

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: April 5, 2023

CASE: 2022-00754N

Citation: Metropolitan Toronto Condominium Corporation No. 1240 v. Debnath, 2023 ONCAT 56

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

Member: Patricia McQuaid, Vice-Chair

The Applicant,

Metropolitan Toronto Condominium Corporation No. 1240

Represented by Gareth Stackhouse, Counsel and Darlene Mezzabotta, Paralegal

The Respondents,

Santanu Debnath and Sunandini Debnath

Hearing: Written Online Hearing – January 31, 2023 to March 28, 2023

REASONS FOR DECISION

A. INTRODUCTION

[1] The Applicant, Metropolitan Toronto Condominium Corporation No. 1240 (“MTCC 1240”), requests an order from the Tribunal that Sunandini Debnath, a unit owner, comply with provisions in its declaration and rules regarding noise and nuisance and that Ms. Debnath indemnify it for its legal costs in this matter pursuant to the indemnification provisions in the declaration and rules. MTCC 1240 alleges that Ms. Debnath has been creating an unreasonable noise, by playing music at an excessive volume resulting in a nuisance and interference with the quiet enjoyment of other residents.

[2] Santanu and Sunandini Debnath are named on condominium documents as owners of the unit; however, Sunandini Debnath informed MTCC 1240 in a letter dated January 10, 2023, that Santanu Debnath passed away in 2018. All written communications from MTCC 1240 in evidence before me have been with Sunandini Debnath and she has responded to various letters, in writing. She did not participate in this case, but acknowledged in her January 10, 2023, letter that she had received the Notice of Case, and stated that she would “not attend to any of these letters...” Based on the evidence before me, I am satisfied that Ms. Debnath had notice of this case and therefore the case proceeded in her absence.

[3] The issues for me to decide in this hearing are as follows:

1. Has the Respondent Sunandini Debnath failed to comply with the governing documents related to noise and in particular, Rule 8?
2. Is MTCC 1240 entitled to an order for indemnification for costs incurred in seeking compliance, including the costs of this proceeding?

[4] For the reasons set out below, I find that the Respondent Sunandini Debnath has contravened s. 22 of the MTCC 1240 declaration and its Rule 8, as well as s. 117 (2) of the *Condominium Act, 1998* (the “Act”). Ms. Debnath shall reimburse MTCC 1240, as compensation of \$2830 as well as costs pursuant to Rule 48 of the Tribunal’s Rules of Practice in the amount of \$2975.

B. EVIDENCE & ANALYSIS

ISSUE 1: Has the Respondent Sunandini Debnath failed to comply with the governing documents related to noise and in particular, Rule 8?

[5] As is frequently stated in these cases, 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. Here, MTCC 1240 has submitted several letters written by Ms. Debnath to either MTCC 1240 management or to its legal counsel. I have reviewed and considered these. They provide some insight into Ms. Debnath’s reasons for playing the music and will be referred to later in this decision. She does not deny playing music.

[6] MTCC 1240 is a two-storey townhouse complex. The residents of the unit next door to Ms. Debnath have lodged the vast majority of complaints about loud music. The complaints seemed to start in about March 2019 and have continued quite consistently through to the time of this hearing. The complaints have been well documented both by emails to property management and Incident Reports completed by MTCC 1240 security personnel¹ who frequently attended outside the Respondent’s unit to confirm (as did the condominium manager on occasion) that the music was audible from outside. Though security generally knocked on her door or called Ms. Debnath, she would not respond. Voice mail messages were left. While Ms. Debnath would on occasion turn down the music, more often than not the music volume would increase after an attempt to contact her.

[7] The evidence before me reveals a litany of noise complaints. For example, between November 20, 2020, and December 15, 2020, there were 14 noise complaints; Between October 2021 and February 7, 2022, there were

¹ I do note that in the Incident Reports, security personnel frequently referred to Ms. Debnath as the “suspect”. This is language that tends to criminalize her conduct and in the context of a dispute between unit owners or between the condominium corporation and a unit owner is language that ought to be avoided.

approximately 28 noise complaints. All complaints were made to security and verified by them. Between June 15, 2022, and February 24, 2023, 36 noise complaints were made, only eight of which were not verified.

- [8] In terms of the timing of the complaints and the volume at which the music is played, the neighbour who was living adjacent to Ms. Debnath complained of music being played as early as 6 a.m. and occasionally as late as 1 a.m., though 11 p.m. was more common. The neighbour described deafening volumes that would wake their baby, a volume that “sounds like a street concert” and crashing volumes blasting through their common wall, at times causing the whole upper floor to vibrate. I note that Irfan Alli, the condominium manager who testified on behalf of MTCC 1240 stated that this neighbour moved out in June 2022 because “they just couldn’t take it anymore”. In an email to Irfan Alli on March 14, 2022, this owner stated that they were no longer calling security about the loud music because they were trying to get their place ready to sell and they did not want to risk Ms. Debnath causing them even more problems.
- [9] In addition to the reports recording incidents of loud music, MTCC 1240 sent letters about various incidents on March 19, 2020, May 8, May 27 and October 9, 2020, November 19, 2021, January 12 and August 4, 2022. In the August 4, 2022, letter, Irfan Alli noted that the neighbours with the young child had to move out because of the excessive noise and the new residents were making the same complaints. The suggestion was made to Ms. Debnath that she could resolve the problem by investing in a pair of wireless earpieces that would allow her to play music whenever and as loud as she wished without disturbing her neighbours, a suggestion that was previously made to her by security personnel in November 2021.
- [10] MTCC 1240 retained legal counsel (CGL Law) who also wrote to Ms. Debnath on several occasions (November 16 and December 15, 2020, January 5, 2021 and March 1 and December 5, 2022) about the noise and nuisance she was causing, and requested that she immediately stop or lower the volume, directing her to various provisions in the declaration and rules. Counsel also suggested that she consider using headphones or earbuds so that neighbours would not be affected by the music.
- [11] The specific provisions that MTCC 1240 relies upon are s. 22 (a) of the declaration which states:

No unit shall be occupied or used by any owner...in any manner that will unreasonably interfere with the use or enjoyment by other owners of the common elements or their respective units ...and such owner shall also be liable to pay and/or fully reimburse the Corporation for all other costs, expenses and liabilities suffered or incurred by the Corporation as a result of such owner’s breach of the foregoing provisions of this subparagraph.

And on Rule 8 which states:

No one shall create or permit the creation of any noise or nuisance which in the opinion of the board or the manager, may or does disturb the comfort or quiet enjoyment of the units or common elements by other unit owners.

Additionally, MTCC 1240 also cites s. 117 (2) of the Act which states that no person shall carry on an activity in a unit which results in the creation or continuation of an unreasonable noise that is a nuisance, annoyance or disruption to individuals in a unit.

- [12] As I noted in paragraph 5 of these reasons, in her various responses to Irfan Alli or CGL Law, Ms. Debnath did not deny that she played music. The reason she gave for playing music loudly was because of “startling sounds coming from the neighbour on one side” In May 2020, she stated that “loud explosive noise is coming from the neighbouring unit which might cause harm if I am climbing stairs or lifting heavy objects. It happens frequently in the wee hours of the morning.” In a November 29, 2020, letter to MTCC 1240’s legal counsel she wrote that she played music to override the violent noise/sound/stomping and that the music would be played at a volume to match the violent noises. She expressed concern about a “spycam” and loud noises that would startle her when she was standing near a burner or stooping to pick up items.
- [13] While Ms. Debnath has expressed concerns about loud violent noises, there is no independent evidence of any such noise that may have interfered with her quiet enjoyment (or feelings of security). And as pointed out by legal counsel in their letter of December 15, 2020, to Ms. Debnath, even if the noises she alleges did occur, playing music at loud volumes was not an appropriate reaction. Further, the evidence also indicates that noise complaints have persisted after the neighbours moved out in June 2022, which suggests that music is not being played at loud volumes to ‘override’ violent noises caused by those neighbours.
- [14] Based on the evidence before me, I find that Ms. Debnath, by playing loud music on many occasions over the past three years has unreasonably interfered with the use and enjoyment by other owners of their units in violation of s. 22 (a) of the declaration and Rule 8. I do note the reference to the words “noise or nuisance which, in the opinion of the board or the manager may or does disturb...” in Rule 8. In making my finding of a violation of Rule 8, I have considered whether the manager was reasonable in reaching their opinion. A bald assertion by a manager of a violation of the rule would not suffice in the absence of valid objective evidence assessed by a manager in good faith. Here, there was well documented evidence over a lengthy period of time which would have reasonably informed the opinion of the manager.
- [15] I also find, as documented in the evidence, that Ms. Debnath has carried on an activity by playing her music loudly which has created an unreasonable noise that is a nuisance, annoyance or disruption. To support a claim of nuisance, the interference must be substantial; the requirement for substantial interference can incorporate a component of frequency and duration of the interference. Here, the

incidents of music played at significant volume, have occurred over a period of almost four years and have been frequent occurrences over several different periods of time.

- [16] Having found that the Respondent Ms. Debnath is in violation of the provisions of the declaration and rules regarding noise, as well as s. 117 (2) of the Act, I will order her immediate compliance.

ISSUE 2: Is MTCC 1240 entitled to an order for indemnification for costs incurred in seeking compliance, including the costs of this proceeding?

- [17] MTCC 1240 seeks to be indemnified by the respondent Ms. Debnath for the costs it incurred in this matter. These are as follows:

1. Costs of \$4084.95 (legal costs plus HST) for its “pre-CAT” costs.
2. Legal costs of \$5715.67 (legal costs plus HST and its filing fee) for its CAT costs.

- [18] In seeking these costs, MTCC 1240 relies on sections 9, 22 and 34 of the declaration (section 22 is cited above at paragraph 11) as well as Rule 22. Section 9 of the declaration states:

Each owner, including the Declarant, shall pay to the Corporation his or her proportionate share of the common expenses...In addition to the foregoing, any losses, costs or damages incurred by the Corporation by reason of a breach of any rules and regulations of the Corporation in force from time to time, by any unit owner...shall be borne and paid for by such owner, and may be recovered by the Corporation against such owner in the same manner as common expense.

Section 34 states:

Each owner shall indemnify and save the Corporation harmless from and against any loss, cost, damage, injury or liability which the corporation may suffer or incur resulting from (or caused by) any act or omission of such owner ..., to the common elements or to any unit...

And Rule 22 states:

All costs and damages incurred by the Corporation as a result of a breach of the rules by any owner...shall be borne by such owner, and be recoverable by the Corporation against such owner in the same manner as common expenses.

- [19] The indemnification provisions in the declaration and Rule 22 do not specifically address compliance costs (I also note that s. 34 of the declaration speaks to costs incurred in relation to cost/damage to property and therefore is not applicable here). However, the underlying intent of these provisions is that unit owners should not be required to pay for those costs which the corporation incurs due to the noncompliant conduct of another owner. In this case, CGL Law wrote five letters to

Ms. Debnath between November 2020 and December 2022 seeking her compliance, to no avail. These letters were sent in addition to those sent by MTCC 1240 management. Ms. Debnath was duly informed of the issues. I find it is fair and appropriate that Ms. Debnath be responsible for the costs incurred by MTCC 1240; the costs were reasonably incurred by it to enforce the declaration and rules.

[20] Regarding the pre-CAT costs claimed, while the fee amount set out in the bill of costs is \$3615, that includes \$745 which was discounted and in fact not included in the client invoices, as clarified by MTCC 1240 in submissions. The cost incurred by MTCC 1240 was therefore \$ 2830 and I will order that Ms. Debnath reimburse MTCC 1240 that amount pursuant to s. 1.44 (1) 3 of the Act.

[21] Regarding the legal costs of the CAT 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 related rules of the Tribunal's Rules of Practice relevant to this case are:

48.1 If a Case is not resolved by Settlement Agreement or Consent Order and a CAT Member makes a final Decision, the unsuccessful Party will be required to pay the successful Party's CAT fees unless the CAT member decides otherwise.

48.2 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.

[22] In accordance with Rule 48.1, I will order that the Respondent reimburse the \$125 Tribunal fee paid by MTCC 1240.

[23] The Tribunal's Practice Direction: Approach to Ordering Costs, issued January 1, 2022 provides guidance regarding the awarding of costs. In this Practice Direction, the Tribunal outlines some of the factors the Tribunal may consider in deciding whether to order costs under Rule 48. These factors include the conduct of a party or its representative in the hearing, whether the parties attempted to resolve the issues before the case was filed, the provisions of the governing documents, and whether the parties had a clear understanding of the potential consequences for contravening them. The Tribunal may also consider whether the costs incurred are appropriate and proportional to the nature and complexity of the issues in dispute.

[24] While the principle that it can be unfair for other owners to be called upon to subsidize the costs of enforcing compliance against another owner has been clearly articulated by the courts and this Tribunal, it is also well-established law that an award of costs is discretionary. An award for full indemnity is relatively unusual. The Tribunal has also stated in its jurisprudence that, in effect, the cost associated with the condominium corporation's carrying out its duty to enforce compliance under the Act and its governing documents is reasonably anticipated

to be part of the common expenses paid by all owners.

[25] In reviewing the bill of costs submitted, it is not unreasonable in the context of the issues before me. However, in addition to the fact that Ms. Debnath chose not to participate in this case (resulting in a more streamlined process for MTCC 1240) and that she has persistently shown a lack of response to overtures to comply, I have also considered the statements made by her, through the documents submitted by MTCC 1240, which suggest some challenges in her life situation. Considering all the evidence before me, and the impact on the MTCC 1240 community as a whole, I find that an award for legal costs pursuant to Rule 48.2 in the amount of \$2850 (approximately 50% of the legal costs claimed) is appropriate.

C. ORDER

[26] The Tribunal orders that:

1. The Respondent Sunandini Debnath shall comply with s. 22 (a) of the MTCC 1240 declaration and its Rule 8, and, without limiting the generality of this order, that Sunandini Debnath shall not create excessive noise by playing music at high volumes.
2. Pursuant to s. 1.44 (1) 3 of the Act, and within 30 days of this Order, Sunandini Debnath shall pay MTCC 1240 compensation in the amount of \$2830 in respect of legal fees and expenses it incurred.
3. Pursuant to s. 1.44 (1) 4 of the Act and Rule 48 of the Tribunal's Rules of Practice, and within 30 days of this Order, Sunandini Debnath shall pay \$2975 to MTCC 1240 for its costs in this matter.

Patricia McQuaid
Vice-Chair, Condominium Authority Tribunal

Released on: April 5, 2023