

Case Name:

215 Glenridge Ave. Ltd. Partnership v. Waddington

Between

215 Glenridge Ave. Ltd. Partnership, (applicant), and
Heather Waddington, (respondent)

[2005] O.J. No. 665
Court File No. 46,569/05

Ontario Superior Court of Justice
St. Catherines, Ontario
J.W. Quinn J.

Heard: January 20, 2005.
Judgment: February 18, 2005.
(21 paras.)

Counsel:

Joseph C. McCallum, for the applicant

Heather Waddington, respondent in person

ENDORSEMENT

J.W. QUINN J. (endorsement):—

Introduction

¶ 1 The applicant is the owner of a residential unit of Niagara North Condominium Corporation No. 125 ("Corporation"). The respondent rents the unit from the applicant pursuant to a written lease or tenancy agreement. The lease has a no-pets provision.

¶ 2 The applicant seeks an order that the respondent is in breach of the declaration of the Corporation and its rules in that she has, in her unit, two cats. The applicant also asks for a compliance order for the removal of the cats.

¶ 3 The respondent argues that s. 15 of the Tenant Protection Act, 1997, S.O. 1997, c. 24 renders void the provision in the lease prohibiting the presence of cats in the unit. However, the applicant does not rely upon the no-pets provision in the lease but, instead,

looks for relief under its rights, and the obligations of the respondent, found in the Condominium Act, 1998, S.O. 1998, c. 19 ("Condominium Act"), and in the registered declaration and rules of the Corporation.

¶ 4 The evidence on the application consists of three affidavits delivered on behalf of the applicant and one affidavit from the respondent. [See Note 1 below]

Note 1: I note that the materials of the applicant were served on the respondent by counsel for the applicant. This is a tacky practice. Additionally, had the respondent not appeared (by appearing she made proof of service a non-issue), I would not have allowed counsel to argue the application. A lawyer should not be counsel in a matter where he relies on his own affidavit as part of the evidence.

Background facts and legislation

¶ 5 Pursuant to subsection 5(1) of the Condominium Act, the Corporation is a corporation without share capital whose members are the owners of a freehold interest in a residential unit in the building.

¶ 6 The respondent entered into the lease of her unit in May 2003. Subparagraph 14(b) of the lease reads:

14. The Tenant(s) further agrees:

...

(b) The Tenant(s) will not keep any animal, bird, insect or reptile to disturb the neighbouring property owners.

¶ 7 Paragraph 13 of the lease requires tenants to comply with the rules of the Corporation:

13. The tenant(s) agrees (sic) to comply with each of the rules and regulations attached as Schedule "A" and such other rules and regulations as may from time to time be amended, modified or added upon written or posted notice to the tenant(s) by the landlord.

The only copy of the lease with which I was provided was in the form of an exhibit to the affidavit of the respondent. Schedule "A" was not attached and so I do not know what "rules and regulations" it contained. Nevertheless, the evidence is that at the time the respondent signed her lease she was provided with a copy of a document summarizing some of the core rules of the Corporation. Rule #6 in the summary states:

6. PETS - no pet shall be permitted in the building

The factum of the applicant refers to the board of directors of the Corporation having passed "rule 12." A copy of that rule was not included in the evidence. I gather that it reads the same as rule #6 in the summary.

¶ 8 There is a policy (unwritten, I assume, as I was not shown anything in writing) that all those persons who occupied units in 1997 (when the building was converted from apartments to condominiums) and had a pet, are permitted to keep the pet until it is voluntarily removed from the unit by the occupant or it dies. And once either of those events occurs, no further pets are permitted in the unit.

¶ 9 In accordance with s. 2 of the Condominium Act, a declaration was registered by the Corporation. Such a declaration, which binds each unit owner, may contain "conditions or restrictions with respect to the occupation and use of the units or common elements": see clause 7(4)(b) of the Condominium Act. The declaration of the Corporation provides, in subsection 7, Article II, a prohibition against the keeping of pets:

No animal, livestock, fowl, fish reptile or insect (a "pet") shall be permitted or kept in the building. Any owner shall, within two (2) weeks of receipt of a written notice from the Board or Manager requesting removal of any such animal, permanently remove such animal from the property. No breeding of animals for sale shall be carried on, in or around any unit.

¶ 10 Letters were forwarded to the respondent on November 24, 2003, May 11th, July 23rd, and October 26, 2004 demanding the removal of her cats. After the last letter, an inspection of her unit revealed the continued presence of the cats.

¶ 11 Apart from s. 2, the power of the board of directors of the Corporation to make rules governing units in a residential complex is found in subsection 58(1) of the Condominium Act:

58(1) The board may make, amend or repeal rules respecting the use of common elements and units to,

- (a) promote the safety, security or welfare of the owners and of the property and assets of the corporation; or
- (b) prevent unreasonable interference with the use and enjoyment of the common elements, the units or the assets of the corporation.

¶ 12 Subsection 119(1) of the Condominium Act requires a tenant to comply with the declaration and the rules of a condominium corporation. It states, in part:

119(1) ... an occupier of a unit ... shall comply with this Act, the declaration, the by-laws [See Note 2 below] and the rules.

Note 2: No by-laws were introduced into evidence.

¶ 13 Compliance with the rules of a condominium corporation is also addressed in subsection 58(10):

58(10) All persons bound by the rules shall comply with them and the rules may be enforced in the same manner as the by-laws.

¶ 14 This application is brought pursuant to subsection 134(1) of the Condominium Act, the operative part of which reads:

134(1) Subject to subsection (2), [See Note 3 below] an owner ... may make an application ... for an order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules ...

Note 3: Subsection 134(2) is not applicable at bar.

¶ 15 Section 15 of the Tenant Protection Act, relied upon by the respondent, states:

15. A provision in a tenancy agreement prohibiting the presence of animals in or about a residential complex is void.

Discussion

¶ 16 Subsection 58(1) of the Condominium Act does not authorize a condominium corporation to make a blanket rule banning all pets. Only if pets compromise "the safety, security or welfare of the [unit] owners and of the property and assets of the [condominium] corporation" (clause 58(1)(a)) or if they constitute an "unreasonable interference with the use and enjoyment of the common elements, the units or the assets of the [condominium] corporation" (clause 58(1)(b)), may the board of directors ban or prohibit their presence. There is no evidence that the cats of the respondent run afoul of clauses (a) or (b) of subsection 58(1). And it cannot be said that the presence of all pets inherently constitutes a breach of those clauses.

¶ 17 I also think that, if any part of a declaration conflicts with subsection 58(1) it is void and unenforceable. In other words, where, pursuant to clause 7(4)(b) of the Condominium Act, a declaration contains "conditions or restrictions with respect to the

occupation and use of the units or common elements," a condominium corporation cannot go beyond that which is permitted in subsection 58(1).

¶ 18 Consequently, the declaration and rules of the Corporation are insufficient to prohibit the presence of the cats.

¶ 19 As the applicant does not rely upon the lease, I will turn to it only briefly. I interpret subparagraph 14(b) to prohibit only those animals that "disturb the neighbouring property owners." There is no evidence here of such a disturbance. As well, the applicant is unable to rely upon the phantom Schedule "A" because, to the extent that it contains a rule prohibiting the presence of all pets, I have already found that the Corporation has no authority under the Condominium Act to enact such a rule.

¶ 20 In the circumstances, because the applicant does not seek to enforce the no-pets provision of the lease, I need not consider the question of whether s. 15 of the Tenant Protection Act operates as a defence to the application.

Conclusion

¶ 21 I find for the felines. The application is dismissed.

J.W. QUINN J.

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