. An order requiring that, within three weeks of the order, the Respondents shall reverse certain alterations and/or additions made by the Respondents to the Corporation's common elements and shall reinstate the common elements to their previous condition by removing the wooden fencing and wooden flags and related alterations or any other additions or alterations made by the Respondents to the exclusive-use common element balcony appurtenant to the Unit and reinstate the property to its previous condition;
6. An order that the tenancy of Sebastien Gauthier of the Unit be terminated in accordance with Section 134(3) of the Act, and an order that the Respondent tenant, Sebastien Gauthier, is prohibited from residing anywhere on the property of CCC 15;
7. In the alternative to the above order numbered 6, an order that the Respondents, cease and desist from conduct that contravenes the Act, and the Applicant's governing documents, and specifically:
 - a. Engaging in conduct contrary to section 117 of the Act, by permitting a condition to exist or carry on an activity in a unit or in the common elements if the condition or the activity is likely to damage the property or cause injury to an individual, including but not limited to, conduct which risks the health and safety of other residents and guests of CCC 15, such as making harassing, distressing or threatening comments or gestures to other residents, and engaging in aggressive confrontations with other residents, in breach of section 117 of the Act;

- b. Storing items in the exclusive-use common element balcony appurtenant to the Unit in contravention of the Corporation's Rules; and
 - c. Storing items in the exclusive-use common element parking space in contravention of the Corporation's Rules; and
 - d. Engaging in conduct contrary to section 98 of the Act, by installing unauthorized additions and/or alterations on the exclusive-use common element balcony appurtenant to the Unit and by permitting the unauthorized additions and/or alterations to remain on the exclusive-use common element balcony.
8. Should the Respondents fail to comply with the above-noted requirements, leave for the Applicant to immediately apply to the Court to obtain an order under 5 above, on affidavit evidence confirming the Respondents' failure to comply, which will result in an order terminating Mr. Gauthier's occupancy in the Unit; and
 9. An Order that the Respondents, on a joint and several basis, pay to CCC 15 its costs of this proceeding, on a full indemnity basis, and that these costs may be added to the common expenses for the Unit, and be recoverable as such, including by way of Condominium Lien against the Unit.

Background

[4] CCC 15 is one of three adjacent high-rise condominium towers. Each tower including the CCC 15 tower is a separate condominium corporation. CCC 15 shares some common areas such as a pool with the two adjacent condominiums.

[5] The Poiriers own the penthouse Unit which is located on the twentieth floor of CCC 15.

[6] Mr. Gauthier has rented the Unit from the Poiriers and occupied the same since September 2018. He lived in a unit in one of the other adjacent towers for several years prior to September 2018.

[7] Mr. Gauthier works as a paralegal. He presented the vast majority of the argument on behalf of the respondents. Mr. Poirier thereafter made brief submissions. Mrs. Poirier made no submissions. The joint factum of the three respondents on occasion cites positions as being that of Mr. Gauthier.

[8] There has been delay in argument of this application.

[9] CCC 15 commenced this application in March 2019. It was served on the respondents in November 2019. It was scheduled to be argued on December 13, 2019 but did not then proceed as the respondents brought a motion for an adjournment on that date in order that it proceed as a bilingual hearing. The court on December 13, 2019, adjourned the application to a date to be set and granted several orders, some interim and some final, pursuant to the consent of the parties. (the “Consent Order”)

[10] This application was scheduled to be argued in March 2020 but was then adjourned due to COVID-19.

[11] The application was then scheduled to proceed on December 16, 2020. Argument thereof was again adjourned as the respondents filed three motions on December 11, 2020.

[12] Two of those motions were argued on December 16, 2020. One motion sought the dismissal of the application against Mrs. Poirier as she stated she had no knowledge of the matters in issue. The second motion sought an indefinite adjournment of the application based upon Mr. Gauthier’s unspecified condition of health.

[13] The court dismissed the two above motions for the reasons stated in the decision dated January 4, 2021. The court set January 11, 2021 to argue this application and the respondents’ December 11, 2020 motion that this application proceed by action to trial.

[14] Argument of this application and the respondents’ motion to convert this into an action were then adjourned on January 11, 2021, due to the recent death of Mr. Gauthier’s father and then rescheduled for a one-day hearing on January 21, 2021.

[15] In the absence of a request for an adjournment, argument of the application and the respondents’ R. 38.10 (1)(b) motion proceeded on January 21 and 25, 2021.

[16] The December 13, 2019 Consent Order, in addition to adjourning that days’ argument of the application and ordering the parties to comply with court set timelines for filing of materials and for cross-examinations, made the following orders:

3. It is ordered that the applicant be granted an interim order for immediate and continuing access to (the Unit) ... by the respondents, for all purposes related to the applicant's objects and duties under the Act and under its governing documents, including but not limited to the purpose of completing inspection of the Unit and the appurtenant common elements.
4. It is ordered that the respondents cease and desist from any conduct that contravenes the Act and/or the applicant's governing documents, specifically:
 - i. engaging in any conduct contrary to s. 117 of the Act, by permitting a condition to exist or carry on an activity in a unit or in the common elements, if the condition or activity is likely to damage the property or cause injury to an individual, including but not limited to, conduct which risks the health and safety of other residents and guests of CCC 15, such as making harassing, distressing or threatening comments or gestures to other residents, and engaging in aggressive confrontations with other residents, in breach of s. 117 of the Act.
5. This court orders that the respondents, Marc Poirier, Suzanne Poirier and Sebastien Gauthier, comply with the (Act and CCC 15's) Declaration, By-laws and Rules.

[17] Paragraph 3 of the Consent Order, as stated, is an interim order. Paragraphs 4 and 5 are not interim orders. They are final orders then granted in this proceeding on consent.

Analysis

[18] The respondents submit the court should, pursuant to R. 38.10(1)(b), order that this application proceed to trial as:

- a. the affidavit and cross-examination evidence are insufficient to permit the court to decide material facts which are in dispute and a trial is required to decide credibility regarding disputed material facts in issue, as the respondents disagree with all allegations of fact relied upon by CCC 15; and
- b. that this application should not have been commenced and the issues between the parties should instead have proceeded to mediation and failing resolution, then to arbitration for determination pursuant to s. 132(4).

Whether Mediation and Arbitration Were Required

[19] CCC 15, pursuant to s. 134(1) of the Act, may bring an application for an order enforcing compliance with any provision of the Act, its declaration, by-laws and rules. That right to proceed by application is subject to and only after any requirement as to mediation and arbitration pursuant to s. 132 and s. 134(2).

[20] Pursuant to s.132(4) of the Act, every declaration is deemed to contain a provision that a condominium corporation and its unit owners agree to submit a disagreement between them with respect to the declaration, by-laws or rules to mediation and arbitration.

[21] CCC 15 on this application however seeks declarations and enforcement of obligations against the three respondents pursuant to s. 119, s. 98, s. 117 and s. 119 of the Act. This application is not limited to enforcement of obligations pursuant to the condominium's Declaration, By-laws and Rules by CCC 15 against the Poiriers as Unit owners, pursuant to s. 132(4) and s. 134(2).

[22] CCC 15 in addition pleads and relies upon breaches of the Consent Order in relation to the relief sought. The court, pursuant to s. 134 (3) and (4) of the Act, may not terminate Mr. Gauthier's lease unless he has contravened a court order.

[23] The substance of CCC 15's allegations include the breach of the obligation provisions of the Act and the Consent Order. CCC 15's reliance on those provisions in the Act and the Consent Order is not in essence simply for alleged breaches of its Declaration, By-laws and/or Rules and pleaded in order for CCC 15 to avoid mediation and arbitration of the issues; thereby distinguishing the decision in *Peel Condominium Corp. No. 166 v. Ohri*, 2017 ONSC 6438, paras. 35 and 36.

[24] Disputes involving the Act itself do not require mediation and arbitration pursuant to s. 132 and s. 134(2) of the Act: *Metropolitan Condominium Corporation No. 747 v. Korolekh*, 2010 ONSC 4448, para. 50.

[25] Disputes with unit tenants like Mr. Gauthier do not fall within the mediation and arbitration provisions of s. 134(2) of the Act: *Ottawa-Carleton Standard Condominium Corporation No. 961 v. Menzies*, 2016 ONSC 7699, para. 37.

[26] Sections 134(1) and (2) accordingly did not require that the subject of this application first proceed to mediation and arbitration. Mediation and arbitration were not required and do not constitute grounds requiring that this application be converted into an action.

[27] This ground of the respondents' motion accordingly is denied for the above reasons.

Whether Application Should Be Converted to Action and Whether Trial Is Necessary

[28] The respondents submit that a trial is necessary because there are material facts in dispute which necessitate determinations of credibility, that such matters cannot be appropriately determined on this application and that the matter therefore should proceed to trial.

[29] R. 38.10 (1) states:

- 38.10 (1) On the hearing of an application the presiding judge may,
- (a) grant the relief sought or dismiss or adjourn the application, in whole or in part and with or without terms; or
 - (b) order that the whole application or any issue proceed to trial and give such directions as are just.

[30] It is not determinative, however the court notes that this alleged need for a trial was not raised by the respondents between November 2019 when this application was served on them, until their motion in December 11, 2020, five days prior to the scheduled December 16, 2020 argument of this application. The respondents were represented by legal counsel during a good part of 2020.

[31] Extensive written materials are filed on this application by CCC 15 and the respondents, including numerous lengthy affidavits with many exhibits which include many photographs of the Unit's exclusive use common elements balcony, copies of many written correspondence between the parties and counsel, a lengthy video recording of the laundry room incident and several transcripts from cross-examinations.

[32] A dispute as to any facts is not the test whether conversion of an application to a trial is required. Disputed facts must be relevant and material to the issues to be determined, which in this case involves whether or not the respondents have breached the Act, the Declaration, the By-laws

and/or the Rules: *Metropolitan Toronto Condominium Corp. No. 965 v. Metropolitan Toronto Condominium Corp. No. 1031*, 2014 ONSC 4458, para. 12 and *Canada Post Corp. v. G3 Worldwide Canada Inc. (c.o.b. Spring)*, 2007 ONCA 348, para. 41.

[33] R. 14.05(2) authorizes the commencement of a proceeding by application where authorized by statute.

[34] S. 134(1) of the Act permits CCC 15 and each of the respondents to commence a proceeding by application in this court for an order enforcing compliance with any provision of the Act, the Declaration, the By-laws and/or the Rules. Given the alleged breaches of the Act and those governing documents by the respondents, CCC 15 was authorized under the Act to bring this proceeding by application.

[35] Given that legislative authority, CCC 15 has a *prima facie* right to proceed by application and this proceeding should not be converted into an action without good reason to do so. The court should not convert this application into a trial unless:

- a. there are relevant material facts in dispute; and
- b. the court cannot properly resolve the material facts without the benefit of a trial: *Sekhon v. Aerocar Limousine Services Co-Operative Ltd.*, 2013 ONSC 542, paras. 48 and 49, *Metropolitan Toronto Condominium Corp. No. 965 v. Metropolitan Toronto Condominium Corp. No. 1031*, 2014 ONSC 4458, para.10 and *Seaworld Parks & Entertainment LLC v. Marineland of Canada Inc.*, [2011] O.J. No. 3105 (SCJ), paras 28-29.

[36] A court in determining whether to convert an application into an action with a trial of an issue will consider factors including:

- a. whether there are relevant material facts in dispute;
- b. whether there are complex issues;
- c. whether there is a need for the exchange of pleadings; and
- d. the importance and the nature of the relief sought: *Metropolitan Toronto Condominium Corp. No. 965 v. Metropolitan Toronto Condominium Corp. No. 1031*, para. 13 and *Sekhon*, para 51.

[37] If the application cannot fairly be determined by the summary process of affidavits and cross examination, it should proceed to trial and a hearing of witnesses. An application should not

be converted into an action with a trial however if the determination of the issues, including issues of credibility, can properly be determined on the application record, namely whether the affidavits and cross-examination transcripts are sufficient to decide any credibility issues. There is little point to a court converting an application into an action however if the same issues could then be determined on a motion for summary judgment, as such issues do not require a trial: *Sekhon*, paras. 51-52 and *Metropolitan Toronto Condominium Corp. No. 747 v. Korolekh*, [2010] O.J. No. 3491, paras 54-55.

[38] This application does not involve complex legal or factual issues.

[39] The facts in this application are relatively simple. The provisions of the Act, the Declaration, the By-laws, the Rules and the Consent Order which contain the obligations of each of the parties and which CCC 15 alleges were breached, are clear and not in dispute.

[40] There are multiple original and subsequent affidavits filed by the parties. There three days of cross-examinations thereon in November 2020.

[41] The category of events relied upon by CCC 15 in support of the relief sought have decreased from those originally pled. The disputed facts as to CCC 15's original complaints no longer relied upon by it included reports of excessive noise disturbances by Mr. Gauthier, unidentified third party hearsay reports of Mr. Gauthier's aggressive conduct towards others in CCC 15 and Mr. Gauthier's reported carrying of a cross-bow and a gun holster. The disputed facts as to events which CCC 15 no longer relies upon are not irrelevant and are not a reason to convert this application to an action.

[42] The remaining material and relevant facts are as to the acts and non-action of the respondents in relation to the obligations in the Act, CCC 15's governing documents and the Consent Order.

[43] The applicant and the respondents have each filed several factums which articulate their positions as to the issues and what evidence they rely upon in relation thereto. Those factums and the numerous affidavits filed indicate that a court does not need and would not be assisted in deciding the issues by the filing of statements of claim and defence.

[44] The relief sought is important to CCC 15 in conducting its obligations under the Act regarding condominium property, safeguarding the interests of and the need to protect condominium residents from the risk of harm or injury.

[45] The relief sought is also important to the respondents who are faced with Mr. Gauthier possibly being required to move elsewhere and the risk of a cost award if they are unsuccessful.

[46] An earlier determination of the issues in this proceeding are preferable to the inevitable delay in commencing an action and the associated costs in bring that proceeding to trial.

Mr. Gauthier's Alleged Prior Misconduct in Another Condominium Corporation

[47] CCC 15's legal counsel wrote to Mr. Poirier on August 8, 2018 and stated that during his prior tenancy in one of the adjoining condominium towers, complaints had been made to Mr. Gauthier about his conduct in that other corporation. CCC 15 stated its expectation in this letter that the Poiriers would commence eviction proceedings if there was any misconduct by Mr. Gauthier in CCC 15.

[48] The Poiriers on the evidence did not commence proceedings to evict Mr. Gauthier from the Unit pursuant to CCC 15's August 8, 2018 letter as to its expectation. The Poiriers have not commenced a cross-application against Mr. Gauthier in this proceeding and are supportive of their tenant's position.

[49] CCC 15 in this application does not rely upon Mr. Gauthier's conduct as a tenant in another condominium corporation. His prior conduct in another condominium is not relevant to the issues in this application and does not justify converting this application into an action.

[50] Mr. Gauthier however submits that a trial is necessary as this August 8, 2018 letter shows CCC 15's then and continuing underlying prejudice towards him and its intention from the beginning to evict him on meritless grounds. As will be seen, Mr. Gauthier's common response to criticism or a statement that he has committed a breach of the Act or CCC 15's governing documents is to avoid the substance of the complaint by alleging wrongdoing by the complainant.

[51] This application is about alleged breaches by Mr. Gauthier and the Poiriers of the Act, the Declaration, the By-laws and the Rules while Mr. Gauthier was a tenant in the Unit in CCC 15. The issues are whether or not such breaches occurred within CCC 15, and if so, what are the appropriate remedies.

[52] Given that Mr. Gauthier's prior conduct in another condominium is not in issue, no trial is required regarding disputed facts as to those prior events and issues or CCC 15's August 8, 2018 letter of expectation. The absence of the relevancy of that August 8, 2018 letter will become clearer for the reasons hereafter indicated.

Breaches Relied Upon by CCC 15

[53] The events relied upon by CCC 15 in this application, which are the subject matters of this application, are summarized as follows:

1. Mr. Gauthier's repeated denials of access to the Unit and the Unit balcony, between October 1, 2018 and July 30, 2019, as prohibited by s. 19 of the Act and CCC 15's Declaration and By-law;
2. a September 5, 2019 laundry room assault and intimidation incident by Mr. Gauthier of Mr. Beaudet, contrary to s. 117 of the Act;
3. A statement by Mr. Gauthier in August 2019 to CCC 15's Property Manager representative that if the President of CCC 15 did not stop bothering him, he would punch him, contrary to s. 117 of the Act and the Consent Order;
4. Alterations by Mr. Gauthier to the Unit's common element balcony in the construction and installation of wooden fences at the ends of, at the front of and over the front railing of the Unit balcony, both prior to and after the Consent Order, contrary to s. 98 of the Act, Article IX (1)(d) of the Declaration and the continuance thereof contrary to the Consent Order;
5. Installation by Mr. Gauthier of a green carpet over the common elements' balcony floor, in contravention of CCC 15's by-law and rules;
6. Installation by Mr. Gauthier of storage and storage units extending above the height of the Unit balcony railing, in contravention of CCC 15's By-laws, Rules and the continuance thereof in contravention of the Consent Order;
7. Installation by Mr. Gauthier of unauthorized storage cabinets on the Unit balcony higher than the balcony railing and two unauthorized storage cabinets at Unit's assigned parking space without permission of CCC 15, as required by CCC 15's Rules and in contravention of the Consent Order; and

8. Mr. Gauthier's July 1, 2020 breach of CCC 15's Covid-19 protocol policy, constituting a breach of s. 117 of the Act, CCC 15's then Covid-19 policy and resulting breach of the Consent Order.

Denial of Access

[54] CCC 15 alleges that Mr. Gauthier on October 1, November 5, 8, and 14, 2018, February 20, May 31 and July 30, 2019 and Mr. Poirier on one of those occasions, denied access to the Unit and/or to the Unit's balcony via the Unit, to its Directors and/or some representatives including contractors of the condominium corporation.

[55] Mr. Gauthier by affidavit in response to the above alleged denials of access acknowledges that he has denied entry into the Unit to members of CCC 15's Board of Directors, whether they were alone or while accompanying a contractor engaged by CCC15, because he has a lot of difficulty trusting Board members and there is no reason for a Board member to enter any unit in CCC 15.

[56] Mr. Gauthier by affidavit acknowledges that he on occasion denied entry to contractors of CCC 15 to the Unit for work that he considered was not required to be done on the Unit balcony. He states that the Unit balcony in any event could be accessed by such workmen by the adjoining balconies on either side of the Unit as the dividing walls between unit balconies have gates to allow access to the Unit balcony. This second argument ignores the wooden fences or walls which Mr. Gauthier installed at the ends of the Unit balcony preventing use of the existing gates between the adjoining balconies of the adjoining units.

[57] Mr. Gauthier by affidavit admits that he has denied access to CCC 15's contractors as a contractor was alone and was not then supervised by CCC 15's Superintendent.

[58] The allegations of denial of access given the above acknowledgments by Mr. Gauthier do not require a trial in order to evaluate credibility.

September 5, 2019 Laundry Room Incident

[59] The court has a September 5, 2019, one hour and 36 minute continuous security video recording of the full interior of CCC 15's laundry room and this incident, including the then interaction between Mr. Gauthier with Mr. Allard and Mr. Beaudet.

[60] While not denying there was a physical interaction between himself and Mr. Beaudet, Mr. Gauthier submits CCC 15 is exaggerating what happened. He denies that he restricted Mr. Allard's movement on this occasion. The video recording clearly contradicts these submissions of Mr. Gauthier.

[61] That recording shows Mr. Gauthier standing for 73 minutes at the entrance to a narrow corridor in the laundry room, between a line of clothing washers or dryers on one side and a counter on the other side, on which Mr. Gauthier places and maintains one hand on either side of those corridor surfaces while speaking to Mr. Allard. The other end of that narrow corridor is a closed wall with no exit.

[62] Mr. Gauthier in his affidavit states that he was disturbed upon hearing Mr. Allard state that he was always cleaning up after the respondent and Mr. Gauthier therefore needed to speak to him, but he did not restrict Mr. Allard's movement during this 73 minute period. He states that Mr. Allard during their conversation had misinformation about him which he found very disturbing and felt must have come from CCC 15's Directors.

[63] Mr. Allard during these 73 minutes, twice walks forward to within an inch or two of Mr. Gauthier who did not move and maintained his outstretched hands on the washing machine and adjacent countertop.

[64] Mr. Allard at one point in attempting to discard a paper towel he had been using, reaches towards but cannot reach and access a garbage pail behind Mr. Gauthier, who remains in the same position with outstretched hands on the two surfaces as Mr. Allard tries to reach for the garbage pail. Mr. Allard then steps back in the narrow corridor and places the paper towel in the sink located inside the subject corridor.

[65] Three women subsequently entered the laundry room. Mr. Allard, using his outstretched thumb and small finger of one hand, signalled to the women to telephone someone. One of the women speaks to Mr. Gauthier and repeatedly touches his shoulder while doing so.

[66] Mr. Beaudet entered the utility room at minute 73 and immediately goes to and speaks to Mr. Gauthier. Mr. Gauthier in his affidavit states that Mr. Beaudet told him that he “could not do that”, when Mr. Gauthier was only having a discussion with Mr. Allard and that Mr. Gauthier then told Mr. Beaudet “it was none of his concern, doesn’t matter what you think, should not get involved and to go away.”

[67] Mr. Beaudet in the video then places one arm under one of Mr. Gauthier’s outstretched arms resting on the countertop, moves his shoulder against Mr. Gauthier and forces him against the adjacent washer, thereby creating a narrow passageway behind Mr. Beaudet, who then with his head signals to Mr. Allard to exit the corridor by passing behind Mr. Beaudet. Mr. Allard then exits the corridor behind Mr. Beaudet, into the main laundry room area.

[68] Mr. Gauthier in his affidavit states that Mr. Beaudet threw himself against and pushed the respondent against the washing machine. He states he told Mr. Beaudet to stop but Mr. Beaudet he failed to stop so, in order to defend himself, Mr. Gauthier used a martial arts move to break Mr. Beaudet’s hold of him, namely that he grabbed the front of Mr. Beaudet’s shirt and pushed him against the laundry machine but was not hurting him. He states Mr. Allard tried to separate them, the three men then spun around, and Mr. Gauthier then released Mr. Beaudet.

[69] The video contradicts Mr. Gauthier’s above version of events. It shows Mr. Gauthier using both of his hands as he grabs Mr. Beaudet’s neck. Mr. Beaudet’s head moves backwards as this occurs. While holding him in this manner, Mr. Gauthier then pulls and forces Mr. Beaudet up against a washing machine. While still holding his neck with both hands, Mr. Gauthier then forcefully drags Mr. Beaudet across the laundry room up against the opposite wall. As he is so moved across the laundry room, Mr. Beaudet is partially lifted by his neck off the floor or otherwise is walking on his toes with his head still forced backwards. As this occurs, Mr. Allard pulls Mr. Gauthier’s arm back in attempting to stop Mr. Gauthier’s neck hold of Mr. Beaudet.

[70] Mr. Gauthier then releases Mr. Beaudet. Mr. Allard then holds Mr. Gauthier back as the respondent forcefully points at and attempts to move towards Mr. Beaudet. Mr. Gauthier in response, then with force pushes Mr. Allard out of the laundry room, while Mr. Beaudet attempts to stop Mr. Gauthier.

[71] There is no material facts in dispute requiring a trial in the face of this clear video evidence of these events.

Alterations to Unit's Balcony

[72] The photographic evidence of the additions and alterations to the Unit balcony indicate that Mr. Gauthier:

- a. Installed a wooden plank fence higher than, across and closing off the existing Unit balcony railing at the ends of the Unit balcony which separate the Unit balcony from the side of the balconies of the adjoining units;
- b. Installed a wooden plank fence across the full front railing of the Unit balcony on which he painted several flag images on the exterior of that plank wall;
- c. Added additional wood fencing in 2020 over the ledge of the Unit balcony railing; and
- d. laid a green carpet over some of the Unit's balcony floor in the summer of 2020, which in the photographs has four 2x4s on top of the carpet.

[73] The evidence is that CCC 15 has repeatedly advised the respondents that these alterations to the Unit's common element balcony, as well as storage shelving Mr. Gauthier placed on that balcony, were prohibited, unauthorized and must be removed.

[74] Mr. Gauthier by affidavit does not dispute the above evidence of balcony alterations. He undertakes to remove the same, if his right to privacy ceases to be breached by a resident living in an adjoining unit.

[75] The unauthorized addition of these elements to the Unit balcony in contravention of CCC 15's governing documents is the relevant issue in this application, not their level of or the permanency of their attachment.

[76] There are no relevant material facts in dispute as to this complaint which require a trial to determine credibility as to whether such breaches occurred.

Mr. Gauthier Threat to Strike Mr. Lefebvre

[77] Mr. Khan, a representative of CCC 15's Property Manager company, by affidavit dated November 11, 2019, states that in a discussion he had in August 2019, Mr. Gauthier stated that if the President of CCC 15 did not stop bothering him, Mr. Gauthier would punch Mr. Lefebvre.

[78] Mr. Gauthier does not address or deny this specific allegation in his subsequent three affidavits sworn on February 20, 2020, November 6, 2020 and January 19, 2021.

[79] Mr. Lefebvre's original November 12, 2019 affidavit contains information from unidentified persons regarding misconduct of Mr. Gauthier, which is why those allegations are not now before the court. Without altering that position, as to this specific allegation made by Mr. Khan as to what the Mr. Gauthier told him, the court notes that Mr. Lefebvre's affidavit alleges that Mr. Gauthier:

- a. was heard by some unidentified person yelling and threatening a neighbor condominium resident on December 30, 2018 and police were advised;
- b. as indicated by an unidentified source, was heard and seen running after a neighbouring resident in a threatening manner on January 1, 2019; and
- c. assaulted Mr. Beaudet in the laundry room on September 5, 2019, as shown on the security video recording.

[80] Mr. Gauthier's reply affidavit three months later dated February 20, 2020, limits his reply regarding the three allegations of his misconduct referred to in Mr. Lefebvre's affidavit and the allegation by Mr. Khan as to what Mr. Gauthier stated to him in their August 2019 conversation, to the following:

DANGEROUS BEHAVIOUR

9. I did not threaten anyone. The police did not contact me about this incident.

[81] Mr. Gauthier's second and third affidavits dated November 6, 2020 and January 19, 2021, again do not address or contradict Mr. Khan's allegation that Mr. Gauthier in August 2019 told him of his intention to strike Mr. Lefebvre, if he did not stop bothering him.

[82] Mr. Gauthier's second November 6, 2020 affidavit purports to speak on behalf of all three respondents. It does not address the four above specific allegations about his above alleged misconduct beyond stating CCC 15 has no proof, in stating:

9. Les Intimees sont de la croyance que les actions ne sont pas point en contrainte avec la section 117 ici mentionnee car l'interpretation des actions n'est au point de prevue.

[83] Mr. Gauthier's second affidavit specifically refers to and addresses the affidavits of Mr. Lefebvre and Mr. Miron, but it is silent as to Mr. Khan's affidavit and the alleged comment of the respondent in their August 2019 conversation.

[84] Mr. Gauthier's short, third, January 19, 2021 affidavit, relates to three other matters and does not address Mr. Khan's allegation as to what Mr. Gauthier told him in their August 2019 conversation.

[85] Mr. Gauthier during argument of the application specifically addressed Mr. Khan's allegation as to what he said to Mr. Khan during their August conversation. Mr. Gauthier in argument as to this conversation stated that that he did not say to Mr. Khan that he would punch Mr. Lefebvre and that in that conversation, he used a Quebec expression and told Mr. Khan that he would "donne une claque en derriere de sa tete" to Mr. Lefebvre.

[86] Punching or hitting someone is an assault and risks injuring the other person.

[87] There are no relevant material facts in dispute regarding this event which requires a trial.

Unauthorized Storage Cabinets on Unit Balcony and in Unit's Parking Space

[88] The evidence is that Mr. Gauthier had three storage cabinet or shelving on the Unit's balcony which exceeded the height of that balcony railing at the time of the annual inspection on October 1, 2018, that there was one such storage shelving on the Unit balcony in June 2019 and that the respondents had repeatedly been requested to remove the same as contravening B-law 4, as such shelving and the storage thereon above the height of the balcony railing posed risk of injury to others.

[89] Mr. Gauthier in his affidavit states that he will remove the storage shelving from the Unit balcony, if CCC 15 requires the removal of similar shelving or cabinets on the balcony of other units in CCC 15.

[90] Mr. Gauthier by affidavit admits he placed two storage cabinets in the Unit's underground designated parking space but states that when he previously resided in an adjoining condominium tower, he obtained permission to place such lockers in that other unit's parking space and that such prior authorization for the other parking space of that prior unit in another condominium should be binding on CCC 15 as to the Unit's designated parking space.

[91] Whether any such prior authorization in another condominium is binding on CCC 15, is not an issue of fact.

[92] Mr. Gauthier admits the allegations of fact as to his placement of these storage units on the Unit's balcony and in its designated parking space.

[93] There are no disputed material and relevant facts in issue as to these storage units requiring a trial of these issues.

July 1, 2020 Breach of COVID-19 Pool Restrictions

[94] The evidence is that CCC 15 and the two other adjoining condominium corporations jointly adopted and distributed a COVID-19 policy limiting the use of the shared outdoor pool facility to four people at a time in the pool and two others on the deck, restricted use of that facility to condominium residents only and prohibited attendance and use thereof to anyone else, in order to protect condominium owners, tenants and occupants from the risk of Covid-19 infection.

[95] CCC 15's affidavits of Mr. Miron and Mr. Desjardin, indicate such COVID policy regarding the pool was in place on July 1, 2020. Mr. Desjardin's affidavits states that Mr. Gauthier breached that policy in allowing too many individuals with him to use the pool on that date and that some of those people, contrary to the policy, were non-residents of the condominiums.

[96] Mr. Gauthier's November 6, 2020 supplementary affidavit states that Mr. Miron's statement in his affidavit that he was advised by Mr. Desjardin of this July 1, 2020 breach of the

pool COVID policy by Mr. Gauthier is hearsay evidence and that Mr. Miron has no personal knowledge regarding the July 1, 2020 pool event. Mr. Gauthier is correct on this point.

[97] Mr. Gauthier however in his subsequent November 6, 2020 and January 19, 2021 affidavits does not deny Mr. Desjardin's allegation that he breached such COVID-19 policy on this date by allowing non-residents and too many people to use the pool facility.

[98] A trial is not required to determine relevant, material disputed facts regarding this event.

Conclusion Regarding Motion to Convert Application to Action

[99] The respondents' motion that this application be converted to an action with a trial as there are disputed relevant and material facts as to these above events which should only be determined by testimony at trial is dismissed for the above reasons.

Whether Respondents Breached the Act, Declaration, By-laws, Rules and Consent Order

[100] The court will now determine whether the evidence and facts established constitute a breach by the respondents of the Act, the Declaration, the By-laws, the Rules and/or the Consent Order.

[101] Pursuant to s. 17(1) and (2) of the Act, the object and duties of CCC 15 are to:

- a. control, manage and administer the common elements on behalf of the condominium owners; and
- b. to take all reasonable steps to ensure the owners and occupiers of the units comply with the Act, the Declaration, the By-laws and the Rules.

[102] S. 119 (1) to (3) of the Act state that:

- a. owners and occupiers of condominium units shall comply with the Act, the declaration, the by-laws and the rules;
- b. a unit owner is required to take all reasonable steps to ensure that an occupier of its unit comply with the Act, the declaration, the by-laws and the rules; and
- c. a condominium corporation has the right to require that a person comply with the Act, the declaration, the by-laws and the rules.

[103] Article XX of CCC 15's Declaration states that owners and tenants of condominium units shall be subject to and shall comply with the provisions of the Declaration, the By-laws and the Rules and Regulations as amended from time to time.

Denial of Access

[104] The evidence establishes that Mr. Gauthier or Mr. Poirer, despite prior notice from the corporation, denied access to the Unit and/or its balcony to representatives of CCC 15, including members of its Board and/or its contractors on:

- a. on October 1, 2018, to CCC 15's Board Member Mr. Paquette;
- b. on November 5, 2018, to CCC 15's contractor Brook Restoration;
- c. on November 8, 2018, to CCC 15's Onsite Manager, Daniel Paquette;
- d. on November 14, 2018, to CCC 15's representative and its contractor Brook Restoration;
- e. on February 20, 2019, to CCC 15's representatives;
- f. on May 31, 2019 to; to CCC 15's representative and its contractor RoofMaster Ottawa Inc.; and
- g. on July 30, 2019 to CCC 15's representatives to conduct the annual inspection.

[105] S. 19 of the Act states:

19 On giving reasonable notice, the corporation or a person authorized by the corporation may enter a unit or a part of the common elements of which an owner has exclusive use at any reasonable time to perform the objects and duties of the corporation or to exercise the powers of the corporation.

[106] Article X of CCC 15's Declaration states:

RIGHTS OF ENTRY

1. **The Corporation** or any insurer of the property or any part thereof, **their respective agents or any other person duly authorized by the Corporation shall be entitled to enter into any unit or any part of a common element of which any owner has the exclusive use at all reasonable times and upon giving reasonable notice for the purpose of making inspections**, adjusting losses, **making repairs, correcting any condition** which violates the provisions of any insurance policies, or any conditions **which might result in damage to the property or carrying out any**

duty imposed upon the Corporation. In case of an emergency, an agent of the Corporation may enter the unit at any time and

The rights and authority hereby reserved to the Corporation, its agents or any insurer or its agents **do not impose any responsibility or liability whatever for the care or supervision of any unit.** (emphasis added)

[107] CCC 15's Rules as to access states:

Rules Balconies and Patios

Balconies and patios form part of the common elements. Access through units may sometimes be required for inspection and maintenance purposes

.....

The corporation may conduct scheduled inspections and maintenance at pre-determined intervals each year. If upon entry, the Corporation discovers any condition which contrevenes the Act, , the Declaration, By-laws or rules, the Corporation may take steps to remedy that condition, give notice to the unit owner or take other steps as the Board of Directors deems appropriate. ... the owner of the unit shall be responsible for any such condition It is the duty of the unit owner ... to take any corrective action.

[108] The respondents' denial of access to the Unit and/or its balcony on these occasions breached s. 19 of the Act and the above provisions of the Declaration.

September 5, 2019 Laundry Room Incident

[109] The video evidence establishes with no doubt that Mr. Gauthier assaulted Mr. Beaudet, used force against Mr. Allard and restricted the movement of Mr. Allard on this occasion.

[110] S. 117 of the Act states:

117 No person shall permit a condition to exist or carry on an activity in a unit or in the common elements if the condition or the activity is likely to damage the property or cause injury to an individual.(emphasis added)

[111] Mr. Gauthier's assault of Mr. Beaudet and his use of force against Mr. Allard breached s. 117 of the Act and could well have caused injury to those individuals.

Alterations to Unit's Balcony

[112] The evidence establishes that Mr. Gauthier installed wooden fencing along the front of the Unit's front balcony railing, over the top of that railing in 2020, at the end of the Unit balcony and covered a portion of the Unit's balcony's floor with carpeting in 2020.

[113] S. 98 (1) of the Act contain the following provisions:

- (1) An owner may make an addition, alteration or improvement to the common elements that is not contrary to this Act or the declaration if,
 - (a) the board, by resolution, has approved the proposed addition, alteration or improvement;
 - (b) the owner and the corporation have entered into an agreement that,
 - (i) allocates the cost of the proposed addition, alteration or improvement between the corporation and the owner,
 - (ii) sets out the respective duties and responsibilities, including the responsibilities for the cost of repair after damage, maintenance and insurance, of the corporation and the owner with respect to the proposed addition, alteration or improvement, and
 - (iii) sets out the other matters that the regulations made under this Act require;

[114] Article IX (1) (d) of the Declaration states that a fence, screen or erection of any kind shall be erected within an exclusive use portion of the common elements unless the plan with the specifications, materials and location is first submitted and approved in writing by CCC 15.

[115] Article XVI (1) of the declaration states that no owner may decorate any part of the common elements or any exclusive use balcony without the prior written consent of CCC 15's Board of Directors.

[116] CCC 15 objected to and did not authorize the wooden fencing additions to the Unit balcony, the flag decorations on such wooden fencing or Mr. Gauthier's 2020 placement of a green carpet over the Unit balcony floor.

[117] The Poiriers and Mr. Gauthier on the evidence were repeatedly notified by CCC 15 in writing that these matters were prohibited and must be removed.

[118] The respondents thereby breached s. 98(1) of the Act and Articles IX and XVI of the Declaration.

[119] The wooden structures and alterations added to the Unit balcony by Mr. Gauthier, on the evidence, continued after and thereby breached the December 13, 2019 Consent Order's compliance requirement.

[120] As to covering the Unit's balcony floor with carpet, CCC 15's By-Law No. 14 states:

1. The corporation's By-law No. 9 is amended as follows: ...
For the purpose of clarity, this amending by-law has the result of **prohibiting any installation of balcony flooring or coverings** in reliance upon the terms of By-law No. 9.
2. Any **unit owner seeking to install any type of flooring or covering on the balcony must seek the consent of the Board of Directors and have a separate agreement** prepared and registered pursuant to section 98 of the Act should such approval be granted. (emphasis added)

[121] The carpeting placed by Mr. Gauthier over the Unit balcony floor in 2020 and his addition of wooden fencing in 2020 over the Unit's balcony railing breached By-law 14 and thereby breached the Consent Order.

Mr. Gauthier Threat to Strike Mr. Lefebvre

[122] The evidence establishes that Mr. Gauthier communicated his intention to strike Mr. Lefebvre, if the latter's conduct continued.

[123] The evidence does not indicate that Mr. Gauthier ever communicated such a threat to Mr. Desjardin or that Mr. Gauthier ever performed the threatened act.

[124] Communication of that conditional threat to a third party was not in itself an activity likely to cause injury to Mr. Lefebvre, but it is a threat of conduct which is likely to cause injury and prohibited under s. 117 of the Act.

Storage Shelving On Unit Balcony

[125] The evidence indicates that Mr. Gauthier placed storage shelving on the Unit balcony on which he stored items. That shelving, as indicated in the photographs in evidence, is much higher than the height of the Unit balcony railing and therefore contrary to By-law 14.

[126] The evidence indicates that CCC 15 requested the removal of such balcony shelving on several occasions, however Mr. Gauthier continued to maintain such shelving on that balcony, both before and after the Consent Order, which the Poiriers failed to remove.

[127] CCC 15's Rules as to storage on unit balconies also states:

If storage units are used, these cannot stand higher than the height of the balcony railing for safety and esthetic reasons.

Reasons as to safety include the risk of shelving and/or their contents falling or being blown off the Unit balcony and the resulting risk of injury to others including CCC 15 residents.

[128] Whether another unit owner or their tenant is in breach of the Act or CCC 15's governing documents does not relieve a similar breach by the respondents. Article XXII of the Declaration states the exact opposite and maintains CCC 15's right of enforcement regarding breaches by the respondents.

[129] Similar non-waiver clauses have been recognized as providing a complete answer to any argument by non-compliant owners based on *laches* or estoppel: *Ballingall v. Carleton Condominium Corp. No. 111*, [2015] O.J. No. 2020, para. 71.

[130] In maintaining such shelving on the Unit balcony with items stored thereon, the respondents thereby breached s. 117 of the Act, the Declaration, the Rules and the Consent Order in not removing the same subsequent to December 13, 2019.

Storage Cabinets In Unit's Designated Parking Space

[131] Article VIII (I) of CCC 15's Declaration states that:

- a. each unit is entitled to the exclusive use of one parking space to be designated by CCC 15; and

- b. unit owners were allowed to install storage lockers at the top end of their assigned parking space, in accordance with all requirements set out in the By-laws, Owners however must first receive pre-approval in writing from the Property Manager for the installation of such lockers.

[132] The Rules of CCC 15 contain provisions with the same above Declaration requirements.

[133] Mr. Gauthier on the evidence never requested or received authorization from CCC 15, or the Property Manager, for the lockers he installed in the Unit's designated parking space. His response to CCC 15 which objected to such lockers was that he obtained permission for a parking space while residing in one of the adjoining condominiums, that CCC 15 should go and obtain proof of that other authorization and that such former permission constituted his right to have the cabinets in the Unit's designated parking space.

[134] Any prior permission Mr. Gauthier obtained from another condominium corporation to install lockers in the parking space of a unit in another condominium corporation may indicate it was likely that the Property Manager would grant a similar installation approval for the Unit's parking space, but that is speculation and not evidence as to this event.

[135] Mr. Gauthier under the Declaration was required to obtain approval for the storage cabinets he placed in the Unit's designated parking space. He did not on the evidence ever apply for or obtain that approval as to The Unit's designated parking space.

[136] CCC 15 on November 15, 2018 advised Mr. Poirier as to the above storage cabinet prohibition pursuant to the Declaration and the Rules, the lack of authorization regarding the same and requested the removal of the storage cabinets from the Unit's designated parking space.

[137] Such storage cabinets on the evidence remained there and were not removed contrary to the Consent Order.

[138] The placement of these cabinets without prior authority and their continuing presence in the Unit's designated parking space establish that Mr. Gauthier and the Poiriers thereby breached the Declaration, the Rules and the Consent Order.

July 1, 2020 Breach of COVID-19 Pool Restrictions

[139] The uncontradicted evidence of Mr. Desjardin is that Mr. Gauthier on this date permitted the attendance of non-condominium residents to attend and use the pool facilities and that the number of people with him exceeded CCC 15's then COVID-19 policy limit and restrictions.

[140] CCC 115's COVID-19 policy regarding use of the common pool facilities was reasonable and subject to the same test as to enforcement of its Rules: *Toronto Standard Condominium Corporation No. 1701 v. Fraser*, 2020 ONSC 5430, para. 19.

[141] Mr. Gauthier in breaching CCC 15's COVID-19 policy thereby breached s. 117 of the Act by acting in a manner which exposed others to the risk of injury through infection in this pandemic.

[142] Mr. Gauthier's conduct on this occasion thereby breached the Consent Order.

Whether Mr. Gauthier's Lease Should be Terminated

[143] Termination of Mr. Gauthier's lease, as requested by CCC 15 pursuant to s. 134(4)(a) of the Act, for his breaches of the Consent Order is clearly an important and serious remedy.

[144] The court grants that remedy and orders the termination of Mr. Gauthier lease for his above stated breaches of the December 13, 2019 Consent Order, paragraphs 4 and 5. Mr. Gauthier breached those orders in failing to follow its requirement that he comply with the Act, the Declaration, the By-laws and the Rules subsequent to December 13, 2019 in:

- a. failing to remove the wooden alterations to the three sides of the Unit's balcony and in adding wooden structures over such balcony railing in 2020;
- b. failing to remove the carpeting he placed in 2020 over the Unit's balcony floor;
- c. failing to remove the shelving on the Unit's balcony;
- d. failing to remove the storage cabinets in the Unit's designated parking space;
- e. in installing carpet over the Unit balcony's flooring in 2020 and
- f. in exposing others to the risk of injury through infection on July 1, 2020 in his then breach of CCC 15's Covid-19 pool limitation policy.

[145] Living in a residential condominium as in this case requires a unit owner and a unit tenant to comply to the requirements of the Act, the condominium's governing documents and interim

court orders: *Metropolitan Toronto Condominium Corporation No. 747 v. Korolekh*, 2010 ONSC 448, at para. 88.

[146] Unit owners and their tenants are not entitled to choose which of those legislative, condominium governing document requirements or court orders they will and will not comply with.

[147] The evidence establishes that CCC 15 has on numerous occasions in writing requested that the respondents comply with the sections of the Act and the condominium's governing documents as referred to herein.

[148] Mr. Gauthier and the Poiriers, despite their consent to the Consent Order, elected to not comply to CCC 15's past and ongoing requests to remove the above Unit balcony additions, the shelving and storage of items on the Unit balcony and the unauthorized cabinets in the Unit's designated parking space which were prohibited pursuant to the Act and CCC 15's governing documents as cited above.

[149] Failure to take such corrective actions not only continued the identified breaches of the Act and the governing documents. Continuation of those unremedied breaches after December 13, 2019, contravened the Consent Order.

[150] The 2020 additions by Mr. Gauthier to the Unit's balcony of carpeting over its floor and wooden fencing over that balcony railing, as well as his exposure of the risk of Covid-19 infection and therefore injury to other condominium residents on July 1, 2020, breached sections 98 and s.117 of the Act, the Declaration, the Rules and the Consent Order's requirement that the respondents comply with the Act and the governing documents.

[151] Residential condominium corporations cannot be expected to fulfill their statutory obligation in s. 17 of the Act requiring that they "manage the property and the assets of the corporation on behalf of the owners and their duty to "control, manage and administer the common elements and the assets of the corporation", where unit owners and their tenants ignore the Act, the governing documents and the Consent Order as occurred in this case.

[152] The court pursuant to s. 134(4)(a) of the Act accordingly orders the termination of the tenancy of and occupation by Mr. Gauthier of the Unit, effective September 30, 2021 and as otherwise requested in the order number 6 requested by CCC 15. The court selects this September 30 date to enable Mr. Gauthier to obtain and move to other accommodation outside of CCC 15 by that date.

Conclusion

[153] Pursuant to the above analysis and determinations of breaches by the respondents, the court also grants the orders and declarations requested in the Amended, Amended Notice of Application, numbered 1 through 5 in the relief claimed.

[154] The court orders that the respondents until September 30, 2021, shall comply with the provisions contained in the alternative order requested by CCC 15 and numbered 7 (a) to (d) of its requested relief.

[155] The court grants the order numbered 8 as requested by CCC 15 until September 30, 2021, permitting it to file an affidavit and seek the earlier termination of Mr. Gauthier's lease and his occupation of the Unit in the event of any subsequent breach by Mr. Gauthier of the orders granted in this decision.

[156] The court does not understand the need for the final order number 9 requested, given the provisions in sections 85(1) and 134(5) of the Act. Notwithstanding that repetition, which would not thereby cause additional harm to the respondents, the court, subject to the its' subsequent determination and award of costs in this proceeding, orders that should it award costs to CCC 15, the same may be added to the common expenses of the Unit and be recoverable as such, including by way of condominium lien against the Unit.

[157] The respondents as stated brought no counter application. The relief Mr. Gauthier and Mr. Poirier refer to in their affidavits against CCC 15 cannot therefore be determined. The court lacks jurisdiction to grant any such relief in the absence of a cross-application by the respondents.

Justice P. Kane

Released: May 25, 2021

CITATION: Carleton Condominium v. Poirier, 2021 ONSC 3778
COURT FILE NO.: CV-19-79782
DATE: 2021/05/25

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

CARLETON CONDOMINIUM CORPORATION NO.
15

Applicant

– and –

MARC POIRIER, SUZANNE POIRIER, AND
SEBASTIEN GAUTHIER

Respondents

APPLICATION DECISION

Kane J.

Released: May 25, 2021