

Corrected Decision

This decision was amended to update paragraphs 34 (4) which clarifies how the Respondent will provide the Applicant with Tribunal fees.

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: April 28, 2023

CASE: 2023-00022N

Citation: Simcoe Standard Condominium Corporation No. 356 v. Caleta et al, 2023 ONCAT 62

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

Member: Monica Goyal, Member

The Applicant,

Simcoe Standard Condominium Corporation No. 356
Represented by Sonja Hodis, Counsel

The Respondents,

Julia Caleta
Self-represented

Unidentified Occupant

Hearing: Written Online Hearing – February 15, 2023, to March 24, 2023

REASONS FOR DECISION

A. INTRODUCTION

- [1] The Applicant, Simcoe Standard Condominium Corporation No. 356 (“SSCC No. 356” or the “Corporation”) filed an application with the Condominium Authority Tribunal (“Tribunal”) against the Respondent, the unit owner, Julia Caleta (“Ms. Caleta”), and the occupant of her unit, who was referred to as Peter by the Applicant, but whose full name they did not know (“the Occupant”), for breach of the Corporation’s by-laws, declaration and rules (“Governing Documents”) relating to smoking and nuisance created by odour.
- [2] Ms. Caleta and the Occupant did not join the case, so the case went to Stage 3 – Tribunal Decision as a default proceeding on February 15, 2023. When they failed to join the case at the onset of Stage 3, I asked the Tribunal staff to contact Ms. Caleta by email and telephone. The Tribunal staff spoke with Ms. Caleta, who indicated that she would be joining the case right away. Ms. Caleta did join the case but failed to respond to any communications on the platform, nor did she

provide any submissions. Many messages were posted to the Tribunal's online portal directed to Ms. Caleta, which she did not respond to. The Occupant's full name has never been identified and he never did join the case.

- [3] Ms. Hodis confirms that notices of the proceeding were delivered to Ms. Caleta in accordance with the *Condominium Act, 1998*(the "Act"), and I am satisfied that she was properly served. Ms. Caleta joined the case, she had the opportunity to provide submissions, but did not provide submissions. The hearing in this matter proceeded without Ms. Caleta and the Occupant's participation and my decision is based solely on the evidence and submissions of SSCC No. 356.
- [4] For the reasons set out below, I have concluded that Ms. Caleta acted in contravention of the nuisance of odour and the non-smoking rule of the Corporation. I am ordering Ms. Caleta to not smoke either tobacco or marijuana products in her unit (the "Unit") and the common elements. She is also ordered to take reasonable steps to ensure that any person occupying the Unit or on the common elements with her permission comply with the non-smoking rule of the Corporation. I am also ordering Ms. Caleta to reimburse to the Applicant the Tribunal Fees of \$150, and to indemnify the Applicant \$864.13 for costs incurred to seek compliance as well as its legal costs of \$3,500 pursuant to rule 48 of the Tribunal's Rules of Practice.

B. BACKGROUND

- [5] In September 2018, SSCC No. 356 enacted rules prohibiting smoking anywhere on the condominium property, including within the units ("Non-Smoking Rule"). A legacy provision permitted persons who were owners at the time the rules were enacted to smoke within their units, and on the common element patios and balconies, provided they took steps to ensure the smoke did not migrate elsewhere in the property. Ms. Caleta and the Occupant moved into the condominium in or around April 2021, long after these rules came into effect. Ms. Caleta is the only registered owner of the Unit as testified by Maria Rasile, the condominium manager, and evidenced by a parcel registry search dated February 7, 2022.
- [6] In or around April 2021, well after the Non-Smoking Rule passed, Ms. Caleta and the Occupant moved into the Unit.
- [7] There was much evidence provided at the hearing to demonstrate that Ms. Caleta and the Occupant were smoking in the Unit in violation to the Non-Smoking Rule.
1. Tom Fawcett, a unit owner of SSCC No. 356, resides on the same floor as Ms. Caleta. Mr. Fawcett testified to seeing both Ms. Caleta and the Occupant smoking in the common elements. He also said that he could smell cigarette and marijuana smoke in the hallways near the Unit.
 2. Wayne Duffenais, also a unit owner on the same floor, and the neighbour of Ms. Caleta, testified that he also smelled smoke in the hallway. He says that

Ms. Caleta's unit is at the end of the hall, and there are no other units around the Unit that smoke. Mr. Duffenais also says that when he passes the Unit there is a strong smell of cigarette and marijuana smoke emanating from the Unit but not the other units on the floor. Mr. Duffenais testified that since February 2023 he has smelt a strong odour of deodorizer in the hallway. He has approached the Occupant twice to ask him to stop spraying the deodorizer. Mr. Duffenais described the smell of the deodorizer as toxic and stated that his wife is having difficulty in entering the hallway because of the smell.

3. Ms. Rasile testified that she received several complaints from residents about the smell of smoke from the Unit, and reported seeing Ms. Caleta, the Occupant and their guests smoking on the common elements. Ms. Rasile has also been in the Unit and reported seeing evidence of smoking cigarette and marijuana use. Ms. Rasile also testified that there was a strong smell of cigarette and marijuana smoke from the Unit. Ms. Rasile stated that she has received complaints about the deodorizer and that one resident claimed it affects their breathing when they enter the hallway.
 4. The Applicant produced two photographs, who witnesses Mr. Fawcett, Mr. Duffenais, and Ms. Rasile testified as being the Occupant. The photograph depicts the Occupant smoking in the parking area of the Corporation.
 5. The Applicant also produced a report from a smoke alarm contractor, who reported smoke discoloration on the smoke detectors in the Unit. Further, the smoke alarm contractor reported there was a strong odour aromatic spray and cigarette or other smoke from the Unit.
- [8] On April 13, 2021, May 11, 2021, August 12, 2021, and April 28, 2022, letters were sent by Ms. Rasile to Ms. Caleta. Ms. Rasile says that Ms. Caleta did not respond to these letters and that she and her guests continued to smoke on the premises of the Corporation. As Ms. Caleta and the Occupant did not comply with the requests from property management, the issue was escalated to the Corporation's legal counsel.
- [9] On July 6, 2022, Ms. Hodis, counsel for the Corporation, sent a letter to Ms. Caleta asking her and her guests to comply with the Non-Smoking Rule, failing which legal proceedings would be commenced, and costs of the legal proceeding would be added to her common expenses. Ms. Caleta did not respond to this letter.
- [10] On December 15, 2022, a second letter was sent by Ms. Hodis that provided notice that a CAT case was being initiated to effect compliance by Ms. Caleta and her guests with the Non-Smoking Rule. Once again, there was no response from Ms. Caleta.

C. ISSUES & ANALYSIS

- [11] The issues to be addressed in this matter are:

1. Are Ms. Caleta and the Occupant in violation of the Non-Smoking Rule? If yes, then what order(s) should the Tribunal make in this case?
2. What legal costs, if any, should be awarded to SSCC No. 356?

[12] In deciding these issues, I have reviewed all the submissions and evidence provided to me by the Applicant, but only refer to those that are relevant and necessary to making my decision.

Issue 1: Are Ms. Caleta and the Occupant in violation of the Non-Smoking Rule? If yes, then what order(s) should the Tribunal make in this case?

[13] SSCC No. 356 submits that the smoking by Ms. Caleta and the Occupant and the resultant smoke and odour are in violation of the Non-Smoking Rule.

[14] On September 24, 2018, SSCC No. 356's rules were amended and a non-smoking rule was implemented. Paragraph 3 of the section entitled Quiet Enjoyment was amended to state as follows:

1. Smoking by anyone shall be prohibited inside a Unit and on any part of the common elements including the exclusive use common elements (including but not limited to storage spaces, parking spaces, patios, and balconies).

2. Smoking means inhaling, exhaling, breathing, burning, or carrying on any lighted, smouldering, or heated cigar, cigarette, or pipe or any other substance (legal or illegal) whether natural or synthetic, in any manner or in any form intended for inhalation including but not limited to hookahs, cannabis and marijuana.

...

3. Every owner who intends to sell or lease his or her unit shall disclose in writing to a purchaser, realtor and/or tenant the smoking restrictions set out above separate and apart from providing a copy of the Rules.

[15] SSCC No. 356's Rule No. 1 under the heading "Quiet Enjoyment" of the rules and regulations dated June 2011 prohibits the creation of, or permitting of an odour, which may disturb the comfort or quiet enjoyment of other units ("Quiet Enjoyment Rule"):

Owners shall not create or permit the creation or continuation of any noise, vibration, odor or other nuisance, which, in the sole opinion of the Board or the Manager, may or does disturb the comfort or quiet enjoyment of the units or common elements by other owners. Upon receiving a written notice from the Board or the Manager indicating that any such noise, vibration, odor or other nuisance is an annoyance or a nuisance or disruptive, then the owner of such unit shall at his expense take such steps as shall be necessary to abate same, the Board shall take such steps as it deems necessary and the owner shall be liable to the Corporation of all expenses hereby incurred in stopping same, including its reasonable solicitor fees.

[16] Section 117 (2) of the Act states as follows:

No person shall carry on an activity or permit an activity to be carried on in a unit, the common elements or the assets, if any, of the corporation if the activity results in the creation of or continuation of,

(b) any other prescribed nuisance, annoyance or disruption to an individual in a unit, the common elements or the assets, if any, of the corporation.

Section 26 of Ontario Regulation 48/01 lists unreasonable odour and smoke among the prescribed nuisances.

- [17] I accept the evidence of Ms. Rasile, Mr. Fawcett, and Mr. Duffenais that Ms. Caleta and the Occupant are smoking in the Unit, and there is a strong smell of cigarette and marijuana smoke emanating from the Unit.
- [18] Ms. Caleta purchased her Unit after the Non-Smoking Rule came into effect, and in all likelihood would have received a copy of the rules before she completed the sale of the Unit and moved in. She has been given many opportunities to bring herself in compliance with the Non-Smoking Rule, which she has not done. Further, pursuant to section 119(2) of the Act, it is also incumbent upon Ms. Caleta as an owner to ensure that anyone residing with her, or her guest in the Unit comply with the Corporation's rules.
- [19] Pursuant to section 119(1) of the Act, Ms. Caleta has a duty to comply with the Act and the Governing Documents of SSCC No. 356, and by extension she must comply with the Non-Smoking Rule.
- [20] On a balance of probabilities, I find that the evidence establishes that Ms. Caleta has, since April 2021, breached the quiet enjoyment rule by the creation of a nuisance odour by smoke from tobacco and marijuana products. Ms. Caleta is ordered to not smoke in her unit and the common elements in violation of the Corporation's Non-Smoking Rule.
- [21] The Applicant has also requested that the order be extended to the Occupant. The Occupant's full name was not known to the Applicant. Witnesses confirmed that the Occupant lives with Ms. Caleta in the Unit. Given that section 119(2) applies to any person occupying an owner's unit with their approval, I order that Ms. Caleta ensure that any person occupying the Unit with her approval not smoke either tobacco or marijuana products in the Unit and on the common elements.
- [22] Counsel asked me to also make an order with respect to the nuisance of odour created by the use of deodorizing sprays by Ms. Caleta or the Occupant in the common element hallways. Mr. Duffenais described the negative impact of these deodorizing sprays on himself and his wife. The Applicant did not provide evidence that the Respondent was provided written notice of this issue, as required pursuant to the Quiet Enjoyment Rule and as such I will not make this order. However, the deodorizing sprays should stop once the smoking stops as it is being used to cover up the smoking odour.

Issue 2: What legal costs, if any, should be awarded to SSCC No. 356?

- [23] SSCC No. 356 is requesting costs and compensation totalling \$17,013.12. The costs comprise of \$150 in Tribunal filing fees, \$5,290.11 in pre-Stage 3 costs, and \$11,663.01 in legal costs for Stage 3. The Corporation submits that they should be awarded the full amount of costs incurred because Ms. Caleta and the Occupant have refused to cooperate with the Corporation and participate in this Tribunal hearing. Further, the Corporation states that multiple notices were sent to Ms. Caleta that outlined the cost consequences of continued breach of the Non-Smoking Rule.
- [24] Section 7.5(b) of the Corporation's declaration states as follows:
- Each Owner shall indemnify and save the Corporation harmless from and against any loss, cost including the insurance deductible and legal costs on a solicitor and client basis, damage, injury or liability which the Corporation may suffer or incur resulting from (or caused by) any act or omission of such Owner, or of any resident, tenant, invitee or licensee of such Owner's Unit, to the Common Elements or to any or all Units except for any loss, costs, damage, injury or liability insured against by the Corporation. All payments to be made by any Owner pursuant to this section shall be deemed to be additional contributions toward the Common Expenses payable by such Owner, and shall be recoverable in the same manner and upon the same terms as unpaid Common Expenses."
- [25] The Applicant submitted that they should be awarded all of their pre-Stage 3 costs. In support of their submission, the Applicant relies on the indemnification provision and cites two Tribunal cases: *Middlesex Vacant Land Condominium Corporation No. 605 v. Cui*, 2021 ONCAT 91 (CanLII) ("Cui") and *Toronto Standard Condominium Corporation No. 2804 v. Micoli et al.*, 2023 ONCAT 21 ("Micoli"). Unlike Cui and Micoli, this case proceeded as a default proceeding as opposed to a contested hearing. As such, I do not find that these cases are useful in determining the costs in this case.
- [26] Ms. Caleta was found to breach the Non-Smoking Rule of the corporation. Many attempts were made by the Corporation to seek her compliance prior to engaging legal counsel. Only after Ms. Caleta failed to comply with the Corporation's letters did the Corporation retain legal counsel. Ms. Hodis then sent several letters to the Respondent prior to starting this case. Ms. Caleta ignored these notices and letters. The indemnification provision in the declaration says the Corporation can fully recover the legal costs for an act or omission by an owner incurred by the Corporation as additional contributions to the common expenses. Based on the wording of the indemnification provision, I find that the costs incurred to enforce compliance as a result of the breach of the Non-Smoking Rule prior to the initiation of the CAT case fall within the scope of the indemnification provision.
- [27] The Applicant requests \$5,290.11, which breaks down to \$864.13 for the first legal letter, and \$4,425.98 for legal work of approximately 9 hours for the pre-stage 3 work, which were primarily CAT-related work for Stage 1. I find that the pre-CAT

costs amount of \$864.13 is reasonable and will be paid by the Respondent pursuant to the indemnification provision in the Corporation's declaration. The legal costs in preparation and filing this case shall be awarded as costs and determined by the CAT's Rules of Practice.

[28] The authority of the Tribunal to make orders is set out in section 1.44 of the Act. Section 1.44 (2) 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 Tribunal Member makes a final Decision, the unsuccessful Party will be required to pay the successful Party's Tribunal fees unless the Tribunal member decides otherwise.

48.2 The Tribunal 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 Tribunal 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] SSCC No. 356 was successful in this case and therefore, in accordance with Rule 48.1 of the Rules of Practice, I will order a cost award of \$150 in respect of the Tribunal fees it paid.

[30] With respect to the legal fees incurred by SSCC No. 356 relating to this proceeding, I am guided by the Tribunal's "Practice Direction: Approach to Ordering Costs" which includes, among other factors to be considered, whether the parties had clear understanding of the potential consequences for contravening the rules, whether a party's conduct was unreasonable or caused delay or expense, and potential impact an order for costs would have on the parties.

[31] In *Condominium Corporation No. 96 v. Psofimis*, 2021 ONCAT 48 (CanLII), the Tribunal awarded the applicant's legal costs where there was persistent misconduct of a respondent with respect to compliance. The Tribunal noted that the corporation was required to request an order from the Tribunal "only because Mr. Psofimis deliberately and repeatedly ignored the condominium's numerous attempts to request his voluntary compliance. He disregarded notices, emails and letters"

[32] In the case before me, Ms. Caleta received multiple notices starting in April 2021, shortly after she moved into the condominium. These notices were followed by two letters from the SSCC No. 356's legal counsel. The legal letters advised her that failure to comply with the Non-Smoking Rule would lead to further legal action, of which costs should be responsible for. Ms. Caleta had knowledge of this case, as the Tribunal staff spoke with her, and then she joined the case. According to the evidence of the witnesses, Ms. Caleta and the Occupant continue to smoke in

breach of the Rules. Ms. Caleta actions demonstrate that she has little regard for her obligations as a condominium owner. On the other hand, because Ms. Caleta did not participate in the case, this case moved straight to the hearing and as such the Applicant spent less time than they would have spent if the Respondent had participated in the case.

[33] The Applicant is requesting \$4,425.98 for pre-stage 3 costs, and \$11,663.01 in stage 3 costs for a total of \$16,088.99. The total number of hours billed was approximately 36 hours. It would be neither reasonable nor fair if the owners were to be liable for all of the corporation's cost of obtaining Ms. Caleta and the Occupant compliance. On the other hand, the proceeding was shortened by the non-participation by the Respondent and the case was factually simple and not complex. Upon reviewing the submission for legal costs by SSCC No. 356, I find that the requested costs are not reasonable for a default proceeding. However, legal fees not awarded as costs are ultimately paid by all owners of a corporation. Based on the foregoing considerations, I am ordering Ms. Caleta to pay costs of \$3,500 of the legal fees the corporation incurred with respect to this proceeding.

D. CONCLUSION

[34] I have concluded that Ms. Caleta acted in contravention of the Quiet Enjoyment Rule and Non-Smoking Rule of the Corporation. The Corporation provided Ms. Caleta with many opportunities to bring her behavior into compliance prior to taking legal action. I am ordering Ms. Caleta to cease smoking tobacco or marijuana products in the Unit and on the common elements. She is also ordered to take all reasonable steps to have any person occupying the Unit and the common elements with her approval to comply with the Non-Smoking Rule. I am also ordering Ms. Caleta to pay Tribunal Fees of \$150, indemnification fees of \$864.13 and legal costs of \$3,500.

E. ORDER

[35] The Tribunal Orders that:

1. Under section 1.44(1)2 of the Act, Ms. Caleta to immediately not smoke either tobacco or marijuana products in her Unit, and on the common elements (including but not limited to storage spaces, parking spaces, patios, and balconies) of SSCC No. 356.
2. Under section 1.44(1)2 of the Act, Ms. Caleta will take all reasonable steps to have any person occupying the Unit to comply with this order.
3. Under section 1.44(1)3 of the Act, Ms. Caleta will indemnify SSCC No. 356 \$864.13.
4. Under section 1.44(1)4 of the Act, within 30 days of this Order, Ms. Caleta shall pay Tribunal fees of \$150 and legal costs of \$3,500 to SSCC No. 356.

Monica Goyal
Member, Condominium Authority Tribunal

Released on: April 28, 2023