COURT OF APPEAL FOR ONTARIO

CITATION: MacDonald v. Wentworth Condominium Corporation No. 96, 2022 ONCA 606
DATE: 20220824
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Huscroft, Harvison Young and Sossin JJ.A.

BETWEEN

Joan Marilyn MacDonald

Applicant (Appellant)

and

Wentworth Condominium Corporation No. 96

Respondent (Respondent)

Shawn Pulver and Elaine Jair, for the appellant

Megan Mackey and Luis Hernandez, for the respondent

Heard: August 16, 2022,

On appeal from the order of Justice Andrew J. Goodman of the Superior Court of Justice, dated February 20, 2020, with reasons at 2020 ONSC 1048.

REASONS FOR DECISION

[1] This is an appeal from the order of Justice Goodman dismissing the appellant, Joan Marilyn MacDonald's oppression application and granting the respondent's condominium corporation ("Condominium") motion for summary

judgment to enforce its lien against the appellant arising from her refusal to pay her share of a condominium assessment.

[2] The relevant facts are straightforward. The Condominium is the owner of a historically significant condominium building in Hamilton, Ontario and the appellant is the owner of one of the twelve building units. Due to the severely deficient reserve fund, as well as the significant structural repairs required to the building, the Condominium levied an additional special assessment of $181,666 on December 29, 2016. These expenditures were required to repair the balcony floors, masonry walls and the elevator. The appellant's share of this total was $21,765.40. This special assessment was levied without consulting the owners or holding a vote. The Condominium's Declaration provides the Condominium Board with wide discretion, and in particular, Article III 4(a) provides that "[t]he Corporation may by a vote of members" make substantial alterations. The motion judge, at para 59, relied on this provision to conclude that the Declaration was permissive of holding a vote to undertake the proposed repairs but did not require one. To the date of the order dated February 20, 2020, the appellant is the only owner who has refused to pay her share of the special assessment.

[3] On appeal, the appellant raised several grounds, which can be grouped into three categories: First, that the motion judge erred in finding that the repair work

to the balcony floors, masonry and elevator was remedial in nature, thus falling under the ambit of s. 97(1) of the *Condominium Act*. Second, that the motion judge erred in his oppression analysis regarding the Condominium's conduct toward the appellant. Finally, that the motion judge erred in failing to require a separate hearing in order to determine the outcome of the summary judgment motion.

[4] For the reasons that follow, we would not give effect to any of these grounds of appeal.

[5] In the course of oral argument, the appellant conceded that there could be no oppression regarding the lack of a vote on the restoration work, if we decided that the motion judge did not err in his finding that the restoration work was remedial within the meaning of s. 97(1) of the Act.[1]

[6] Turning to the first ground of appeal, we find no error in the motion judge's finding that the restoration work fell within the scope of remedial work within the meaning of s. 97(1) of the Act. The question of whether the restoration work fell

[1] Section 97(1) of the *Condominum Act* provides that:

> If the corporation has an obligation to repair the units or common elements after damage or to maintain them and the corporation carries out the obligation using materials that are as reasonably close in quality to the original as is appropriate in accordance with current construction standards, the work shall be deemed not to be an addition, alteration or improvement to the common elements or a change in the assets of the corporation for the purpose of this section.

within the ambit of s. 97(1) is a question of mixed law and fact. It is thus reviewable on a standard of palpable and overriding error.

[7] At first instance, the appellant argued that the failure to hold a vote on the special assessment was a breach of the Condominium's duty under s. 97(4) of the Act. The motion judge identified the relevant sections of the Act applicable to determining whether restoration work falls within the scope of remedial work. The motion judge first identified, at para. 67, that under s. 1 of the Act, the balcony and elevator are outside the individual's unit and thus, are common elements. The motion judge then outlined the relevant considerations from *Harvey* to determine whether remedial work will fall within the ambit of s. 97(1) of the Act.

[8] The motion judge correctly identified that s. 97 of the Act must be read harmoniously and that the "substantial additions or alterations" provision found in s. 97(4) is circumscribed by s. 97(1) of the Act. In effect, "[s]ection 97(1) provides that remedial work will not trigger s. 97(4)".

[9] As such, the motion judge committed no error of law.

[10] In oral argument before this Court, the appellant argued that the motion judge erred in relying exclusively on the 2018 Engineering Report when determining that the restoration work was remedial within the meaning of s. 97(1).

[11] We see no such error. It is trite law that a motion judge's reasons must be read as a whole and in context: *Humphrey v. Mene Inc.*, 2022 ONCA 531, 2022 CarswellOnt 9971, at para. 88; *Doyle v. Zochem Inc.*, 2017 ONCA 130, 2017 CarswellOnt 1733, at para. 40. It is clear from the motion judge's decision that he considered the totality of the evidence in arriving at his decision. In particular, at para. 37 of his decision, the motion judge reviews all the evidence before him, not only the 2018 Engineering Report.

[12] After determining that the restoration work fell within the ambit of s. 97(1), the motion judge noted that the Condominium had a duty "to manage, maintain and administer the common elements in this case", and that he must not apply a duly restrictive interpretation of the terms "repair" and "maintenance". We find no error in the motion judge's determination.

[13] In light of the appellant's concession and our holding that the motion judge did not err in finding that the restoration work fell within the ambit of s. 97(1), it is not necessary to consider whether the Condominium's decision to not hold a vote constituted oppressive conduct. That said, we find no reason to interfere with the motion judge's findings as the appellant showed no palpable and overriding error.

[14] Turning to the remaining two grounds of appeal, we would not give effect to either of them, even though they were not strongly pursued in oral argument.

[15] The motion judge committed no error in either his statement of the law on oppression, or his application to the above facts. The motion judge stated, at para. 42, that the test of oppression requires evidence to support the claimant's reasonable expectations and to support the claims that the conduct violating the reasonable expectations was "oppressive". The focus is ultimately on the reasonable expectation of the owners. The analysis on reasonable expectations will center on the arrangement between the parties and whether the impugned conduct violates an applicant's reasonable expectations of that arrangement".

[16] We see no error in the motion judge's statement on the law of oppression.

[17] Further, the motion judge did not fall into palpable and overriding error in his application of the law of oppression to the set of facts. The motion judge agreed that the appellant had a reasonable expectation that: 1) a reserve fund study be completed prior to the levying of a special assessment and 2) the Board to keep minutes from all meetings and more importantly, to keep detailed minutes from meetings where punitive action is sought to lien a unit owner's property knowing full well the hardship and restriction this action can have on a property owner's rights.

[18] In both instances the motion judge found that the Condominium's alleged conduct failed to rise to the required level of oppressive conduct. First, the motion

judge found that the decision to delay a reserve fund study to ensure the special assessment did not "evince bad faith", "unfair[ly] prejudice" or "unfair[ly] disregard" sufficiently enough to warrant an oppression remedy.

[19] Second, the motion judge found as a matter of fact that the Board minutes were later drafted and provided to the parties. Thus, the question remained whether the lack of minutes rose to the level to grant an oppression remedy. The motion judge rejected this argument. He also noted, at para. 76, that the reasoning and outcome of the Board's decision to seek a lien is obvious as the appellant remains the only unit owner who refuses to contribute funds for the remedial work. In short, these findings were open to him on the record before him and we find no reason to interfere with these findings as the motion judge committed no palpable and overriding error.

[20] Finally, we do not agree that the motion judge erred in finding that there was no genuine issue requiring a trial and in granting summary judgment.

[21] The Condominium sought an order for summary judgment to enforce its lien against the appellant. In effect, it argued that the special assessment was valid, and that no arguments were raised alleging any errors with the registration of the lien, nor the Notice of Lien to Owner, nor the Notice of Sale. Accordingly, it argued

that as there was no genuine issue requiring a trial, summary judgment should be granted in its favour.

[22] The motion judge correctly concluded that after his finding that the levying of the special assessment was valid, the Board's right and obligation to assess the appellant's unit crystalized. Importantly, the appellant raised no argument at first instance alleging any errors with the lien or Notice of Sale. In summary, the motion judge committed no error in granting the order for summary judgment as there was no genuine issue requiring a trial.

[23] The appeal is dismissed. The Condominium is entitled to costs in the amount of $11,000, inclusive of disbursements and H.S.T.

"Grant Huscroft J.A."
Harvison Young J.A."
"L. Sossin J.A."