CITATION: Waterloo Standard Condominium Corp. No. 399 v. Lee et. al., 2023 ONSC 3807
COURT FILE NO.: CV-19-777
DATE: 2023/06/27

ONTARIO

SUPERIOR COURT OF JUSTICE

Application Under s. 134 of the *Condominium Act, 1998*, S.O. 1998, C. 19

BETWEEN:	)	
	)	
WATERLOO STANDARD CONDOMINIUM CORPORATION NO. 399 Applicant	)	Danielle Marks, Counsel for the Applicant
	)	
– and –	)	
	)	
YI JUAN LEE & TZU ARCHIE YU Respondents	)	Meng Dan Li, Counsel for the Respondents
	)	
The Honourable Justice C.D. Braid		**HEARD:** January 10, 2023

REASONS ON APPLICATION

I. OVERVIEW

[1] Ms. Yi Juan Lee and her son, Mr. Tzu Archie Yu, are the registered owners of a 1,400 square foot condominium unit ("the unit"). The owners purchased the unit in 2009 and made extensive modifications to its layout, transforming a two-bedroom, two-bathroom unit into a five-bedroom, three-bathroom unit.

[2] Waterloo Standard Condominium Corporation No. 399 is a condominium corporation ("the condominium") responsible for the management of the residential condominium where the owners reside.

[3] The Condominium Declaration ("the Declaration") prohibits the owners from making modifications without the written consent of the board of directors of the condominium ("the board"). The owners did not obtain written consent to make the modifications to the unit.

[4] The condominium brought an application seeking an order to return the unit to its original configuration. In the alternative, the condominium asks for an order requiring the respondents to bring the added bathroom into compliance with the *Ontario Building Code* ("*Building Code*"). The condominium states that the modifications have caused conditions that pose serious risk to the condominium property and its occupants.

[5] The following issues arise on this application:

A. Does this court have jurisdiction to hear this application when the issues have not been submitted to arbitration?

B. Is the application statute-barred or barred by equitable estoppel?

C. Are the respondents in breach of their obligations pursuant to s. 117 of the *Condominium Act*, *1998*, S.O. 1998, c. 19 (the "*Act*")?

D. What is the appropriate remedy?

[6] For the reasons set out below, I find that the respondents are in breach of their obligations pursuant to s. 117 of the *Act* with respect to the added bathroom modifications that are not in compliance with the *Building Code*. I order the respondents to complete the work required to correct the *Building Code* deficiencies or to remove the added bathroom. If the respondents do not complete this work by a specified date, the applicants may complete the work at the respondents' cost.

II. BACKGROUND

[7] The respondents purchased the unit from a developer on July 25, 2009. Prior to the purchase of the unit, the respondents received a copy of the Declaration, which is registered on title to all condominium units. Upon purchasing the unit, they became bound to comply with the Declaration.

[8] The respondent Ms. Lee states that, one month prior to the purchase of the unit, she spoke to the selling agent for the developer to ask whether modifications to the layout of the unit would be allowed to create more rooms in the unit. Ms. Lee states the selling

agent told her that it was permitted; that the developer could help with the renovations; and referred Ms. Lee to an architect to prepare the drawings. Ms. Lee also states that, one week prior to purchase, she sought re-confirmation from the representative about the modifications to the layout of the unit. She states that she was told that the modifications were permitted by the condominium directors, although none of this was in writing.

[9] Ms. Lee retained an architect to prepare an application for a building permit from the City of Waterloo. The respondents added three bedrooms and one bathroom to the unit. The modifications were completed in August 2009. The City conducted inspections for compliance with the *Building Code* and provided pass results.

[10] The Declaration states that prior written consent of the condominium board is required to undertake the following:

i. changes to the configuration and layout of the unit;

ii. removal, addition or modification of internal walls or room dividers; and

iii. structural changes or other work in the unit that requires a building permit.

[11] The respondents do not dispute that the modifications were made and that they did not comply with the Declaration because they did not obtain prior written consent from the board.

[12] The applicant states that it first became aware of the modifications to the unit during a routine fire inspection on March 7, 2017. On June 12, 2017, the applicant delivered correspondence to the respondents demanding that the unit be restored to its original configuration. The parties engaged in mediation, held on September 24, 2018, but they were unable to resolve the dispute.

[13] Around the time of the mediation, the unit located below the respondents' unit sustained water damage to its ceiling. The applicant commenced this application without referring the matter to arbitration.

III. ANALYSIS

A. Does this Court Have Jurisdiction to Hear this Application When the Issues Have Not Been Submitted to Arbitration?

[14] Section 132 and 134(2) of the *Act* require a condominium corporation and the owners to mediate a disagreement with respect to the declaration, and if the mediation fails, to submit the disagreement to arbitration prior to bringing a court application. The word “disagreement” within the meaning of s. 132 of the *Act* applies to disagreements about the validity, interpretation, application or non-application of the declaration, by-laws and rules: *McKinstry v. York Condominium Corp. No. 472* (2003), 68 O.R. (3d) 557 (S.C.) at paras. 19-20.

[15] The respondents submit that this court does not have jurisdiction to hear this application because the applicant failed to refer the dispute to arbitration. However, the requirement under s. 132 to mediate and arbitrate prior to bringing a court application does not apply to breaches of the *Act*: *Metropolitan Toronto Condominium Corp. No. 747 v. Korolekh*, 2010 ONSC 4448, at para. 49.

[16] In this case, the applicant alleges that the respondents have caused a condition to exist that is likely to damage the property or to cause injury/illness to individuals, contrary to s. 117(1) of the *Act*. The legislation does not require the parties to arbitrate the alleged s. 117 breach prior to bringing a court application. The breach of s. 117 of the *Act* and the dangers posed by the unauthorized modifications to the unit entitles a condominium to bring a court application without first attending arbitration: *YRSCC No. 927 v. Lee*, 2021 ONSC 3877, at para. 18, aff’d 2021 ONCA 914.

[17] Therefore, the court has jurisdiction to hear the application in relation to the alleged breach of s. 117 of the *Act*. To the extent that the applicant argues that the respondents failed to comply with the Declaration and requests an order for removal of the modifications because the respondents did not obtain prior approval, the applicant was required to engage in arbitration before bringing a court application requesting this relief. That portion of the application is dismissed.

B. Is the Application Statute-Barred or Barred by Equitable Estoppel?

[18] Where there is a breach of the *Act*, a limitations argument based on statute or equity has no application: *Toronto Common Element Condominium Corporation No. 1508 v. William Stasyna*, 2012 ONSC 1504, at para. 46.

[19] In this case, the alleged s. 117 breach was brought to the attention of the applicants around the time of the mediation, which was held on September 24, 2018. The Application was issued on June 14, 2019. Even if the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B applies, the Application was brought within the limitation period. In addition, I find that there is no basis to argue equitable estoppel.

[20] Therefore, the application is not statute-barred or barred by equitable estoppel.

C. Are the Respondents in Breach of their Obligations Pursuant to s. 117 of the *Act*?

[21] No person shall cause a condition to exist in a unit, if the condition is likely to damage the property or the assets or to cause an injury or an illness to an individual: s. 117(1) of the *Act*.

[22] The respondents added a bathroom to the unit ("the added bathroom") by installing a raised subfloor in an existing bathroom that extended into the next room, and installing bathroom fixtures on top of the subfloor in each room. This was to allow for the routing of the new sanitary drainage piping without penetrating the concrete building slab into the ceiling space of the suite below.

[23] DEI Consulting Engineers ("DEI") provided two reports that set out several examples of the added bathroom's non-compliance with the *Ontario Building Code* (as it was at the time of construction):

i. The ABS combustible pipes and fittings are not permitted in a high-rise residence;

ii. Improper elbow fitting in the toilet drain;

iii. Inadequate venting;

iv. Improper installation of an air admittance valve;

v. Improper sanitary drain that is connected to the drainage system of the existing toilet, which is not acceptable plumbing installation practice; and

vi. Unsupported and unsecured water lines. Movement of the piping due to the fact that they are not secured could compromise the integrity of the piping in the future.

[24] The report of DEI, dated January 9, 2019 ("DEI report"), involved an assessment of apparent water damage to the ceiling of unit #203, which is located directly below the respondents' unit, unit #303. The DEI report states the following:

> There was obvious water damage to the ceiling in the washroom and adjacent furnace closet of unit #203. There is substantial mould growth below and above the ceiling. The damage appears to be localized to the area below the renovated washroom above and the drainage tie in point at the existing toilet flange…
>
> The lack of a solid mechanical connection to the drainage system in the washroom of unit #303 would be the likely source of the water. [Emphasis added]

[25] In April of 2019, Pinchin Ltd. environmental consultants ("Pinchin") attended at the unit and identified water coming out of a baseboard nail hole when it peeled back the baseboard in the ensuite bathroom. The Pinchin report stated that the water damage, mould growth and wet materials in the respondents' unit and the unit below "were likely caused by the active leak discovered by Pinchin and the reported incorrectly installed washroom plumbing." [Emphasis added]

[26] Mr. Kerry Johnston, plumber for the respondents, attended the unit after Pinchin discovered the active leak. He found a rusty nail through a pipe, fixed the damaged pipe, turned the water back on and did not detect any further leakage from the pipe. After Mr. Johnston's work was completed, the respondents replaced the mouldy floorings and repainted the walls in the unit.

[27] In September 2019, Pretium Engineering Inc. performed a follow-up inspection and found that the ceiling and floor slabs between the units appeared to be dry. The report noted that the dry conditions implied that the repair of the punctured water line was effective in stopping the water leak that resulted in damage to the ceiling and in the lower unit. However, the report noted that they could not be sure that all of the plumbing leaks have been rectified since the respondents' unit was not occupied during the renovations and the normal use of all bathrooms had not yet occurred. Any deficient non-watertight drainpipes may leak once in regular use.

[28] The respondents submit that any finding that there is non-compliance with the *Building Code* is a collateral attack on the work of the city inspector. I do not accept this submission. The DEI inspection revealed breaches of the *Building Code* that the respondents are now aware of, and the original cause of those breaches is not in issue at this hearing. To require the applicants to sue the City or the inspectors would do nothing to remedy any breach of s. 117 of the *Act*.

[29] The respondents submit that the cause of the mould in the unit and the unit below remain unclear, and that the applicant cannot establish causation of the damage. However, these submissions ignore the findings in at least two of the reports stating that the incorrectly installed washroom plumbing is the likely source of the water or one of the sources of the water.

[30] The purpose of the *Ontario Building Code* and the broader building inspections scheme is to protect the health and safety of the public by enforcing safety standards for all construction projects: *Ingles v. Tutkaluk Construction Ltd*., 2000 SCC 12, [2000] 1 S.C.R. 298, at para. 23.

[31] I am concerned with the numerous ways in which the added bathroom is not in compliance with the *Building Code*. The lack of compliance with the code breaches s. 117 of the *Act*, and that breach will continue until the respondents bring the alterations to the unit in compliance with the *Building Code*. A condition of faulty plumbing in danger of failure is likely to damage the property and justifies a remedial order: *York Region Standard Condominium Corporation No. 927 v. Li*, 2021 ONCA 914, at para. 10.

[32] As stated in the Pinchin report, wet drywall must be removed since building materials that are wet for longer than 48 hours are at risk for mould growth. Mould growth in buildings can be a risk factor for adverse health effects. Once mould exists in a building, steps must be taken to remediate the damage.

[33] The applicant does not need to definitively establish that the incorrectly installed washroom plumbing is the source of the current water damage. I find that the applicant has established that the faulty plumbing is in danger of failure; and is likely to damage the property and put others at risk.

[34] I find that the respondents have permitted a condition to exist in their unit that is likely to damage or has damaged the condominium property, and is likely to cause illness or injury. The respondents have breached s. 117 of the *Act*.

D. What is the Appropriate Remedy?

[35] The notice of application seeks an order requiring the respondents to comply with their obligations under the *Act*. One of their obligations is to ensure that a condition does not exist that is likely to damage the property or the assets or to cause an injury or an illness to an individual. The requested relief includes any mechanism that the court finds is appropriate to remediate that condition.

[36] Courts have made orders for removal of additions or dangerous components in similar cases:

a *Toronto Common Element Condominium Corp. No. 1508 v. Stasyna*: The court granted the condominium's application for compliance and ordered the respondents to remove unauthorized alterations to land adjacent to their units.

b *YRSCC No. 927 v. Lee*: The court granted an order permitting the condominium and/or its agents to enter the respondent's unit and complete any work necessary to remove an older type of pipe that is prone to spontaneously burst, which posed a risk to the condominium property and the occupants of the condominium.

[37] I find that bringing the unit into compliance with the *Building Code,* as set out in the DEI report, dated November 12, 2018, will compel the respondents to remove the condition that is likely to damage the property or the assets or to cause an injury or illness to others. This will force the respondents to comply with their obligations under the *Act*. I therefore make an order requiring the respondents bring the added bathroom into compliance with the *Building Code*.

[38] However, I am concerned that doing so may require modifications that infringe on the common elements of the condominium. For example, when the respondents added the bathroom, they installed a raised subfloor to allow for the routing of the new sanitary drainage piping. If bringing the added bathroom into compliance with the *Building Code* requires penetration of the concrete building slab into the ceiling space of the suite below, this will encroach on the common elements.

[39] Modifications that encroach on the common elements of the condominium require the prior written consent of the board. In light of the applicant's position on this application, I am certain that the board will not consent. Therefore, the order will direct that, if bringing the added bathroom into compliance with the *Building Code* will require the respondents to encroach on the common elements, the respondents must completely remove the added bathroom and reverse any modifications to the original plumbing system that were made in 2009.

[40] In the alternative to making the modifications, the respondents may completely remove the added bathroom.

[41] The condominium is incorporated pursuant to the *Act* to govern the affairs of a residential apartment-style condominium building. Pursuant to s. 17(3) and 119(3) of the *Act*, the condominium has an obligation to enforce the provisions of *Act* in order to protect the rights of all unit owners within the condominium property and to preserve the contracts that govern community living. The condominium is entitled and required to take all reasonable steps to ensure compliance with these provisions: *Ballingall v. Carleton Condominium Corporation No. 111*, 2015 ONSC 2484, at para. 64.

[42] If an owner has an obligation under the *Act* and fails to maintain that obligation, and if it poses risk to property or persons, the condominium corporation may complete the renovations: s. 92(3) of the *Act*. Thus, if the respondents do not comply with this order by October 2, 2023, the applicant is granted permission to enter the unit and to perform the work necessary to comply with this order, at the respondents' expense.

IV. COSTS

[1] On the record before me, there has been a mixed result on this application. I am inclined to direct that each party shall bear their own costs. However, if one of the parties served a formal offer to settle that is similar to the ultimate result on the application, they may provide written costs submissions by July 7, 2023. Submissions shall be no longer than two typed pages, double-spaced, in addition to any relevant Bill of Costs and Offers to Settle. If submissions are made, the other party shall provide responding costs submissions by July 14, 2023.

[43] If no costs submissions are received by July 7, 2023, there shall be no costs.

V. CONCLUSION

[44] On consent of the parties:

1. This court orders that the respondents shall use the unit at 303-255 Keats Way, Waterloo, Ontario ("the unit") as a single-family dwelling only.

[45] Not on consent, and for all of these reasons, the court makes the following orders:

2. This court declares that the respondents are not in compliance with their obligations pursuant to s. 117 of the *Condominium Act*, *1998*, S.O. 1998, c. 19.

3. This court orders that, by October 2, 2023, the respondents shall bring the added bathroom in the unit into compliance with the *Ontario Building Code,* as set out in the DEI report, dated November 12, 2018. If bringing the added bathroom into compliance with the *Building Code* will require the respondents to encroach on the common elements of the condominium, the respondents must completely remove

the added bathroom and reverse any modifications to the original plumbing system that were made in 2009.

4. In the alternative to paragraph 3, the respondents may completely remove the added bathroom and reverse any modifications to the original plumbing system that were made in 2009.

5. The respondents shall provide the applicant with an opportunity to inspect the unit once the modifications or removal have been completed.

6. If the renovations are not completed by October 2, 2023, the applicant is authorized to enter into the respondents' unit in order to perform the work necessary to bring the alterations into compliance with paragraph 3 and 4 of this order, at the respondents' sole expense.

Braid, J.

Released: June 27, 2023

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