

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: February 15, 2024

CASE: 2023-00082N

Citation: D'Souza v. Toronto Standard Condominium Corporation No. 2565 et al., 2024 ONCAT 23

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

Member: Nicole Aylwin, Member

The Applicant,

Dena D'Souza
Self-Represented

The Respondents,

Toronto Standard Condominium Corporation No. 2565
Represented by Deborah Howden, Counsel

Alanna Gonzalez
Self-Represented

Mian Shi
Self-Represented

Hearing: Written Online Hearing – September 13, 2023 to January 31, 2024

REASONS FOR DECISION

A. INTRODUCTION

[1] The Applicant, Dena D'Souza, is a unit owner in the Respondent, Toronto Standard Condominium Corporation No. 2565 ("TSCC 2565"). Ms. D'Souza, who represented herself for most of the hearing, but was represented by counsel for reply and closing submissions, asserts that cigarette smoke and odour are migrating to her unit from neighbouring units causing a nuisance. She asserts that the Respondent, Alanna Gonzalez, who is a tenant in the unit below that of Ms. D'Souza's, is responsible for the smoke. It is Ms. D'Souza's position that TSCC 2565 has failed to properly enforce compliance with its smoking rules both generally, and specifically against Ms. Gonzalez and the unit owner, Mian Shi, and

is allowing an activity to be permitted that is causing a nuisance in the form of smoke and odour, contrary to s. 117 (2) of the *Condominium Act, 1998* (the “Act”). Ms. D’Souza has asked the Tribunal for several orders, including an order that TSCC 2565 enforce its rules and pay her costs.

- [2] It is TSCC 2565’s position that this application should be dismissed. They argue that they have fully investigated and responded to all Ms. D’Souza’s complaints and there is no evidence that Ms. Gonzalez is smoking in her unit contrary to the rules, and no evidence to support the more general claim that smoke is migrating into Ms. D’Souza’s unit to the point of being a nuisance. Rather, it is TSCC 2565’s position that Ms. D’Souza has repeatedly made unfounded and exaggerated complaints of smoke in her unit leading to the condominium having to incur unnecessary costs to verify smoke transmission and participate in this proceeding. As such, they have requested the Tribunal order Ms. D’Souza to pay its costs.
- [3] It is Ms. Gonzalez’s position that she has been unfairly accused of being the source of the smoke. She asserts that she does not smoke and has never smoked, making it impossible for her to be the source of the smoke complained of by Ms. D’Souza.
- [4] Finally, despite having joined the case, the unit owner, Ms. Shi, did not provide any evidence or submissions on the issues, despite having ample opportunity to do so.
- [5] At the outset of the hearing, the issues in this case were determined to be as follows:
1. Has TSCC 2565 failed to enforce compliance, as against Anna Gonzalez and Mian Shin, with its governing documents specifically related to smoke and odour which may be creating a nuisance, annoyance, or an unreasonable interference with the enjoyment of the Applicant’s unit?
 2. If there is a nuisance and there has been a failure to enforce compliance, what is the appropriate remedy?
 3. Is any party entitled to costs?
- [6] For the reasons set out below, I conclude that Ms. Gonzalez is not smoking in her unit in breach of the rules, and I find that there is no evidence that Ms. D’Souza is experiencing smoke and odour, particularly at a degree that rises to the level of a nuisance. I further conclude that TSCC 2565 has complied with its obligations to enforce its governing documents and the Act. I dismiss this application without costs to any party.

[7] In coming to this decision, I have reviewed all the evidence provided to me but refer only to the evidence relevant to my analysis.

B. ISSUES & ANALYSIS

Issue no. 1: Has TSCC 2565 failed to enforce compliance, as against Anna Gonzalez and Mian Shin, with its governing documents specifically related to smoke and odour which may be creating a nuisance, annoyance, or an unreasonable interference with the enjoyment of the Applicant's unit?

[8] Section 117 (2) of the Act states that no activity is permitted that creates a nuisance, annoyance, or disruption. It reads:

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,

(a) any unreasonable noise that is a nuisance, annoyance or disruption to an individual in a unit, the common elements or the assets, if any, of the corporation; or

(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.

[9] The "other prescribed" nuisances are defined in s. 26 of Ontario Regulation 48/01 ("O. Reg 48/01") and include odour and smoke.

[10] TSCC 2565 also has rules that regulate smoking in the condominium. However, despite the claim made on several occasions that the condominium is a "smoke-free" building, this is not technically correct. While TSCC 2565's "Tobacco and Cannabis Rules" prohibit smoking in any unit or anywhere on, within, or upon the corporation's property, the rules also contain a legacy provision that allows individuals who smoked tobacco or tobacco-related products at the time the rule was passed (July 2019) to continue to do so. As a result, there are units in the building in which smoking is allowed.

[11] However, TSCC 2565's smoking rules are not without limits. While the rules do have a legacy provision, they also state that if one or more complaints are received by TSCC 2565 that smoke or smoking odours are entering another unit or the common elements as a result of smoking in the unit, and the owner does not resolve those complaints following receipt of written notice from the board or condominium manager, the board may prohibit smoking in that unit. This effectively allows TSCC 2565 to prohibit smoking all together in an offending unit.

Section 17 (3) of the Act requires TSCC 2565 to enforce compliance with the Act and its governing documents.

- [12] It is Ms. D'Souza's position that TSCC 2565 is permitting an activity to continue (i.e. smoking) that is creating a nuisance in the form of smoke and odour in her unit, effectively interfering with the enjoyment of her home. She reports that the smoke is worsening her asthma symptoms and elevating her blood pressure, and notes that the smoke has impacted her socially, as her friends and family have refused to visit. She also notes that it has cost her money, as she has had to buy HEPA air filters that run constantly, increasing her hydro costs.
- [13] According to Ms. D'Souza, she began smelling second-hand smoke in her unit in November 2022, approximately two months after she moved into her unit. The first recorded complaint about smoke is of January 2023, at which time Ms. D'Souza sent an email to the condominium's administration email account complaining of smoke, which she identified as starting in mid-November and getting worse over the holidays. In the email, she identified the unit below her – the unit in which Ms. Gonzalez resides – as the likely source of the smoke, "since smoke rises". Ms. D'Souza's determination of the culprit was based on her own consultation with air quality testing companies and other organizations which, according to Ms. D'Souza, stated that the most likely source of smoke was from "below".
- [14] Between January 2023 and March 2023 when this application was filed, Ms. D'Souza made further complaints by email and phone and remained steadfast in her assertion that the smoke was coming from Ms. Gonzalez's unit and that TSCC 2565 was failing to enforce its no-smoking rule against Ms. Gonzalez, resulting in smoke and odour migrating to her unit.
- [15] Based on the evidence before me, I cannot conclude that this is the case. Ms. Gonzalez provided testimony stating that she is aware of TSCC 2565's no-smoking rules but, regardless of the rules, she is a non-smoker – she does not smoke cigarettes or vape. She also testified that none of the guests who have visited her unit in the past several months have smoked or vaped. In addition to this testimony, which I find credible, Ms. Gonzalez provided boarding passes and a flight itinerary showing that she was out of town for several weeks over the holiday season (December 11, 2022 – January 13, 2023), a time that according to Ms. D'Souza's early email complaint, the smoke in her unit continued unabated. Ms. Gonzalez was also away on January 10, 2023, when Ms. D'Souza called in a complaint regarding smoke; a complaint which was investigated by the condominium staff who visited Ms. D'Souza's floor, as well as the floors above and below Ms. D'Souza's, and did not detect smoke in the hallways. Additionally, on

January 20, 2023, after Ms. Gonzalez had returned home, her unit was specifically inspected in response to a complaint by Ms. D'Souza, and no smoke was detected.

- [16] Despite Ms. D'Souza's repeated claims that Ms. Gonzalez is the source of the smoke migrating into her unit, she has offered no evidence to support this claim other than her assertion that it must be Ms. Gonzalez, because "smoke rises" – which is a very thin basis for such an allegation. Therefore, I cannot conclude that Ms. Gonzalez has failed to comply with the no-smoking rule causing nuisance in the form of smoke.
- [17] Ms. D'Souza maintains that even if Ms. Gonzalez is not responsible for the smoke and odour she is experiencing, she is still experiencing smoke and odour from somewhere and that the smoke and odour is a nuisance as per the Act. She maintains that TSCC 2565 has not adequately investigated her complaints allowing smoke migration and transmission to continue, contrary to its own rules and s. 117 (2) of the Act.
- [18] While the term nuisance may be a common term that is used regularly within our daily lives, it has specific meaning in the context of making a claim of nuisance. In determining whether something is a nuisance, it must be determined: (a) that it has substantially interfered with the enjoyment of a person's property (i.e. it must be more than a trivial interference); and (b) that the interference is unreasonable. In determining what is unreasonable, criteria such as frequency of the interference, the duration of the interference, and the distinct aspects of the condominium community and building are all things to be considered. It is recognized that some interferences may be acceptable and must be accepted as a part of life in a multi-unit residential complex. Not every undesirable interference will result in a successful claim of nuisance.
- [19] In both her submissions, as well as her written complaints to the condominium, Ms. D'Souza indicates that the smoke is so bad that she often finds herself "choking" on smoke and suffering from "smoke headaches". She claims that the smoke is so severe she feels that she is "living in an ashtray" and that the smoke is "non-stop".
- [20] While I accept that Ms. D'Souza's self-identified sensitivity to smoke may result in her describing in the terms above the smoke that she says she smells, there is no objective evidence before me that allows me to conclude that, on the balance of probabilities, she is experiencing smoke and odour at the level that would make it a nuisance as per the Act.

- [21] The evidence shows that the condominium staff investigated the complaints from Ms. D'Souza on January 14, 21, 23, February 4, 6, 7, and March 25 and 29, 2023. The investigations of these complaints involved the concierge and/or condominium management walking various floors above and/or below Ms. D'Souza's unit to try to verify smoke and odour through smelling, visiting specific units above and below her unit to see if smoke could be smelled, speaking to the occupants of accused units, entering the units identified by Ms. D'Souza as the source of the smoke, and entering Ms. D'Souza's own unit to investigate her complaints. No smoke or odour was verified in her unit or in other units.
- [22] Ms. D'Souza takes issue with the way TSCC 2565 investigated these complaints, arguing that a "smell-test" is not sufficient for determining smoke that is a nuisance. However, as already noted, in her complaints and submissions, Ms. D'Souza insists that the smoke is often so bad that it "chokes" her, and that she is "living in an ashtray". Given Ms. D'Souza's description of the severity of the smoke, it is reasonable to assume that a person without any olfactory disability would be able to smell the smoke odour both in a unit and/or in the common elements when investigating. The fact that it was not detectable by any staff member during the various investigations, which by credible account were undertaken with diligence, makes it difficult to conclude that the smoke and odour were present at the level of severity described by Ms. D'Souza.
- [23] The claim that the smoking is "non-stop" is also inconsistent with the evidence. The evidence indicates that, at times, Ms. D'Souza told the condominium staff and/or management that the reason the smoke could not be smelled by them when they came to investigate her unit is because it lasted only minutes (in one case two minutes, in another case 10 minutes), and the staff did not respond quickly enough to her complaint. Smoke that lasts only minutes is not 'non-stop' and it is difficult to conclude, based on all the evidence before me including her own, that smoke and odour experienced by Ms. D'Souza is as persistent as suggested.
- [24] As evidence of smoke in her unit, Ms. D'Souza also submitted an air quality report conducted by an air quality solutions company, as well as reports from her personal home air quality monitor. She asserts that the levels of volatile organic compounds (VOCs) found in the air in her home demonstrate unreasonable levels of smoke and odour. It is important to note that while VOCs do include compounds associated with cigarette smoke, they also include compounds associated with disinfectants/air fresheners, personal care products, among other things – all of which the air quality report noted as making up the total level of VOCs in Ms. D'Souza's unit. The air quality report did not pinpoint cigarette smoke as the

primary or sole cause of the VOCs in Ms. D'Souza's unit, and it provides no evidence of the frequency of the smoke, the severity of the odour, or evidence that that the compounds found in Ms. D'Souza's unit are a direct result of smoke that is migrating from elsewhere in the building. Similarly, while Ms. D'Souza's home monitor reports show that there are VOCs present in her unit, the reports are of little probative value for the same reasons. So, while I accept that the reports provided identified VOCs in Ms. D'Souza's unit – some of which may be associated with cigarette smoke – they do not prove, on a balance of probabilities, that the smoke Ms. D'Souza says she has been experiencing amounts to a substantial and unreasonable interference that is a nuisance.

- [25] Finally, Ms. D'Souza provided witness statements from two individuals who had visited her home (her daughter and the co-owner of the unit). While both individuals reported smelling smoke during their visits, they provided no further details. Their testimony largely focuses on the impact of the smoke/odour on Ms. D'Souza's health and the steps Ms. D'Souza had taken to mitigate the smoke. While I accept that these witnesses are genuinely concerned for Ms. D'Souza and did smell smoke, their testimony does not prove that smoke and odour are substantial and unreasonable.
- [26] I appreciate that Ms. D'Souza may be sensitive to smoke and smoke odour, and she may want "to live in a smoke-free environment"; however, she has chosen to live in a building where there is some smoking permitted, this means that some smoke and odour (as well as compounds associated with smoke) may be expected and will need to be tolerated. As noted, to rise to the level of a nuisance, the interference must be substantial and unreasonable and there is no objective evidence to suggest that Ms. D'Souza is experiencing smoke and odour at this level. Therefore, based on the evidence before me, I do not find that the smoke and odour Ms. D'Souza is experiencing amounts to a nuisance as per the Act.
- [27] Further, the evidence does not support Ms. D'Souza's claim that TSCC 2565 failed to do their due diligence in investigating her complaints, and I find Ms. D'Souza's claims that TSCC 2565 has not taken "any action" to enforce its rules and s. 117(2) of the Act disingenuous at best. On February 14, 2023, TSCC 2565 sent Ms. D'Souza a detailed letter outlining all the actions TSCC 2565 had taken in response to her complaints. The actions listed are extensive, as is the evidence provided in this case of TSCC 2565's enforcement actions. In addition to investigating Ms. D'Souza's complaints (as detailed above), TSCC 2565 sent four notices between January and March 2023 to its residents reminding them of the smoking rules. On one occasion, when TSCC 2565 did identify a unit that was not in compliance with its no-smoking rule (in that case it was cannabis smoking and

was not discovered in response to a complaint from Ms. D'Souza or any other resident, but when the staff entered the unit for maintenance), it took immediate action sending a Notice of Violation that indicated TSCC 2565 would enforce its rule through daily inspection of the unit, which TSCC 2565 submits resulted in the unit coming into compliance. Moreover, despite not being able to validate Ms. D'Souza complaints, and despite the deteriorating levels of civility in Ms. D'Souza's communication with condominium management and staff, TSCC 2565 took her complaints seriously and sealed the electrical outlets in her unit in an attempt to reduce any smoke that may have been migrating between units. While more extensive egress sealing did not appear to go forward, this appears to have been by mutual consent of the parties.

[28] Ms. D'Souza may not be mollified by the actions taken by TSCC 2565 and may be unhappy that TSCC 2565 has not resolved the situation to her satisfaction, but this is not evidence that TSCC 2565 has shirked its responsibility to enforce its governing documents and the Act.

Issue no. 2: If there is a nuisance and there has been a failure to enforce compliance, what is the appropriate remedy?

[29] Having concluded that there is no nuisance or failure to enforce compliance, no remedy is necessary.

Issue no. 3: Is any party entitled to costs?

[30] The Tribunal's authority to make cost-related orders is set out in s. 1.44 (1) 4 of the Act. Section 1.44 (2) of the Act further 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.

[31] Ms. D'Souza has requested that TSCC 2565 reimburse her for her expenses

related to this matter. As Ms. D'Souza has not been successful in her claims, she is not entitled to costs.

[32] TSCC 2565 has also requested costs in this matter in the amount of \$31,128.50 for legal fees related to this application, citing, in addition to the Tribunal's Rules of Practice, the indemnification provisions of its declaration. It takes the position that Ms. D'Souza has been unreasonable in her claims. TSCC 2565 argues that instead of working cooperatively with TSCC 2565 to resolve her complaints, Ms. D'Souza opted to continuously raise complaints of smoke when they could never be verified, and continuously made unfounded accusations against TSCC 2565 staff and other residents. TSCC 2565 argues that had Ms. D'Souza worked cooperatively with TSCC 2565 and not "rushed" to file this application, this proceeding and the legal costs associated with it could have been avoided.

[33] While it is true that Ms. D'Souza was unsuccessful, that does not mean she was unreasonable and did not have the right to bring a case to the Tribunal for its consideration. I do not find, based on the evidence, that Ms. D'Souza was entirely unreasonable in the positions she took or in her behavior during the hearing. Nor do I find that Ms. D'Souza filed the application for an improper purpose or took positions that unduly complicated the case. Costs are discretionary and, given the facts before me, I award no costs to TSCC 2565.

C. ORDER

[34] The Tribunal Orders that this application is dismissed without costs.

Nicole Aylwin
Member, Condominium Authority Tribunal

Released on: February 15, 2024