CITATION: Kikites v. York Condominium Corporation No. 382, 2022 ONSC 4606
COURT FILE NO.: CV-21- 00661981
DATE: 20220810

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ANDREAS KIKITES, Applicant

– and –

YORK CONDOMINIUM CORPORATION NO. 382, Respondent

BEFORE: Justice E.M. Morgan

COUNSEL: *Shawn Pulver and Elaine Jair*, for the Applicant

Avi Sharabi and Leigh Clark, for the Respondent

HEARD: August 9, 2022

ENDORSEMENT – CONDOMINIUM APPLICATION

[1] This Applicant seeks a number of remedies under the *Condominium Act, 1998*, SO 1998, c. 19 (the "Act") in respect of oppression that he says he suffers as a result of the Respondent's management. His complaint is that there is noise – in particular, nighttime noise – that he says interferes with his quiet enjoyment of his premises. The Applicant owns unit 2212 in a 45- story residential building called Palace Pier, located next to the Gardiner Expressway at 2045 Lakeshore Blvd, Etobicoke, ON.

[2] The noise is alleged to emanate from the unit immediately above him: unit 2312. The owner of unit 2312, Ms. Nives Ceronja, has twin children – a daughter and a son who is disabled and whose care requires operating medical equipment. Specifically, Ms. Ceronja's son, who is a quadriplegic, requires an oxygen and heart rate monitor on a table, a pump on a medical hospital pole with wheels, and an oxygen concentrator and humidifier. A nurse attends at unit 2312 every night of the week and stays all night long to provide care for the son.

[3] Ms. Ceronja is not a party to this Application. She was examined as a non-party by the Applicant and her transcript is in the record. In addition, both parties have produced reports by acoustical engineers. Applicant's counsel object to the admissibility of the third and final report

by the Respondent's engineer as it was delivered after the deadline on the court endorsed schedule for these proceedings. In an effort to encourage adherence to the scheduling of proceedings, I will disregard that late served report.

[4] However, even disregarding the Respondent's last report, the Respondent and the Applicant still have multiple engineering reports that were done within the agreed-upon time parameters. Perhaps not surprisingly, the experts have conflicting findings. Applicant's sound engineer found that noise from the medical machinery being operated in Ms. Ceronja's unit seeps down to the unit below; Respondent's sound engineer found that there is no or negligible noise coming from the unit above.

[5] The Respondent's expert evidence confirms that the building is built to Code and that there is no issue with the structure of the building itself producing noise or falling short of what is expected of a building of this nature. If there is an unusual amount of noise, it is a result of the use by the owner in the unit above the Applicant and not due to a physical/structural shortcoming of the building.

[6] The record before me is lengthy. It contains dozens of separate conversations and emails between the Applicant and the building management in which the Applicant complains of noises that invade his premises. It also contains documentation of numerous visits by the building management and security personnel to the Applicant's and Ms Ceronja's unit, with them generally finding that there are no unusually loud noises created by the medical equipment that Ms. Ceronja's son needs for his care.

[7] I do not think it fruitful to review the details of all of the complaints and visits to the units by the Respondent's personnel. Suffice it to say that each side accuses the other of being the faulty one – the Respondent says that the Applicant makes much ado about nothing, and the Applicant complains that the Respondent goes through the motions of looking into the matter but never does anything of substance to address the noise problem. The long history of accusations and recriminations shows me that each side is convinced of their respective positions and are somewhat unbending and closed to the other's position.

[8] The record also contains noise complaints by the Applicant relating to short periods of furniture moving, cleaning, and playing or jumping around by Ms. Ceronja's daughter. These latter instances are acknowledged by both parties, but they are not the issue that the Applicant seeks to remedy. To the extent that those types of noises have been identified, the Applicant has asked Ms. Caronja to see to it that it stopes and she has done so.

[9] As Applicant's counsel stated at the hearing before me, the real issue is the post-midnight noise from the unit above. Ms. Ceronja has explained in her testimony that a nightly nurse starts her shift at midnight and that in pursuing her duties she walks back and forth from the bedroom to the bathroom, kitchen, etc. In addition, certain medical procedures and the operation of medical equipment needs to be done all night long.

[10] This late-night activity, while necessary for Ms. Ceronja's son, is alleged to create a level of noise that may not be bothersome during the daytime when the Respondent's security personnel have visited the unit, but that is bothersome during what would be the Applicant's sleeping hours after midnight. In that respect, the Applicant's claim is credible. It cannot be a coincidence that where there is an unusual amount of movement and activity after midnight in one unit in a condominium building, there might be an unusual amount of noise from that movement and activity in the unit below.

[11] The Respondent has taken the position that the Applicant is overly sensitive to such noise. The Applicant takes issue with that, and I don't blame him. Other than the fact that he has complained about the noise, there is no evidence that he is somehow unusually sensitive.

[12] The more likely explanation is that the occupants of the unit above him are making some noise by having the nurse walk around and by running some medical equipment. It is not excessive to the point that it would be particularly noticed or bothersome in the daytime, but the fact is that there are daytime-like noises at nighttime coming from the unit above the Applicant. That experience, night after night, might well be experienced as a nuisance by most people who keep to standard sleeping hours.

[13] Counsel for the Applicant compare the present situation to other noisy neighbour controversies in the reported case law. As one example, they point to *Zaman v. Toronto Standard Condominium Corporation No. 1643*, 2020 ONSC 1262, where a condominium owner complained about consistent loud talking late into the night by neighbours on a balcony that was shared by the two owners. A second example relied on by Applicant's counsel comes from *Wong v. TSCC NO. 1918*, 2022 ONSC 3409, where a condominium unit was situated immediately adjacent to a noisy, vibrating trash compactor. A third example put forward by Applicant's counsel is my own decision in *Dyke v. Metropolitan Toronto Condo. Corp. No. 972*, 2013 ONSC 463, where the condominium owner complained of the noise created by her upstairs neighbours who, it turned out, where running a commercial dance studio in their apartment.

[14] In my view, the latter two cases are easily distinguished from the present case. In *Dyke*, the source of the noise was an unlawful, or non-municipally unauthorized commercial activity being conducted in a residential unit. It was readily apparent that the condominium corporation was in a position to intervene by enforcing the municipal by-law and insisting that the dance-instructor owners cease and desist from the improper use of their unit. In *Wong*, the source of the noise was the hallway trash compactor – i.e. a common element that was owned by and within the control of the condominium corporation itself. It was apparent that the remedy for the nuisance lay entirely with the corporation in quieting its equipment or limiting its hours of use, and not with any private unit owner.

[15] By contrast, the *Zaman* case presents a situation much closer to the present case. In *Zaman*, the noise nuisance was coming from a neighbour engaged not in illegal or improper activity *per se*, but rather in ordinary activity (i.e. audible conversation) at unusual hours of the night. The conversations, like the footsteps and other sounds coming from Ms. Caronja's apartment, were not

unusually loud for daytie activity, but were bothersome to the neighbour when they took place at night. The condominium corporation had asked the neighbours to stop their nighttime activity on the balcony, but this was to no avail according to the complaining unit owner.

[16] The court in *Zaman* dismissed the applicant's complaint. It was satisfied that the notification to the noisy neighbour and a request that they keep quiet at night was enough. Ordinary levels of noise, even if done at night, are not excessive enough to warrant any further intervention. Accordingly, *Zaman* held that a condominium corporation does not act oppressively by failing to stop this level of activity, and that in any case some activity within a privately owned unit is simply not within a condominium corporation's power to actually stop.

[17] In the case at bar, the Respondent sent its employees to the Applicant's and to Ms. Ceronja's unit on multiple occasions. When they identified remediable instances of noise, such as where Ms. Ceronja's daughter was running around the apartment, the Applicant asked that the bothersome activity cease. On the other hand, they could not, and would not, ask that the medical care needed by Ms. Ceronja's son cease.

[18] When the Appellant produced expert reports describing unusual sounds at night, the Respondent responded with its own expert reports. Those reports stated that the construction of the building was satisfactory and that there was not an excessive level of noise. Applicants' counsel take issue with those reports, but that is what they say. The Respondent cannot be said to have done nothing when it invested in two different experts who produced reports that the Applicant doesn't like.

[19] From the point of view of the hearing, there is a contest of experts and a mixed record. But from the point of view of a condominium corporation, the investigative expense incurred by the Respondent cannot be ignored. Applicant's counsel characterizes this as something that should have instantly been done as a first step by a condominium board, but I perceive it as an attentiveness to the Applicant that is above and beyond what might be expected. As I pointed out in *Dyke*, at para 29, in a noise dispute "[t]he commissioning of an expert report is somewhat beyond what one expects of a condominium corporation in its management function".

[20] Applicant's counsel suggest in their submissions that the real remedy here is the one proposed by the Applicant's engineer – installing a raised and padded floor in Ms. Ceronja's unit. From an engineering point of view that may well be a remedy, but from a legal point of view it is a problematic suggestion. While the condominium rules provide that each unit owner deserves quiet enjoyment of their property, they also provide limitations to the condominium corporation's authority.

[21] Specifically, the corporation has ownership and control over the common elements and what is usually called the 'envelope' of each unit, but it has no right in or authority over the interior of any privately owned unit. The Respondent is not in a position to renovate Ms. Ceronja's unit and install new flooring. If that were to be the remedy, Ms. Ceronja would have had to be a party to the Application. While I understand why the Applicant may not have been enthusiastic about

drawing Ms. Ceronja into this legal dispute, and I would not want to hazard a guess as to what would have been the result had he done so, the fact is that at present the court is left with no remedy for his complaint.

[22] The condominium corporation – the one and only Respondent before me – has done what it could and has not been oppressive in its conduct. It is not in a position, and cannot be expected, to either do internal renovations to another unit owner's unit. And given the conflicting sound engineering evidence and the fact that the noise is non-bothersome all day long, the Respondent is not in a position to compel another unit owner to renovate her unit. In any case, the Court certainly would not be in a position to order such a remedy without fulsome participation and legal submissions from that unit owner.

[23] I understand why the Applicant has brought these proceedings. I am willing to take him at his word that he hears noises that interfere with his sleeping hours. I sympathize. But that does not mean that this Application yields a legal remedy. The Respondent has not been oppressive toward the Applicant; it simply has no realistic means at its disposal to further address his concerns.

[24] The Application is dismissed.

[25] Under the circumstances, I will not add to the Applicant's burden by imposing on him costs. There will be no costs of this Application for or against any party.

Date: August 10, 2022 Morgan J.