Court file no CV 09-376529

Lexington on the Green v. Toronto Standard Condominium Corporation No. 1930
(Decision of Ontario Superior Court of Justice) (June 29, 2009)

The Issue

The issue on this Application is whether section 112 of the *Condominium Act* applies to the purchase and conveyance agreement between the parties such that the respondent can terminate the agreement to purchase the residence manager unit, one parking unit and one locker unit for $240,000. The applicant suggests that the respondent is required to purchase the unit, parking and locker at the price of $240,000. The applicant also seeks reimbursement for expenses incurred by it since the unit was to have been transferred.

The Facts

The Applicant is the developer of the condominium project and the respondent is a condominium corporation created on April 29, 2008 upon registration of its declaration with the Land Titles office.

The Declaration provides among other things, that,

> "The corporation shall purchase from the Declarant the ownership interest in the residence manager unit, one parking unit and one locker unit for a purchase price of $240,000"

Every prospective purchaser of a condominium unit was provided with a Disclosure Statement that included the declaration and the parties agree that perspective purchasers were aware of the provision regarding the purchase of the manager unit with parking and locker for $240,000. Such disclosure is required to be provided pursuant to s.72 of the *Condominium Act*.

In accordance with this provision, the applicant engaged a full-time superintendent who has been living in the manager unit since February 2008.

On May 1, 2008 the applicant enacted a by-law pursuant to which the respondent entered into a conveyance and purchase agreement with the applicant for purchase of the manager unit. The conditions of purchase are identical to those set out in the disclosure statement and declaration.

The applicant appointed the first board of directors of the respondent. The first board authorized the respondent to execute the conveyance and purchase agreement on behalf of the respondent. That agreement was signed on May 1, 2008

On August 14, 2008, a "turnover" meeting was held to elect a new board of directors at a meeting of new owners. A new board of directors was elected.

On March 12, 2009 the new board of directors of the respondent passed a resolution to terminate the conveyance and purchase agreement. This was communicated to the solicitor for the applicant by letter dated March 23, 2009.

The Law

Section 112 of the *Condominium Act* is a new provision enacted in May 2001. The new provision provided that by resolution, a condominium board may, within 12 months following the election of the new board terminate an agreement "for the provision of facilities to the corporation on other than a non-profit basis" that the corporation has entered into before the election of the new board.

This new provision (unlike its predecessor s.39(2)) expands the scope of agreements that can be terminated to include not only "recreational facilities" but "facilities" generally. Moreover the new provision contains a new subsection that attributes the agreements that cannot be terminated pursuant to s.112.

Moreover, pursuant to the maxim *expressio unius est exclusio alterius*, the specific inclusion of a non-application section and mention of one instance of non-application would seem to preclude an inference that there are other agreements to which section 112 does not apply.

I note that all of the authorities cited by the applicant are cases decided prior to the enactment of section 112 of the *Condominium Act* on May 5, 2001.

Conclusion

On the wording of s.112, it would seem that the legislators intended to allow a board to terminate on agreement for the provision of facilities [1]such as the ones in this case, that are provided on a for-profit basis and that are effected by board resolution within 12 months following the election of a new board of directors held in accordance with s.43 of the Act. (Section 43 of the Act provided that the new board shall call a meeting of owners to elect a new board no more than 21 days after the declarant ceases to be the registered owner of the majority of the units).

This interpretation is consistent with the general purpose of the *Condominium Act*, to protect consumers of condominium units through their elected board of directors.

It is also consistent with section 7(5) of the *Condominium Act*, which provides that "If any provision in the declaration is inconsistent with the provisions of this Act, the

[1] From the definition of the word "facilities" found in the Black's Law Dictionary and the Canadian Law Dictionary provided to me by both parties, it is clear it is clear that the manager's unit, locker and parking spot are "facilities" within the meaning of s.112 of the *Condominium Act*.

provisions of this Act prevail and the declaration shall be deemed to be amended accordingly."

Thus, to the extent that a provision in the declaration is being relied on to deny the respondents the right to terminate the agreement in accordance with s.112 of the *Condominium Act*, the declaration which was created after the enactment of s.112 must be amended to allow for same.

For these reasons the application to immediately require the respondent to purchase the residence manager unit, parking unit and locker unit for a purchase price of $240,000 is dismissed.

LEXINGTON ON THE GREEN INC.
Applicant

and

TORONTO STANDARD CONDOMINIUM CORPORATION NO. 1930
Respondent

Court File No. CV-09-376529

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceedings commenced at Toronto

APPLICATION RECORD

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THE ISSUE

The issue on this Application is whether section 112 of the Condominium Act applies to the Purchase and Conveyance agreement between the parties such that the Respondent can terminate the agreement to purchase the residence manager unit, one parking unit and one locker unit for $240,000.00. The Applicant also seeks reimbursement for expenses incurred by it since the unit was to have been transferred.

suggests that the Respondent is required to purchase the unit, parking and locker at the price of $240,000, the Applicant

THE FACTS

The Applicant is the developer of the condominium project and the Respondent is a condominium corporation created on April 29, 2008 upon registration of a declaration with the Land Titles Office.

The Declaration provides amongst other things, that,

"The Corporation shall purchase from the Declarant the ownership interest in the Residence Manager Unit, one Parking Unit and one Locker Unit for a purchase price of $240,000.00."

Every prospective purchaser of a condominium unit was provided with a Disclosure Statement that included the Declaration and the parties agree that prospective purchasers were aware of the provision regarding the purchase of the manager unit with parking and a locker for $240,000. Such disclosure is required to be provided pursuant to s. 72 of the Condominium Act.

In accordance with this provision, the Applicant engaged a full-time superintendent who has been living in the

manager unit since February 2008.

On May 1, 2008 the Applicant enacted a by-law pursuant to which the Respondent entered into a Conveyance and Purchase Agreement with the Applicant for purchase of the manager unit. The conditions of purchase are identical to those set out in the Disclosure Statement and Declaration.

The Applicant appointed the first Board of Directors of the Respondent. The first Board authorized the Respondent to execute the Conveyance and Purchase agreement on behalf of the Respondent. That agreement was signed on May 1, 2008.

On August 14, 2008, a "Turn-Over" meeting was held to elect a new board of directors at a meeting of new owners. A new board of directors was elected.

On March 12, 2009 the new board of directors of the Respondent passed a resolution to terminate the Conveyance and Purchase Agreement. This was communicated to the solicitor for the Applicant by letter dated March 23, 2009.

THE LAW

Section 112 of the Condominium Act is a new provision enacted in May 2001. The new provision provided that by resolution, a condominium board may, within 12 months following the election of the new board, terminate an agreement "for the provision of facilities to the corporation on other than a non-profit basis"

that the corporation has entered into before the election of the new board.

This new provision (unlike its predecessor S. 39(2)) expands the scope of agreements that can be terminated to include not only "recreational facilities" but "facilities" generally. Moreover, the new provision contains a new subsection that ~~a~~ ~~not~~ agreements that can not be terminated pursuant to S. 112.

(*)

Moreover, Pursuant to the maxim expressio unius est exclusio alterius, the specific mention of one instance of non-application would seem to preclude an inference that there are other agreements ~~that~~ to which section 112 does not apply. inclusion of a non-Application section

I note that all of the authorities cited by the Applicant are cases decided ~~pursuant to~~ prior to the enactment of section 112 of the Condominium Act on May 5, 2001.

CONCLUSION

On the wording of S. 112, it would seem that the legislature intended to allow a board to terminate an agreement for the provision of facilities such as the ones in this case, that are provided on a for-profit basis,

* From the definitions of the word "facilities" found in the Black's Law Dictionary and the Canadian Law Dictionary provided to me by both parties, it is clear that the manager's unit, locker and parking spot are "facilities" within the meaning of S. 112 of the Condominium Act.

and Act are effected by board resolution within 12 months following the election of a new board of directors held in accordance with s. 43 of the Act. (Section 43 of the Act provides that the new board shall call a meeting of owners to elect a new board no more than 21 days after the declarant ceases to be the registered owner of the majority of the units.).

This interpretation is consistent with the general purpose of the Condominium Act, to protect consumers of condominium units through their elected Board of Directors.

It is also consistent with section 7(5) of the Condominium Act which provides that, "If any provision in the Declaration is inconsistent with the provisions of this Act, the provisions of this Act prevail and the Declaration shall be deemed to be amended accordingly."

~~The Applicant~~ Thus, to the extent that a provision in the declaration is being relied on to deny the Respondents the right to terminate the agreement in accordance with s. 112 of the Condominium Act, the Declaration must be amended to allow for same. which was created after the enactment of s. 112

For these reasons the Application is immediately ~~requires~~ requiring the Respondent to purchase the residence manager unit, parking unit and locker unit for a purchase price of $240,000 is dismissed. ~~The agreement is terminated effective November 22, 2005~~

However the Respondent admits that the Applicant has incurred expenses in relation to the Agreement and that damages are owed to the Applicant. No submissions were made regarding the quantum of damages as the did not permit.

The parties will attempt to settle the issue of damages owing to the Applicant. If they are unable to do so, they have agreed to reattend before me on Thursday September 17th at 9 am at 301 University Avenue for a one hour proceeding to determine the quantum of damages payable to the Applicant.

Costs of today's date to be reserved to September 17, 2009.