

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: January 18, 2023

CASE: 2022-00676N

Citation: Baker v. Pecarski. 2023 ONCAT 7

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

Member: Patricia McQuaid, Vice-Chair

The Applicant,

Thomas Baker
Self-Represented

The Respondent,

Alexander Pecarski

The Intervenor,

Essex Condominium Corporation No. 28
Represented by Kevin Kok, Counsel

Hearing: Written Online Hearing – November 29, 2022 to January 6, 2023

REASONS FOR DECISION

A. INTRODUCTION

- [1] Thomas Baker, the Applicant, is a unit owner in Essex Condominium Corporation No. 28 (“ECC 28”). His neighbour in the adjacent unit is the Respondent, Alexander Pecarski. Mr. Baker filed this application against Mr. Pecarski to recover the cost of an air cleaner which he alleges he needed to purchase because of Mr. Pecarski’s noncompliance with ECC 28’s rules, and specifically Rule 29, its “smoking” rule. Rule 29 prohibits owners, tenants, occupants or invitees from smoking tobacco or marijuana in their unit and exclusive use common areas, including patios and balconies.
- [2] Mr. Pecarski did not participate in the case. I am satisfied that he received notice of the case and therefore I allowed the case to proceed without his involvement.
- [3] Pursuant to Rule 17.3 of the Tribunal’s Rules of Practice, ECC 28 was named as an intervenor in this case and did join the case. For reasons explained below, ECC 28 took no position in the case before me.

B. BACKGROUND

- [4] This is not the first case before the Tribunal in which Mr. Pecarski's compliance with Rule 29 has been in issue. ECC 28 previously filed a case (2022-00205N) against Mr. Pecarski alleging noncompliance. That case resolved by way of a settlement agreement. However, ECC 28 subsequently filed another case (the "SA case"), pursuant to s. 1.47 of the *Condominium Act, 1998* (the "Act"), alleging that Mr. Pecarski breached the terms of their Settlement Agreement. Mr. Pecarski did not participate in that case.
- [5] In the SA case¹, the Tribunal found that Mr. Pecarski continued to smoke in his unit and/or balcony in breach of the Settlement Agreement. In addition to seeking various cost orders against Mr. Pecarski, ECC 28 requested that the Tribunal also order that Mr. Pecarski reimburse Mr. Baker for the cost of his air cleaner, relying upon terms of the Settlement Agreement. The Tribunal did not make the requested order, stating at paragraphs 23 - 25:
- [23] While paragraph 6 of the Settlement Agreement says that the Respondent may be required to contribute some or all of the funds needed to purchase an air purifier should his smoking be accommodated upon the provision of medical evidence, the receipt provided by Mr. Baker shows that the air purifier was purchased on December 23, 2020, approximately 18 months before the Settlement Agreement between the parties.
- [24] The Respondent submits that as their attempts to establish compliance with the smoking rule covers the period from September 17, 2020, to August 2021, the December 2020 purchase needs be covered....
- [25] Given the timing of the air purifier purchase, I find that the air purifier was not purchased in contemplation of this Settlement Agreement. The fact that the Respondent was allegedly seeking compliance before is minimally relevant on this issue. Paragraph 6 of the Settlement Agreement speaks to future costs. If this was a cost that was related to the Respondent's smoking that had already been incurred, it ought to have been specifically referenced in the Settlement Agreement. It was not. Lastly, Mr. Baker is not a party to these proceedings. Therefore, I am unable to award the recovery of the cost of Mr. Baker's air purifier.
- [6] As a result of these Tribunal findings, ECC 28, as Intervenor, stated that it would not take a position in this matter.
- [7] A key difference between the two cases is that Mr. Baker is now the Applicant. He is not seeking to enforce a term of the Settlement Agreement to which he was not a party, but rather, states that he has suffered damages as a result of Mr. Pecarski's noncompliance with Rule 29. The issue for me to decide is whether Mr. Baker should recover damages, the cost of his air purifier, because of that noncompliance. Mr. Baker is also seeking reimbursement of the fees paid to the

¹ 2022ONCAT116 (CanLII)

Tribunal in this application. Based on the facts as found in the previous Tribunal case, and the evidence before me, I find that Mr. Baker is entitled to be reimbursed by Mr. Pecarski for the cost of his air purifier pursuant to s. 1.44 (1) 3 of the Act as well as the Tribunal fees.

C. EVIDENCE AND ANALYSIS

- [8] When a respondent does not join a case, the Tribunal must decide the case based on the evidence provided by the applicant, weighed on the balance of probabilities. In this instance, I have also taken note of the findings of fact made in the recent SA case, particularly those related to Mr. Pecarski's noncompliance with Rule 29. Mr. Baker provided submissions and his two daughters provided witness statements.
- [9] Mr. Baker and his wife moved into their unit at the end of May 2020. Mr. Pecarski was already living in the adjacent unit, with which they share a common wall. They also share a balcony which is separated by a cement wall. Mr. Baker complained about Mr. Pecarski's smoking almost immediately after moving in, to both condominium management and to Mr. Pecarski. Mr. Baker stated that they were unable to enjoy their balcony because Mr. Pecarski constantly smoked on his balcony. He described a constant 'stench' inside their unit because of the smoke migrating from Mr. Pecarski's unit. Despite his communication of concerns to Mr. Pecarski, there was no change in his behavior.
- [10] As is evident from ECC 28's cases before the Tribunal, it did take enforcement measures between September 2020 and August 2021, apparently without much success though the Settlement Agreement suggested an acknowledgement of past breaches of Rule 29 by Mr. Pecarski and an undertaking to comply going forward.
- [11] I accept Mr. Baker's evidence that because of the continuing impact of Mr. Pecarski's smoking they concluded that they had no recourse but to purchase the air purifier in December 2020 to alleviate the impact of the second-hand smoke which was migrating into and interfering with their use and enjoyment of their home. Of note, paragraph 6 of Rule 29 reads as follows:

The Owner of a unit and the residents and tenants of the Unit in which tobacco or cannabis products are present shall take all necessary steps to ensure that smoke or odor that is in the unit (from smoking) does not travel or migrate from the Unit or to another Unit or the common elements of the Condominium Property and both shall be responsible and shall install caulking or insulation or what ever barriers necessary to stop the travelling or migration of the smoke or odor and they shall be responsible for the cost of repairs of any damage to the common elements or other units which damage was caused by or related to smoking in the Unit...

- [11] It appears that Mr. Pecarski was not only smoking in violation of Rule 29, he was taking no steps to ensure smoke or odour from his unit did not travel or migrate to the Baker's unit, leaving it to them to attempt to mitigate the impact. It is therefore

fair and reasonable in these particular circumstances that Mr. Pecarski be responsible for the cost of the air purifier they were compelled to purchase because of his noncompliance with Rule 29 through the summer and fall of 2020 and his apparent continued noncompliance as indicated by the SA case. I will so order.

[12] Regarding the costs related to this proceeding, the Tribunal's authority to make orders is set out in section 1.44 of the Act. Section 1.44 (2) of the Act states that an order for costs "shall be determined...in accordance with the rules of the Tribunal." The cost rule of the Tribunal's Rules of Practice relevant to this case is Rule 48.1 which states that if a case is not resolved by Settlement Agreement or Consent Order and a Tribunal Member makes a final decision, the unsuccessful party will be required to pay the successful party's Tribunal fees unless the Member decides otherwise. In accordance with Rule 48.1, I will order that the Respondent reimburse the \$150 Tribunal fee paid by Mr. Baker

D. CONCLUSION

[13] In summary, I have concluded that the smoking by the Respondent, Mr. Pecarski, in his unit, in violation of ECC 28's Rule 29, has resulted in damages to the Applicant, Mr. Baker; specifically, this violation has caused Mr. Baker to incur the cost of an air purifier in the amount of \$2485.99. I am ordering the Respondent to pay damages in this amount pursuant to s. 1.44 (1) 3 of the Act. Further, pursuant to s. 1.44 (1) 4 of the Act and Rule 48 of the Tribunal's Rules of Practice, the Respondent shall reimburse the Applicant for the \$150 paid for Tribunal fees.

E. ORDER

[14] The Tribunal orders that:

1. Pursuant to s. 1.44 (1) 3 of the Act, within 30 days of this Order, the Respondent shall pay Thomas Baker compensation for damages in the amount of \$2485.99.
2. Within 30 days of this Order, in accordance with s. 1.44 (1) 4 of the Act and Rule 48 of the Tribunal's Rules of Practice, the Respondent shall pay \$150 to Thomas Baker for his costs in this matter.

Patricia McQuaid
Vice-Chair, Condominium Authority Tribunal

Released on: January 18, 2023