COURT OF APPEAL FOR ONTARIO

CITATION: Mohamoud v. Carleton Condominium Corporation No. 25, 2021 ONCA 191
DATE: 20210329
DOCKET: C67919

Tulloch, Miller and Thorburn JJ.A.

BETWEEN

Sadiya Ali Mohamoud

Applicant (Appellant)

and

Carleton Condominium Corporation No. 25

Respondent (Respondent)

Gary G. Boyd and Hilary Chung, for the appellant

Melinda Andrews, for the respondent

Heard: November 17, 2020 by video conference

On appeal from the judgment of Justice Heather J. Williams of the Superior Court of Justice dated December 9, 2019, with reasons reported at 2019 ONSC 7127.

REASONS FOR DECISION

[1] The appellant appeals the order of the application judge dated December 9, 2019, which dismissed her application under the *Condominium Act*, 1998, S.O. 1998, c. 19 ("the Act").

[2] The appellant has owned a unit in the respondent's condominium since 2009. The appellant brought an application against the respondent alleging that:

(1) the corporation failed to properly maintain and repair the common elements of the condominium building under ss. 89 and 90 of the Act, and (2) it acted in a manner that was oppressive or unfairly prejudicial, or that unfairly disregarded her interests, under s. 135 of the Act.

[3] The application involved a noise complaint relating to fans located on the roof directly above the appellant's condominium unit. The appellant informed the respondent that the noise was causing her discomfort in 2014. In 2019, the respondent removed two fans above the appellant's unit. According to the appellant, the removal of these two fans reduced the noise to a tolerable level. The appellant alleged that the respondent did not take her complaints seriously, and did not rectify the problem in a timely manner.

[4] The appellant asks this court to set aside the order of the application judge, raising two grounds of appeal:

1. the application judge erred in using the legal test of "reasonableness" when determining whether the respondent corporation acted oppressively within the meaning of s. 135 of the Act; and

2. the application judge erred by only considering the applicant's reasonable expectation that the respondent would comply with its maintenance and repair obligations, without also considering her other reasonable expectations, including that: the respondent would address her concerns in a timely manner; she could have quiet enjoyment of her unit; the respondent would act in accordance with the professional advice it received; and the respondent would take her concerns seriously.

[5] For the following reasons, we dismiss the appeal.

A. THE TEST UNDER S. 135(2) OF THE ACT

[6] The judge dismissed the application, finding that the respondent met its obligations under the Act. In particular, she found that the respondent acted reasonably and appropriately when responding to the appellant's noise complaint.

[7] The appellant agrees that the application judge properly applied the test of reasonableness when she assessed whether the respondent breached its obligation to maintain and repair the common elements of the condominium under ss. 89 and 90 of the Act. However, she submits that the application judge erred in applying the same test of reasonableness when determining whether the respondent's conduct was oppressive within the meaning of s. 135 of the Act. Put another way, the appellant contends that the application judge conflated the test of oppression under s. 135 of the Act with the test of reasonableness under ss. 89 and 90.

[8] Under s. 135(2) of the Act, the court must determine whether the impugned conduct is, or threatens to be, oppressive or unfairly prejudicial to the applicant or unfairly disregards their interests. The test under s. 135(2) has two prongs. First, the court must assess whether there has been a breach to the claimant's reasonable expectations. If the answer is yes, the court must then go on to consider whether the conduct complained of amounts to oppression, unfair prejudice, or unfair disregard of the relevant interest: *Metropolitan Toronto*

Condominium Corporation No. 1272 v. Beach Development (Phase II) Corporation, 2011 ONCA 667, 285 O.A.C. 372, at paras. 5-6; *3716724 Canada Inc. v. Carleton Condominium Corporation No. 375*, 2016 ONCA 650, 61 B.L.R. (5th) 173, at para. 29.

[9] Reading the application judge's reasons in their totality, it is clear that she understood and applied the correct test under s. 135(2) of the Act. The application judge correctly sets out the test at para. 36 of her reasons:

> A unit owner seeking an oppression remedy under the *Condominium Act* must show both that there was a breach of their reasonable expectations and that those reasonable expectations were breached by conduct legitimately characterized as oppressive. (*Weir*, supra, at paras. 10-11.)

[10] The application judge also grasped the nature of the appellant's claim in relation to s. 135(2): namely, that the respondent allegedly "ignored her, disbelieved her complaints about the noise and deliberately dragged its heals when responding to her complaints."

[11] After thoroughly engaging with these concerns, the application judge made the following finding:

> I find that Ms. Mohamoud had a reasonable expectation that CCC25 would comply with its statutory obligations to repair and maintain its common elements. I also find that CCC25 acted reasonably and in compliance with these obligations.

Stated otherwise, the application judge found that the appellant failed to satisfy the first prong of the test: the respondent did not act in a manner that breached the appellant's reasonable expectations because it acted reasonably and complied with its statutory obligations.

[12] Moreover, based on the factual matrix before her, the application judge was entitled to find that the respondent's conduct did not amount to oppression, unfair prejudice, or unfair disregard of the appellant's interests on the basis that the respondent acted reasonably. In our view, the evidence, as set out by the application judge, was consistent with the finding that the respondent did not act in a manner that was oppressive or unfairly prejudicial to the appellant, or that it unfairly disregarded her interests. In coming to that determination, the application judge noted that:

> 1. There was evidence that the fans were inspected and maintained on a regular basis by a company retained by the respondent;
>
> 2. After the appellant brought her concerns to the respondent's attention, the fans were inspected specifically with a view to identifying the source of the noise;
>
> 3. In August 2014, the respondent retained a company that inspected the roof of the building and found nothing that was rattling;
>
> 4. In January 2015, the same company inspected and serviced the fans, and was unable to identify any problems;

5. In the spring of 2015, the appellant retained a consultant who concluded that none of the noise levels in the appellant's unit exceeded industry guidelines. Highway traffic and a refrigerator were the sources of the loudest noises in the appellant's unit;

6. In June 2016, the company retained by the respondent inspected the fans and exchanged some of the blower assemblies. The company placed quieter blowers in the fans above the appellant's unit;

7. In February 2017, the company conducted an "on/off' test to ascertain which fans caused the noise. The appellant reported that turning off fans other than those over her own unit eliminated the noise problem entirely. The company removed those fans;

8. In September 2018, mechanical engineers inspected the two fans over the appellant's unit and concluded that neither fan was particularly noisy. One of the fans was quiet according to industry standards, while the other had only "a slight bearing noise";

9. The fans over the appellant's unit were serviced on October 5, 2018;

10. When the respondent sought to change the fans over the appellant's unit, the appellant's consultant objected to the installation instructions of the fans' manufacturer, resulting in further delay;

11. The new fans were installed on July 16, 2019, in accordance with the manufacturer's original instructions, even though the respondent's expert was of the opinion that these fans were not the cause of the noise in the appellant's unit; and

12. After the fans over the appellant's unit were replaced, the appellant initially said that the noise and vibration persisted, however her own expert did some testing and

> reported that the noise in her unit was at acceptable levels.

[13] As a result, the application judge was satisfied that the respondent had addressed the appellant's complaint in a reasonable manner by meeting with her, communicating with her orally and in writing, visiting her unit on multiple occasions, retaining contractors and experts to investigate, and in following the recommendations of the experts. The application judge's finding that the respondent's conduct did not amount to oppression, unfair prejudice, or unfair disregard is entitled to deference on appeal.

[14] We find no error in the decision of the application judge.

[15] This ground of appeal is dismissed.

B. THE APPLICANT'S OTHER REASONABLE EXPECTATIONS

[16] Again, the appellant submits that the application judge erred by failing to consider her reasonable expectations that: the respondent would address her concerns in a timely manner; she could have quiet enjoyment of her unit; the respondent would act in accordance with the professional advice it received; and the respondent would take her concerns seriously.

[17] The appellant's argument is not borne out in the facts, as found by the application judge, and as reiterated above, in para. 12. The respondent tried to address the appellant's concerns in a timely manner. It also tried to ensure that

she had quiet enjoyment of her unit. The respondent took action even when it was contrary to the professional advice that it had received. The application judge specifically found that the respondent took the appellant's concerns seriously, and that the respondent spent considerable amounts of money trying to address them.

[18] We find no error in the decision of the application judge. It appears the appellant is simply attempting to re-litigate the factual determinations made by the application judge.

[19] We give no effect to this ground of appeal.

C. CONCLUSION AND DISPOSITION

[20] The appeal is dismissed. As noted in the hearing, costs are awarded to the respondent in the amount of $12,000, inclusive of disbursements and HST.

"M. Tulloch J.A."
"B.W. Miller J.A."
"J.A. Thorburn J.A."