






Ahmad v. 1288124 Ontario Inc., 2012 ONSC 237 (CanLII)

Date: 2012-01-09
Docket: CV-11-436144
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CITATION: Ahmad v. 1288124 Ontario Inc., 2012 ONSC 237

COURT FILE NO.: CV-11-436144

DATE: 20120109

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: TAHIR AHMAD, TORONTO CONDOMINIUM CORPORATION
NO. 1908, SANJAY SARAN MATHUR, SYED Z. QADRI,
MARCELLUS WIRADHARMA, 1752166 ONTARIO INC.,
ANJANIAY HOLDINGS INC., REXDALE JAME MASJID and
1770420 ONTARIO INC.

Applicants

AND:

1288124 ONTARIO INC.

Respondent

BEFORE: MR. JUSTICE LEDERER

COUNSEL: *Yadvinder Singh Toor*, for the Applicants

Dilreet S. Dandiwal, for the Respondent

HEARD: January 5, 2011

ENDORSEMENT

[1] In this matter, the respondent, 1288124 Ontario Inc., is the declarant with respect to a condominium located at 127 Westmore Drive, Toronto. The principal and directing mind of the respondent is Harpreet Sethi.

[2] It is said that the declarant has failed to carry out its responsibilities under the *Condominium Act, 1998*, S.O. 1998 Ch. 19. There are problems with the building and its operation. The applicants say that the roof leaks and that this has resulted in damage to the carpets, tiles, walls and furniture. The applicants say that the snow has not been removed, the grass has not been cut and the parking has not been operated in an appropriate manner.

[3] Under the legislation, the declarant is required, within ten days after the registration of the declaration and description, to appoint the first board of the condominium corporation. The declarant may revoke the appointment of a director to the first board and appoint his or her replacement. As a result, the first board is controlled by the declarant (see: *Condominium Act, 1998*, ss. 42(1) and (2)). The first board is required to call and hold a meeting of owners by the later of the 30th day after the day by which the declarant has transferred 20% of the units and the 90th day after the declarant transfers the first unit. No such meeting was held. This being so, the applicants have been denied their right to elect two directors to the first board (see: *Condominium Act, 1998*, s. 42(6) and (8)).

[4] The record indicates that ownership of a majority of the units (18 units) was transferred by the declarant to individual unit holders on January 7, 2009. The *Condominium Act, 1998*, s. 43(1) requires that not more than twenty-one days after the declarant ceases to be the registered owner of the majority of the units, the "first board" is required to call a meeting of the owners to elect a new board (a turnover meeting). As of June 2011, no turnover meeting had been held.

[5] By letter, dated June 6, 2011, counsel for the applicants wrote to the solicitor for the declarant requesting, amongst other things, that a turnover meeting be held. There was no response. The unit holders, as they are entitled to do, prepared and served a notice to conduct the turnover meeting on September 7, 2011 (see: *Condominium Act, 1998*, s. 43(2)). On that day, a meeting was held and a new Board of Directors was elected. It consists of four of the applicants: Tahir Ahmad, Marcellus Wiradharma, Sanjay Saran Mathur and Syed Z. Qadri.

[6] The affidavit filed in support of the application advised that shortly after the meeting, which took approximately ten minutes to complete, Harpreet Sethi appeared and asked that the meeting be "held again". Evidently, earlier in the day, he had been seen attempting to obtain proxies from some of the unit owners. The following day, September 8, 2011, the solicitors for the declarant wrote to unit owners indicating that the turnover meeting had not been properly constituted, was improper and that "Harpreet Sethi and the other original directors" would remain as directors.

[7] At a turnover meeting, the declarant is required to deliver the following to the board that is elected:

- (a) the seal of the corporation;
- (b) the minute book for the corporation including a copy of the registered declaration, registered by-laws, current rules and minutes of owners' meetings and board meetings;
- (c) copies of all agreements entered into by the corporation or the declarant or the declarant's representatives on behalf of the corporation, including management contracts, deeds, leases, licences and easements;
- (d) copies of all policies of insurance and the related certificates or memoranda of insurance and all insurance trust agreements;
- (e) bills of sale or transfers for all items that are assets of the corporation but not part of the property;
- (f) the records maintained under subsection 47(2) and subsection 83(3); and,
- (g) all records that it has related to the units or to employees of the corporation.

(see: *Condominium Act, 1998*, s. 43(4))

[8] Within thirty days after the turnover meeting, the declarant is required to deliver the following to the board that was elected:

- (a) the existing warranties and guarantees for all the equipment, fixtures and chattels included in the sale of either the units or common elements that are not protected by warranties and guarantees given directly to a unit purchaser;
- (b) the as-built architectural, structural, engineering, mechanical, electrical and plumbing plans;
- (c) the as-built specifications, indicating all substantive changes, if any, from the original

specifications;

- (d) all existing plans for underground site services, site grading, drainage and landscaping, and television, radio or other communications services;
- (e) all other existing plans and information not mentioned in clause (b), (c) or (d) that are relevant to the repair or maintenance of the property;
- (f) if the property of the corporation is subject to the *Ontario New Home Warranties Plan Act*,
 - (i) proof, in the form, if any, prescribed by the Minister, that the units and common elements have been enrolled in the Plan within the meaning of that Act in accordance with the regulations made under that Act, and
 - (ii) a copy of all final reports on inspections that the Corporation within the meaning of that Act requires be carried out on the common elements;
- (g) a table setting out the responsibilities for repair after damage and maintenance and indicating whether the corporation or the owners are responsible;
- (h) a schedule setting out what constitutes a standard unit for each class of unit that the declarant specifies for the purpose of determining the responsibility for repairing improvements after damage and insuring them;
- (i) all financial records of the corporation and of the declarant relating to the operation of the corporation from the date of registration of the declaration and the description;
- (j) if the meeting is held after nine months following the registration of the declaration and description, the reserve fund study that is required within the year following the registration of the declaration and description;
- (k) all reserve fund studies that have been completed or are required to have been completed at the time the meeting is held, other than the reserve fund study that is required within the year following the registration of the declaration and description;
- (l) a copy of the most current disclosure statement delivered to a purchaser of a unit in the corporation under section 72 before the meeting; and,
- (m) all other material that the regulations made under this Act require to be given to the board.

(see: *Condominium Act, 1998*, s. 43(5))

[9] Within sixty days after the turnover meeting, the declarant is required to deliver the following to the board that was elected:

...audited financial statements of the corporation prepared by the auditor, on behalf of the owners and at the expense of the corporation, as of the last day of the month in which the meeting is held.

(see: *Condominium Act, 1998*, s. 43(7))

[10] The declarant has failed to comply with any of these obligations.

[11] The Condominium Corporation is required to keep adequate records, including:

1. The financial records of the corporation;
2. A minute book containing the minutes of owners' meetings and the minutes of board meetings.
3. A copy of the declaration, by-laws and rules.
4. All lists, items, records and other documents mentioned in subsections 43 (4) and (5).

5. The report described in subsection 44(8) that the corporation receives from the person who conducts a performance audit.
6. The records required under subsection 47(2) and 83(3).
7. A record of all reserve fund studies and all plans to increase the reserve fund under subsection 94(8).
8. A copy of all agreements entered into by or on behalf of the corporation.
9. The report that the corporation receives from an inspector in accordance with subsection 130(5).
10. All other records as may be prescribed or specified in the by-laws of the corporation.

(see: *Condominium Act, 1998*, s. 55)

[12] There is no evidence as to whether these records have been or have not been kept.

[13] As a result, the applicants commenced this proceeding seeking, among other things:

- a declaration that the turnover meeting of September 7, 2011 was properly called and held pursuant to the *Condominium Act, 1998*, s. 43(2);
- a declaration that the Board of Directors is comprised of the directors elected at the turnover meeting;
- pursuant to the *Condominium Act, 1998*, s. 43(9), orders for:
 - (a) damages suffered by the corporation as a result of the declarant's failure to comply with the *Condominium Act, 1998*, s. 43(4), (5) and (7);
 - (b) costs of this application;
 - (c) an additional amount of \$10,000; and,
 - (d) requiring the declarant to deliver the items, materials and documents as referred to in the *Condominium Act, 1998*, sections 43(4), (5) and (7); and,
- an order that the records kept, pursuant to the *Condominium Act, 1998*, s. 55, be delivered to the Board of Directors.

[14] The application first came before court on December 19, 2011. Nothing had been filed on behalf of the declarant despite the fact that application had been served six weeks earlier, on October 30, 2011. At the time of the first appearance, counsel for the declarant advised that, on September 7, 2011, Harpreet Sethi was on his way to the meeting, that he was late, that he had telephoned to a colleague or employee to say he was on his way, but that by the time he arrived, the meeting was over. Counsel also said that he had been advised that, at the time, his client held proxies for owners representing more than half of the units in the building.

[15] The endorsement made on that day includes the following:

...It concerns me that a majority of the owners MAY have been denied their rights. On the other hand the respondent cannot expect the rights of the other owners to be set aside waiting for him. The next available court date is some weeks away. This must move faster. Accordingly, I order the following:

Adjourned to January 4, 2012, to be dealt with, by me, for one half hour and no more. The motion will not be dealt with then unless the respondent fails to deal with this endorsement as follows:

- (a) by January 3, 2012 the respondent will file his responding material. I have advised counsel that merely deposing, in an affidavit, that his client had the proxies will not be enough. I will want to see the documents that demonstrate these proxies,

- (b) by January 3, 2012 the respondent will provide the material referred to in ss. 43(4), (5) + (7) of the *Condominium Act*. It will be filed with the court and with counsel for the applicants,
- (c) the respondent, by January 3, 2012, will provide evidence he has complied with s. 55 (1) of the *Condominium Act*,
- (d) the respondent, by January 23, 2012, will provide a full accounting of the money received to support and maintain the common elements of the condominium since January 21, 2008, the day the condominium corporation came into existence up to and including today, December 19, 2011.

[16] An affidavit has been filed on behalf of the declarant. The deponent describes himself as a business associate of Harpreet Sethi. It does little more than provide an explanation as to what occurred on September 7, 2011 and assert that, on that day, Harpreet Sethi was in possession of proxies representing a majority of the units.

[17] None of the orders referred to above have been complied with.

[18] Counsel for the declarant advised that he delivered a copy of the endorsement made on December 19, 2011 to his client, by e-mail, on that day. A few days later, his client left the country and has not returned. Today, counsel for the declarant asks for a further adjournment until his client returns to this country, on or about January 16, 2012.

[19] I will not grant the adjournment.

[20] It is plain that the declarant has failed to comply with its obligations under the *Condominium Act, 1998*. It has not been contested in any of the material before me, or by counsel, that ownership of the majority of the units was transferred by January 7, 2009. The turnover meeting was long overdue. The affidavit provided by the business associate does not disagree that there have been difficulties in the operation of the building and provides no assurance that the obligations of the declarant to look after it are being fulfilled and that proper records are being kept.

[21] As a result of the adjournment granted on December 19 2011, the declarant was given an opportunity to demonstrate that everything was in order. In response, the declarant has done nothing to accommodate the direction and orders of the court. What the affidavit of the business associate demonstrates is that we are no further ahead now than we were at the time of the first appearance.

[22] It may be that Harpreet Sethi was on his way to the meeting. Perhaps the applicants should have been more patient. Even if that is so, it does not override or set aside the declarant's failures to do what the *Condominium Act, 1998* requires. In circumstances where the declarant has been offered the opportunity but failed to produce the proxies, there is insufficient evidence that the declarant had any ability to change the result of the meeting.

[23] The endorsement made on December 19, 2011 advised that the declarant cannot expect the rights of the unit owners to be set aside waiting for it and makes clear that if the declarant failed to do what is ordered the motion will be dealt with. Whatever may happen here after, it is preferable that the responsibility for management of this condominium corporation be passed on from the "first board" to the Board of Directors elected at the "turnaround meeting".

[24] I order the following:

1. It is declared that the turnover meeting of September 7, 2011 was a proper meeting and the Board of Directors elected, at that time, is confirmed as the Board of Directors Condominium Corporation No. 190;
2. It is ordered that the declarant deliver to the Board of Directors the items, materials and documents referred to in the *Condominium Act, 1998* s. 43(4), (5) and (7) forthwith;
3. It is ordered that the declarant deliver to the Board of Directors the records kept, pursuant to the *Condominium Act, 1998*, s. 55, forthwith;

4. It is ordered that any monies in the trust account of the solicitors for the declarant, standing to the credit of Condominium Corporation 1908 be distributed to it; and,
5. It is ordered that the declarant provide a full accounting of the money received to support and maintain the common elements of the condominium since January 21, 2008, the day the condominium corporation came into existence up to and including today, December 19, 2011 no later than February 10, 2012.



[25] No submissions were made as to costs. If the parties are unable to agree, I will consider written submissions on the following terms:

1. On behalf of the applicants, within fifteen days of the release of these reasons. Such submissions are to be no longer than four pages, double-spaced, exclusive of any Costs Outline, Bill of Costs or case law that may be submitted.
2. On behalf of the respondent, within ten days thereafter. Such submissions are to be no longer than four pages, double-spaced, exclusive of any Costs Outline, Bill of Costs or case law that may be submitted.
3. On behalf of the applicants, within five days thereafter. Such submissions are to be no longer than two pages, double-spaced.

LEDERER J.

Date: 20120109

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Case Name:
Ahmad v. 1288124 Ontario Inc.

**RE: Tahir Ahmad, Toronto Condominium Corporation, No. 1908,
Sanjay Saran Mathur, Syed Z. Qadri, Marcellus Wiradharma,
1752166 Ontario Inc., Anjaniay Holdings Inc., Rexdale Jame
Masjid and 1770420 Ontario Inc., Applicants, and
1288124 Ontario Inc., Respondent**

[2012] O.J. No. 1299

2012 ONSC 1782

Court File No. CV-11-436144

Ontario Superior Court of Justice

T.R. Lederer J.

March 19, 2012.

(6 paras.)

Counsel:

Yadvinder Singh Toor, for the Applicants.

Dilreet S. Dandiwal, for the Respondent.

COSTS ENDORSEMENT

1 T.R. LEDERER J.:-- The respondent, 1288124 Ontario Inc., has consistently failed to comply with its obligations and responsibilities under the *Condominium Act, 1998*, S.O. 1998 Ch. 19. It has continued to demonstrate its lack of regard for what the law requires by failing to adhere to orders of this Court. The application first came before the court on December 19, 2011. Nothing had been filed on behalf of the declarant despite the fact that the application had been served six weeks earlier. The application was adjourned until January 4, 2012, but included the requirement that certain information be provided by the respondent. This order was not complied with.

2 Following the hearing of the motion, an endorsement was issued on January 9, 2012. It directed that, in the absence of agreement, the applicants file written submissions with respect to costs within fifteen days of the release of the reasons contained within the endorsement. The submissions were received by the court on January 20, 2012. The respondent was required to respond within twenty-five days of the release of the reasons. It is March 15, 2012. Nothing has been received from, or on behalf of, the respondent.

3 The applicant requests costs, pursuant to Rule 57.01 of the *Rules of Civil Procedure*, in the amount of \$16,344.29, inclusive of HST and disbursements. I have reviewed the Bill of Costs which has been provided. In the circumstances, the costs requested fall within the limits of what the respondent should reasonably have anticipated. This is particularly so given the failure of the respondent to deal with this matter in an appropriate fashion. I note that the costs include a consultation with a more senior and experienced counsel. In the circumstances, I expect this served to lower rather than raise the costs.

4 Counsel for the applicants, in his submissions, makes reference to the *Condominium Act, 1998, supra*, ss. 43(9)(c) which allows the court, where the declarant, without reasonable excuse, has failed to comply with subsections (4), (5) or (7) of the same section, to award an additional amount not to exceed \$10,000. These clauses all require information be provided, by the declarant, to the board of the condominium corporation. It has not been. No explanation as been provided. By adjourning this matter, the court offered the declarant a further opportunity to comply which it has failed to do.

5 Counsel has also referred me to the *Condominium Act, 1998, supra*, s. 137. Contrary to the view expressed by counsel, this section does not allow me to award anything further. It provides that a party who fails to comply with identified sections of the *Condominium Act, 1998, supra*, is a guilty of an offence and outlined the fines that can be imposed. There has been no such conviction here.

6 I award costs in favour of the applicants and against the respondent in the amount of \$16,334.29 and an additional \$10,000 be paid by the respondent to the applicants as authorized by the *Condominium Act, 1998*, ss. 43(9)(c).

T.R. LEDERER J.

cp/e/qlafr/qljxr