CONDOMINIUM AUTHORITY TRIBUNAL

DATE: November 7, 2022
CASE: 2021-00347N
Citation: York Region Standard Condominium Corporation No. 1375 v. Sousa, 2022 ONCAT 118

Order under section 1.44 of the *Condominium Act, 1998.*

Member: Michael Clifton, Vice-Chair

The Applicant,
York Region Standard Condominium Corporation No. 1375
Represented by David Thiel, Counsel

The Respondent,
Aniceta Sousa
Represented by Tony Bui, Counsel

The Intervenor,
Maria Armanda Sousa
Represented by Tony Bui, Counsel

Hearing: Written Online Hearing – March 25, 2022 to October 29, 2022

REASONS FOR DECISION

A. INTRODUCTION

[1] The Applicant, a residential standard condominium corporation, has several rules relating to dogs on the condominium property. These include a weight restriction prohibiting dogs that do or will at maturity weigh more than 25 lbs. In addition, the Applicant's declaration prohibits dogs of certain breeds, including German Shepherds.

[2] The Respondent has a dog, identified as "King," that exceeds the maximum weight permitted under the Applicant's rules, and is a German Shepherd. The Applicant seeks the enforcement of its rules and declaration by seeking an order that King must be removed from the condominium property. The Respondent states she is entitled to accommodation under the Ontario Human Rights Code (the "Code") and the accommodation she seeks is to be allowed to keep King on the condominium

property although the dog exceeds the weight and breed restrictions set out in the condominium's governing documents.

[3] By agreement of the parties at the outset of this Stage 3 – Adjudication process, the issues in this case were narrowed down to the single question of whether the Respondent has a basic entitlement to her requested accommodation. If she does, then there would be a further question of whether the Applicant had met its duty to accommodate up to the point of undue hardship.

[4] The Parties also agreed that a Confidentiality Order should be issued; therefore, this decision shall not contain a detailed description of the Respondent's reasons for seeking accommodation. As a result, not every part of the evidence, arguments, and other submissions of the parties can be or is fully described; however, I confirm that the materials that both parties provided – including reports and correspondence from three qualified professionals – were substantively and sufficiently detailed regarding the issues in this case to enable me to reach a conclusion, and that in doing so all of those materials have been carefully reviewed and considered.

[5] Based on my consideration and analysis of such evidence and submissions, I find that the Respondent is entitled to the requested accommodation and that the granting of such accommodation does not cause the Applicant undue hardship. As such, the application is dismissed, and the Respondent is entitled to continue to have King reside with her on the condominium property. I also make an award for costs in favour of the Respondent.

B. <u>ISSUES & ANALYSIS</u>

ISSUE NO. 1 – IS THE RESPONDENT ENTITLED TO THE REQUESTED ACCOMMODATION?

[6] The parties agreed that the Respondent has genuine needs entitling her to accommodation under the Code, and that such needs are met in part by having a support dog. However, the Applicant argued:

1. That the Respondent had failed to demonstrate that Code-related needs include a requirement for a dog weighing in excess of 25 pounds, and of the prohibited German Shepherd breed; and

2. That the Applicant's willingness to permit the Respondent to keep a dog on the property provided it does not violate the provisions of the Applicant's declaration and rules respecting animals, constitutes reasonable

accommodation.

[7] I will address the second argument first. Since the Applicant's declaration and rules do not prohibit dogs, but only impose restrictions on them with respect to such issues as breed, size, and behaviour, "permitting" the Respondent to keep a dog that does not breach such restrictions cannot be viewed as reasonable accommodation, because it is not any kind of accommodation at all. Unless the Respondent's dog breaches the declaration or rules of the condominium, she would neither require any accommodation nor be subject to the Applicant's present application for enforcement.

[8] With respect to its first argument, the Applicant submits that the Respondent has not shown that her needs cannot be fully met by a dog that does not contravene its restrictions, and implicitly argues that they can. The Applicant characterizes the Respondent's desire to keep King as a "preference" and cites the principle that the purpose of accommodation under the Code "is not to accommodate individuals' preferences."[1] They cite this Tribunal's decision in Martis v. Peel Condominium Corporation No. 253[2] as an example of the application of this principle where a condominium's animal weight restriction was upheld despite a unit owner's request for accommodation.

[9] The Applicant submitted that the opinions and reports submitted as evidence by the Respondent do not indicate that a specific weight or breed of dog is necessary to meet the Applicant's needs, nor do they state that such needs could not be met by a dog weighing less than 25 pounds or of a breed permitted by the Applicant's declaration. With respect to the statement in one report that the Respondent "will be unable to live in the unit and would have to relocate" if required to remove King, the Applicant points out that this statement was a quotation of what the Respondent had said to the writer of the report, and therefore they suggest this was not a conclusion reached or supported by that professional.

[10] The Applicant referred to the decisions of the Ontario courts in Niagara North Condominium Corporation No. 125 v. Kinslow[3] ("Kinslow") and Waterloo North Condominium Corp. No. 198 v. Donner[4] ("Donner").

[11] In Kinslow, the court found that there was no evidence to support the claim that the respondent, Ms Kinslow, would be unable to live without her cats if required to remove them from the condominium. The court stated,[5]

> *Certainly, they are a comfort to her and, no doubt, her preference is to live with them rather than without them, but the evidence does not support a finding that*

she is so physically, emotionally or otherwise medically dependent upon them that she cannot live without them.

[12] In Donner, the court found that the respondent was in a situation where she would be unable to continue to reside in the condominium without her dog. The respondent in that case was deaf, and the dog was a “hearing ear” dog on which the respondent depended fully in order to hear the intercom and alarms in the building.

[13] The Applicant submitted that, contrary to Donner, and more akin to Kinslow, the reports and letters of the qualified professionals submitted in this case “do not conclude that [the Respondent] needs that specific dog to be able to reside in the unit. …While she is attached to the dog, the evidence does not show that she is dependent on the dog to enable her to function on her own or that it would effectively prohibit her from living in the condo.”

[14] The Respondent disagrees with the Applicant’s analysis. In particular, the Respondent submits that the reports and letters of qualified professionals included in their evidence clearly address the restrictions in the Applicant’s declaration and rules and support the Respondent’s position in regard to them.

[15] Notwithstanding the Respondent’s references to the reports and letters submitted as evidence in this case, I find that they do not, in fact, clearly support the Respondent’s position that a dog of the weight and breed of King is necessary to address the Applicant’s needs. They do not specifically state that her needs must be met by a dog that weighs more than 25 pounds, or that a breed such as German Shepherd is necessary. In this regard, the Applicant’s position is more persuasive.

[16] However, contrary to the Applicant’s view, I find that what the letters and reports – particularly the most detailed report dated July 18, 2021 – do demonstrate is that King itself is necessary for the Respondent. By way of example, the letter dated August 20, 2021, expressly states that King is “indispensable” to the Respondent for addressing her particular needs. In general, the reports appear to support this notion, and I am not prepared to substitute my or the Applicant’s non-expert assessment for that of the several qualified professionals whose letters and reports have been entered into evidence.

[17] I am persuaded by the accumulation of such materials and other evidence in this case that, on at least a balance of probabilities, the Respondent’s desire to keep King is not merely a matter of preference, but that King is indispensable to the Respondent to meet her needs for which she is entitled to accommodation and

that King could not simply be replaced by another dog. I therefore find that the Respondent's requested accommodation – i.e., to keep King in the condominium – is the accommodation to which she is entitled under the Code.

ISSUE NO. 2 – WOULD THE ACCOMMODATION RESULT IN UNDUE HARDSHIP?

[18] The Applicant argued that the requested accommodation would result in undue hardship because German Shepherds and certain other breeds prohibited by the condominium's declaration "pose a danger" and that "it is not reasonable to expect other residents to incur any increased danger from a large dog." The Applicant stated,

> *The Corporation must balance the needs of various residents with the proposed accommodation requested by the Respondent. The Corporation must weigh the Respondent's requests against residents' expectations not to encounter these dogs in the building.*

[19] The Respondent's submissions in relation to the Applicant's duty to accommodate were more extensive. It is not necessary that they be set out in detail for the purposes of this decision. However, it is appropriate to include the Respondent's answer to the Applicant's specific claim that the alleged danger posed by German Shepherds justifies denial of the Respondent's accommodation.

[20] The Respondent points out that the Applicant's statements suggesting that German Shepherds "pose a danger" are unsupported by evidence and amount to speculative generalizations. The Respondent cites a document on the topic of Undue Hardship published by the Ontario Human Rights Commission on its website, which states,[6]

> *Anticipated hardships caused by proposed accommodations should not be sustained if based only on speculative or unsubstantiated concern that certain adverse consequences "might" or "could" result if the person is accommodated.*

[21] I note that the same document cites relevant case law confirming that, "[t]he onus is on the accommodation provider to establish that it cannot accommodate a person due to dangers related to health and safety," including evaluating the seriousness of the risk.[7] In its submissions, the Applicant presented no evidence of any such evaluation having been made or any other support for its contention as to the danger posed by German Shepherds. The mere fact that the Respondent's declaration states that such dogs "may be considered dangerous to the Owners and occupants, as determined in the sole discretion of the Board,"[8] does not form a sufficient basis for denying the Respondent's requested accommodation.

[22] Nor did the Applicant present evidence that King itself presents any danger on the property and merely asserted to the Respondent that some unidentified residents were frightened by the dog. To the contrary, while the parties agreed that King's conduct on the property was not an issue in this case, the Respondent's evidence included statements from several residents whose encounters with King were described in positive terms, and the parties shared evidence that King had successfully completed three levels of obedience and behaviour training and was considered a "friendly, social dog."

[23] I find that the Applicant has not demonstrated that it has sought to accommodate the Respondent to the point of undue hardship before seeking removal of King. Though some residents of the condominium might conceivably be made uncomfortable by the presence of a German Shepherd, this appears to be a minor hardship provided King does not actually engage in any aggressive or violent conduct, none of which is alleged to have occurred or appears likely. Even if concerns about such behaviour were to arise, the Applicant and the Respondent should together consider alternatives for dealing with this prior to the Applicant deciding whether to issue any order for the dog's removal.

[24] I also find no other basis on which undue hardship could apply. King's presence as a matter of accommodation will not prevent the Applicant from enforcing its rules and declaration provisions in other cases where accommodation is not reasonably required, and the Applicant has neither alleged nor appears likely to suffer any significant detriment, risk, cost, health or safety concern, or any other unreasonable or undue burden on account of King's continued presence on the property. This stands in direct contrast to the considerable harm the Respondent's evidence indicates she would necessarily suffer if required to remove King from the property.

[25] In conclusion, I find that the Applicant has not met its duty to accommodate in this case and that there is no ground on which the requested accommodation should not be granted.

ISSUE NO. 3 – IS EITHER PARTY ENTITLED TO COSTS?

[26] Both parties have sought their costs in this case.

[27] In the ordinary course, costs follow the result of the case: Since the Applicant was unsuccessful, it is not entitled to reimbursement of its Tribunal filing fees under the Rule 48.1 of the Tribunal's Rules of Practice; and since respondents are not charged fees for participating in a case, the Respondent, though successful in this case, is also not entitled to any award under that Rule.

[28] Either party, however, could be entitled to an award of costs under Rule 48.2, which provides,

> *The CAT generally will not order one Party to reimburse another Party for legal fees or disbursements ("costs") incurred in the course of the proceeding. However, where appropriate, the CAT may order a Party to pay to another Party all or part of their costs, including costs that were directly related to a Party's behaviour that was unreasonable, undertaken for an improper purpose, or that caused a delay or additional expense.*

[29] I also note the Tribunal's Practice Direction, "Approach to Ordering Costs," which sets out a non-exhaustive list of various factors that the Tribunal may consider when determining whether an award of costs is justified. These factors include those listed in Rule 48.2 and,

1. Whether a case was filed in bad faith or for an improper purpose,

2. The conduct of the parties or their representatives,

3. The potential impact of the order on the parties,

4. Whether the parties attempted to revolve the issues prior to filing the case,

5. Whether a party failed to follow or comply with a Tribunal order or direction, and

6. The content and clarity of the condominium's governing documents.

[30] The Respondent has requested reimbursement of legal fees in the amount of $12,500. They allege that "[t]he evidentiary record demonstrates the Applicant did not have a principled basis [to] insist upon King's removal." They also state that the Applicant failed "outright" to acknowledge the Respondent's entitlement to accommodation until obtaining legal advice, and after that still failed to provide the appropriate accommodation.

[31] The Applicant has requested reimbursement of legal fees in the amount of $15,000, alleging that:

1. The Respondent did not provide the Applicant with "the type of clearly identified evidence required to support" the request for accommodation;

2. The Respondent "prolonged the hearing and increased the time and costs involved by, notwithstanding suggestions by the adjudicator that additional evidence and/or cross examination may not be necessary, insisting upon such

steps;" and

3. The condominium's declaration provides for the recovery of costs relating to breaches of the declaration or rules.

[32] Each party appears to have requested only its costs that pertain to these proceedings, which do not appear excessive or unreasonable for the time and matters required to be dealt with in this case. Contrary to the Applicant's submissions, I do not find that the Respondent caused the proceedings to be excessively or unreasonably prolonged, or that the steps taken were not reasonably done despite my recommendations that they might not be needed. I also do not see any basis for concluding that either party was insincere, lacked good faith, or otherwise improperly pursued this case. While I have found that the Applicant was not correct regarding the requested accommodation, and even though it should and could have agreed upon the accommodation earlier, circumstances can always be evaluated better in hindsight and I cannot say with certainty that the conclusions I have reached in this case were so obvious that there could have been no good reason at all for the Applicant to have pursued the course it did.

[33] Nevertheless, to the extent that the Applicant's position rested on demands it made for a particular "type of… evidence" of the Respondent's need for accommodation other than the professional letters and reports that were given – which appeared adequate and appropriate documentation for the purposes of establishing the need for the requested accommodation – this appears to have created an unnecessary and significant hinderance to resolving this case prior to it needing to come to this Tribunal. Much of the evidence of correspondence between the parties and between their counsel demonstrates this was the case. I also note that as early as June 2021, the Respondent had directed the Applicant's attention to the guidelines of the Ontario Human Rights Commission with respect to the extent of background information that should be properly required to justify a request for accommodation,[9] which guidelines clearly suggest the Applicant's requests, or demands, for additional information and documentation were excessive and improper.

[34] Another factor that demonstrates the Applicant's unwillingness to resolve this matter prior to coming to the Tribunal, has been its position that "permitting" the Applicant to keep a dog other than King that complies in all respects with the Applicant's declaration and rules, constituted "reasonable accommodation." There was no evidence that the Applicant ever varied from this position and demand. As noted already, this position was in fact one of no accommodation at all, and, as

stated by the Respondent's counsel in one of the items of correspondence included in evidence in this case, amounted to prioritizing "strict adherence to the wording of YRSCC 1375's Declaration over [the] obligation to reasonably accommodate Code-related needs." The Applicant's continuing insistence upon strict compliance in place of accommodation rendered the possibility of resolution without Tribunal proceedings to be effectively nil.

[35] Lastly, I have considered that the impact upon the Respondent of a 'no costs' decision in this case would be significantly greater than it would be upon the Applicant, which is not an individual but relies upon the collective spending power of all of its unit owners. Considering all these factors, I will order that the Applicant pay the Respondent the amount of $6,250, being one-half of the costs award requested by her.

[36] I also note that the unit owners who ultimately pay the Applicant's costs include the Intervenor, Maria Armanda Sousa. She owns the unit in which the Respondent resides and supports the Respondent's position. They share the same legal counsel. Although the Intervenor's presence in this case caused no complications, delays, or other issues, in the absence of any order to the contrary, she would ultimately be paying a portion of the Applicant's costs and a portion of the costs award in favour of the Respondent, in addition to any legal fees she has incurred, all despite the fact that the Respondent, whose position she supports, was entirely successful in this case.

[37] I will therefore further order that a credit be applied to the Intervenor's contributions to the common expenses in an amount equal her unit's proportionate shares of both this costs award of $6,250 and the Applicant's stated legal expenses of $15,000, to minimize the risk that the Intervenor shall contribute any significant amount to the Applicant's costs of this case.

C. <u>ORDER</u>

[38] The Tribunal Orders that the Applicant's case is hereby dismissed, and the Applicant is ordered:

1. Under 1.44 (1) 1 of the Condominium Act, 1998, to permit King to reside on the property with the Respondent as a matter of accommodation under the Code;

2. Under section 1.44 (1) 4 of the Condominium Act, 1998, and the rules of this Tribunal, to pay the Respondent costs in the amount of $6,250 within thirty (30) days of the date of this decision and order; and

3. Under section 1.44 (1) 7 of the Condominium Act, 1998, to immediately apply a credit to the Intervenor's contributions to the common expenses on account of her unit in the amount determined by multiplying the percentage representing her unit's proportionate share of the contributions to the common expenses of the Applicant (as set out in the declaration of the condominium) by: (i) the foregoing costs award; and (ii) $15,000.

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Michael Clifton
Vice-Chair, Condominium Authority Tribunal

Released on: November 7, 2022

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[1] *Taite v. Carleton Condominium Corporation No. 91*, 2014 HRTO 165 at par. 56 (https://canlii.ca/t/g311s)

[2] *Martis v. Peel Condominium Corporation No. 253*, 2021 ONCAT 11 (https://canlii.ca/t/jks6v)

[3] *Niagara North Condominium Corporation No. 125 v. Kinslow*, 2007 CarswellOnt 7444 (https://canlii.ca/t/1tpqz)

[4] *Waterloo North Condominium Corp. No. 198 v. Donner*, [1997] O.J. No. 6332 (https://canlii.ca/t/1vvfq)

[5] Kinslow, at par. 35

[6] https://www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability/9-undue-hardship; see section 9.2.3

[7] Ibid.

[8] See section 4.5(a) of the Declaration of York Region Standard Condominium Plan No. 1375, registered as Instrument No. YR 2834271, on June 4, 2018, in the Land Titles Office of the Land Registry Office for York Region (No. 65) in Aurora

[9] https://www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability/8-duty-accommodate; see section 8.7 and commentary contained in footnote 191