

2012 CarswellOnt 7225, 2012 ONSC 3019

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Perper v. York Region Condominium Corp. No. 860

Marina Perper and Nataliya Lysenko, Applicant and York Region **Condominium Corporation** No. 860, Respondent

York Region **Condominium Corporation** No. 860, Applicant and Marina Perper and Nataliya Lysenko, Respondent

Ontario Superior Court of Justice

Quinlan J.

Heard: May 4, 2012

Judgment: May 22, 2012

Docket: Newmarket CV-12.1086622.00, Toronto CV-12-449118

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Counsel: Marina Perper, Nataliya Lysenko (Applicant / Respondent), for themselves in both actions

Matthew Morden, for Respondent / Applicant in both actions

Subject: Property

Real property.

Quinlan J.:

Overview

1 Disputes and dissension between condominium owners can result in an unbearable situation. This is one such case.

2 Marina Perper ("Perper") and Natalia Lysenko ("Lysenko") are each registered owners of units in York Region **Condominium Corporation** No. 860 ("YRCC 860"), a condominium at 91 Townsgate Drive, Thornhill, Ontario.

3 YRCC 860 has brought an application for a declaration that the requisition ("Requisition") to vote on the removal of three members of the board of directors ("Board") of YRCC 860 delivered by Perper and Lysenko is invalid and no meeting should be called or held in respect of the Requisition. They also seek injunctive relief restraining:

i) any meeting from being held;

ii) further dissemination by Perper or Lysenko of certain information; and

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iii) canvassing or soliciting by Perper or Lysenko for any election or owner's meeting of YRCC 860 for a period of time.

4 Perper and Lysenko have commenced an application for a declaration that a special meeting for the removal of three members of the Board be called, together with related relief in relation to the meeting, and an order restraining YRCC 860's management company from canvassing or soliciting in respect of the meeting.

5 On March 21, 2012, Grace J. ordered that the application brought by YRCC 860 be transferred from Toronto to Newmarket to be heard with the application brought by Perper and Lysenko. The Order also provided that no meeting be held and no canvassing or soliciting be done by any of the parties until after the applications could be heard.

Background

6 YRCC 860 is a non-profit **condominium corporation** created pursuant to the *Condominium Act, 1998, S.O. 1998, c.19* ("*Condominium Act*"). The condominium development at 91 Townsgate Drive, Thornhill, Ontario is comprised of 162 residential dwelling units, parking and locker units and common elements.

7 Perper and Lysenko are the registered owners respectively of units 503 and 201 in the condominium development.

8 On February 15, 2012 Perper and Lysenko mailed a letter ("Letter") and Requisition to all YRCC 860 unit owners.

9 The Letter and Requisition alleged the following:

(1) "...the three members from the previous Board of Directors...ignoring your vote and your will, made a decision to proceed with the lawyer's opinion on the validity of your signatures on the proxies." [Letter]

(2) "In our budget the surplus of \$16,196 that we carried from 2010 is gone...the Board of Directors budgeted the "deficit" of \$18,000...by which our corporation *spending exceeds its income* for this fiscal year." [Letter]

(3) "As of November 30, 2011 another huge amount of \$167,000...was illegally taken from the Reserve Fund and this is not the end of unnecessary spending for this fiscal year." [Letter; in Requisition allegation of illegal charging of \$168,000]

(4) "As a result, the Corporation will end with insufficient funds in our Reserve Fund which automatically will reflect on the increase in our maintenance fees." [Requisition]

10 In response to the Letter and Requisition, Fine & Deo LLP, counsel to YRCC 860, delivered a letter dated February 28, 2012. That letter was distributed to all owners in an attempt to prevent unit owners from signing the Requisition on the basis that the Requisition contained numerous misrepresentations and was intended to create acrimony.

11 Approximately 23% of the unit owners of YRCC 860 signed the Requisition. Perper and Lysenko delivered the Requisition to YRCC 860 by letter dated February 28, 2012.

12 The issue that seems to have precipitated the conflict between Perper and Lysenko and the Board is the initiation of major work to the security system at the condominium development without obtaining the consent of the unit

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owners.

13 The position of Perper and Lysenko is that the work was not identified in the Reserve Fund Study and there were no requests from the owners to proceed with substantial changes of the entire security system. Twenty-five owners (and more as time went on) who together owned 15% of YRCC 860 requested a special meeting, which request has been ignored by the Board.

14 Perper and Lysenko take the position that the original security system consisted of 19 cameras. Only this equipment can be charged against a Reserve Expense if there is a need for replacement. The total cost of the security system is \$167,127 (including HST), including replacement of the 19 existing cameras. The charging of the total cost of the security system to the reserve account is contrary to the *Condominium Act*.

15 Affidavits filed by both parties confirm that these applications are causing significant upset to YRCC 860's unit owners.

Issues

16 The issues are:

- (1) Is the Requisition invalid due to its misleading content and non-compliance with the *Condominium Act*?
- (2) Is the YRCC 860 Board in breach of the *Condominium Act* by not holding the special meeting for the removal of three directors?
- (3) If the Requisition is invalid, should an injunction be granted as sought by YRCC 860?

Analysis

1) Validity of the Requisition

Lawyer's Opinion as to the Validity of the Proxies

17 I find that the Letter is misleading in relation to whether Perper and Lysenko had any part in the decision to obtain a lawyer's opinion. Minutes of the Board meeting held December 6, 2011 confirm that Lysenko brought a motion to ask the law firm of Fine & Deo to confirm whether proxies submitted by Perper and Lysenko in support of their election to the Board were valid or invalid. The motion noted that "if a lawyer is unable to rule on the validity of the proxies than [sic] this matter will be taken before a judge." The motion was seconded by Perper and the motion carried.

18 The Minutes of the Board meeting held December 19, 2011 confirm that Perper and Lysenko agreed to be bound by Fine & Deo's opinion as to the validity of the proxies. By letter dated January 27, 2012, Fine & Deo delivered the opinion that the elections of Perper and Lysenko were invalid.

19 It is clear that the manner in which this issue was addressed in the Letter would lead the reader to believe that Perper and Lysenko had no part in the decision to proceed to obtain and be bound by the lawyer's opinion on the validity of the proxies. That was clearly not the case. I find that it would have the effect of misleading the unit owners.

Surplus, Deficit and Excess Spending

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20 Audited and unaudited financial statements demonstrate that at the beginning of the fiscal year ending May 31, 2012, YRCC 860 will have a surplus of \$46,223.78. Financial statements also show the carry-over of the \$16,196 (in the financial statement \$16,197.51) referred to in the Letter as being "gone".

21 In her cross-examination on her affidavit, Lysenko testified as to her familiarity with financial statements in her position as a property manager. She testified that she was aware of the audited and unaudited financial statements before sending the Letter and Requisition. She acknowledged all necessary figures to support the conclusion that the \$16,196 referred to in the Letter was clearly carried forward.

22 In her cross-examination, Perper admitted that she recalled a discussion of an operating surplus of approximately \$20,000, had seen audited financial statements and agreed that statements showed the surplus of \$16,196 being carried forward.

23 The allegation in the Letter that the surplus of \$16,196 was "gone" was clearly false and misleading. I find that Perper and Lysenko were aware that this allegation was false and misleading. The financial statements also clearly demonstrate that YRCC 860 is in a positive operating position.

\$167,000 (or \$168,000) Illegally Taken from the Reserve Fund and Further Unnecessary Spending

24 This is where the security system issue comes in. The Board decided to replace YRCC 860's 17-year-old analog security system in the late summer and fall of 2011, having determined that it was inadequate to ensure the safety and security of unit owners and residents. The Board consulted with its auditor who advised that:

In your case if you are in fact replacing the entire system with a new one and the new standard makes it more efficient to have extra cameras, we would feel it is fine to charge the entire amount to the reserve fund. If however you are just adding on new cameras, it would have to come from operating funds.

25 After receiving this advice, the Board decided that the replacement of the analog security system could be funded by the Reserve Fund. The auditor advised the Board and Lysenko that he would not review the Board's decision to fund the replacement of the analog security system from the Reserve Fund before YRCC 860's financial year-end on May 31, 2012.

26 The position of Lysenko at her cross-examination was that the auditor had come to the conclusion that the Reserve Fund expenditures for the new security system were illegal. Lysenko failed to fulfil her undertaking to provide a document substantiating her assertion.

27 The financial statements demonstrate that even if the auditor determines that a portion of the replacement should not have been funded from the Reserve Fund, the operating budget surplus will be more than adequate to cover the cost.

28 It is also clear that Lysenko, in her role as property manager, was aware that the Board has a statutory duty to decide when common elements and assets need to be replaced, that replacement of the security system from the Reserve Fund would be a legitimate expense, and the Board does not have to seek an auditor's opinion before making an expenditure from the Reserve Fund. Her issue appears to be the addition of extra cameras, an interphone system and a CCTV system.

29 Perper and Lysenko argued that the changes related to the installation of the new security system do not qualify as changes without notice because the overall cost for the security project exceeds 1% of the annual budgeted common expenses for the current fiscal year. They argued that this has demonstrated incompetence on the Directors' part, the misuse of condominium funds and a commission to changes without the necessary consent of the owners. In addition,

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the Directors misused condominium funds in that a Reserve Fund shall be used solely for the purpose of major repair and replacement of the common elements and assets of the corporation.[FN1]

30 Bijan Dalir, the property manager, deposed in his affidavit sworn March 28, 2012, that the new system was required to address a number of the unit owners' safety and security concerns, such as thefts, use of intravenous drugs in common areas, vandalism and the presence of unauthorized individuals within the building. The additional cameras and the interphone system provided the necessary increase in security.

31 I find that the security system upgrades were part of YRCC 860's obligation to repair and maintain the common elements. They were properly made without notice in that the addition was necessary to ensure the safety or security of persons using the property.[FN2]

32 I find that the addition, improvement, or change was not "substantial" in that the total cost did not exceed 10% of the annual budgeted common expenses for the current fiscal year.[FN3] I accept that if there was an addition and not a replacement, the cost was \$24,900 which is approximately two percent of the annual budget.

33 I find that there has been no breach of section 97 of the *Condominium Act*. The Reserve Fund was properly used for the purpose of major repair and replacement of the common elements, in accordance with s. 93(2) and s.95 of the *Condominium Act*.

34 Perper and Lysenko both acknowledged in their cross-examinations that they had no information to support other "unnecessary spending for this fiscal year" from the Reserve Fund.

35 I find that Perper and Lysenko intentionally misled the unit owners when they stated in the Letter and Requisition that \$167,000 was "illegally" taken from the Reserve Fund and that unnecessary spending was continuing.

Increase in Maintenance Fees

36 Once again, the financial statements do not support that YRCC 860 will end this fiscal year with insufficient funds in the Reserve Fund which will increase the maintenance fees. The Reserve Fund Study required a Reserve Fund balance of just in excess of \$500,000. The Reserve Fund balance is currently \$1,134,000.00, after the expenditures of \$463,247.00 were made this year. I accept that no increases in common expenses will result from this year's Reserve Fund expenditures.

37 It is clear that Lysenko was aware of the Reserve Fund, the Reserve Fund Study and of the fact that there are actual assets well beyond the recommended balance.

38 I find that the Requisition falsely asserts that YRCC 860 will have insufficient funds in the Reserve Fund which will result in an increase in the maintenance fees. The Letter circulated with the Requisition also contained false and misleading information about the financial state of affairs of YRCC 860.

Conclusion of the Validity of the Requisition

39 The cross-examinations of Perper and Lysenko support that they deliberately disseminated false information in the Letter and Requisition. I accept the position of YRCC 860 that Perper and Lysenko intended to cause the unit owners to conclude that the Board was engaged in misconduct and that YRCC 860 was in financial trouble in order to induce unit owners to sign the Requisition on the basis of the misleading information.

40 I accept YRCC 860's submission that a meeting of unit owners under the *Condominium Act* is analogous to a

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shareholder's meeting. A notice must not only sufficiently state the purpose of the meeting but it must not be misleading.[FN4] The misleading information in the Requisition in this case would not permit unit owners to form a reasoned judgment as to whether or not a meeting should be requisitioned.

41 Accordingly, as a result of the false and misleading information contained therein, I find that the Requisition is invalid.

42 In view of my finding, I need not consider whether the Requisition complies with the *Condominium Act* for failing to state the proposed replacement directors.

2) Is the Board in Breach of the Condominium Act By Not Holding the Special Meeting?

43 A requisition for a meeting of unit owners may be made by unit owners who own at least 15% of the units in a condominium corporation.[FN5]

44 Although a sufficient number of unit owners requisitioned the meeting, I find that the Board is not in breach of the *Condominium Act* by not holding the special meeting due to the invalidity of the Requisition.

45 I accept that forcing YRCC 860 to call a meeting of unit owners pursuant to an invalid requisition would violate YRCC 860's right to require compliance with the *Condominium Act*. [FN6]

46 As a result of my finding, it is unnecessary to consider whether YRCC 860 should be ordered to provide a list of the owners, access to the party room and reimbursement to Perper and Lysenko of costs incurred for the meeting.

47 In addition, I need not decide whether the Requisition caused substantial damages for YRCC 860 as no such claim has been made in the applications before me.

3) Should an Injunction Be Granted?

48 YRCC 860 seeks an injunction restraining a meeting from being held pursuant to the Requisition and restraining Perper and Lysenko from making further misleading statements to the unit owners of YRCC 860.

49 I find that immediately after Perper and Lysenko were removed from the Board at the end of January 2012, they began a campaign to remove members of the Board. Their Letter and Requisition contained false and misleading information. The result has been significant acrimony between some of the unit owners, the members of the Board and the property manager. Affidavits filed by both parties show that the situation that has resulted from the actions of Perper and Lysenko is distressful to the unit owners. There have been allegations of assault and of a restraining order. A security guard has been hired to protect the property manager. Affidavits filed by YRCC 860 support that the actions of Perper and Lysenko have interfered with the ordinary operations of YRCC 860.

50 I accept that the evidence filed demonstrates that if a meeting were to be held, members of the Board could be permanently removed on the basis of false information. This is an unjustified interruption in the Board's management of YRCC 860's affairs which could threaten the conduct of YRCC 860's affairs in the future. I am further satisfied that to permit a meeting to be held pursuant to the Requisition would result in YRCC 860's rights being irrevocably violated. I am satisfied that a permanent injunction should be granted restraining a meeting from being called or held pursuant to the Requisition.[FN7]

51 I am also satisfied that the record supports that there should be a permanent injunction restraining Perper and Lysenko from further disseminating the Letter and Requisition or the allegations therein.

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52 The more difficult issue is whether Perper and Lysenko should be restrained for a period of time from canvassing or soliciting, directly or indirectly, in respect of, or for, any election or owners' meeting of YRCC 860.

53 In deciding this issue I consider the following:

(1) The false and misleading representations set out in the Letter and Requisition.

(2) The clearly inaccurate submission before me by Perper that no quote had been obtained for the security system.

(3) What I find to be a misleading letter filed in the factum of Perper and Lysenko signed by Fortuna Savage, which is completely contradicted by Ms. Savage's affidavit sworn April 4, 2012 which I accept.

(4) Lysenko's unsupported and unjustified insistence at her cross-examination that the auditor had come to a conclusion that money had been improperly taken from the Reserve Fund.

54 I accept the submission of YRCC 860 that Perper and Lysenko have lost all objectivity and will do what is necessary to remove the members of the Board. I am satisfied that the dispute is only increasing and becoming more fractious.

55 The significant disturbance to the unit owners and to YRCC 860 in the conduct of its affairs must stop.

56 YRCC 860 has sought a temporary injunction restraining Perper and Lysenko for five years. However, I am advised that the next Annual General Meeting is in November 2012. It is anticipated that by that time audited financial statements will be completed, resulting in some of the issues that have been raised hopefully being resolved by then.

57 I am satisfied that an interim injunction should be granted and should remain in place until December 31, 2012, at which time it shall terminate. This period of time should be sufficient for elections to be held, audited financial statements to be completed and any newly elected Board to be established.^[FN8]

58 Accordingly, Perper and Lysenko are restrained from canvassing and/or soliciting, directly or indirectly, in respect of, or for, any election or owners' meeting of YRCC 860 until December 31, 2012.

Conclusion

59 YRCC 860 is granted:

(a) A declaration pursuant to section 134 of the *Condominium Act, 1998* that the Requisition to vote on the removal of three members of the Board of Directors of YRCC 860 delivered by Marina Perper and Nataliya Lysenko is invalid and that no meeting should be called or held in respect of the Requisition;

(b) A permanent injunction restraining any meeting from being called or held pursuant to the Requisition;

(c) A permanent injunction restraining Marina Perper and Nataliya Lysenko from further dissemination of the Letter dated February 15, 2012 and the Requisition, or the allegations therein;

(d) An interim injunction restraining Marina Perper and Nataliya Lysenko from canvassing and/or soliciting,

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directly or indirectly, in respect of, or for, any election or owners' meeting of YRCC 860 until December 31, 2012.

(e) The Application of Perper and Lysenko is dismissed.

Costs

60 If the parties cannot agree on costs, I will receive written submissions, not to exceed five pages in length, plus a costs outline. Submissions from YRCC 860 are to be provided by June 12, 2012 with responding materials from Perper and Lysenko to follow by June 27, 2012. Any reply by YRCC 869 is to be filed by July 9, 2012.

FN1 *Condominium Act*, s. 97, 93 and 95

FN2 *Little v. Metropolitan Toronto Condominium Corp.* 590, 2006 CarswellOnt 4984 (S.C.); *Condominium Act*, s. 97 (2)(b)

FN3 *Condominium Act*, s.97 (6)

FN4 Hartley R. Nathan and Mihkel E. Voore, *Corporate Meetings Law and Practice*, looseleaf (Toronto: Carswell, 1992) at paras. 13-12.3 to 13-13.

FN5 *Condominium Act*, 1998, s.46

FN6 *Condominium Act*, s. 46 and 119

FN7 Canadian Encyclopaedic Digest, online at CEDInjunctions I.3.(c)

FN8 *Sikh Cultural Society v. Kooner*, 2011 ONSC 5513

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CITATION: Perper v. York Region Condominium Corp. No. 860, 2012 ONSC 4888
NEWMARKET COURT FILE NO.: CV-12.1086622.00
(Toronto Action) CV-12-449118
DATE: 20120831

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
MARINA PERPER AND NATALIYA)
LYSENKO) Derrick M. Fulton, for the Applicant
)
Applicant)
)
-- and --)
) Matthew Morden, for the Respondent
)
YORK REGION CONDOMINIUM)
CORPORATION NO. 860)
)
Respondent)
)
AND BETWEEN:)
)
YORK REGION CONDOMINIUM)
CORPORATION NO. 860) Matthew Morden, for the Applicant
)
Applicant)
)
-- and --)
) Derrick M. Fulton, for the Respondent
)
MARINA PERPER AND NATALIYA)
LYSENKO)
)
Respondent)
)
)
) By written submissions
)
)

RULING ON COSTS

QUINLAN J.

ANALYSIS**Were the applications brought pursuant to section 134 of the *Act*?**

- [8] YRCC 860's application and Perper and Lysenko's application were both styled as applications pursuant to section 134 of the *Act*. Each of the parties sought declaratory relief. Each sought compliance with the *Act*. It was clear from YRCC 860's factum that reliance was being placed upon section 134 of the *Act*.
- [9] Section 134(1) of the *Act* provides that an owner, occupier or a corporation may make an application to the Superior Court of Justice for an order enforcing compliance with any provision of the *Act*.
- [10] The Requisition in question was prepared and delivered pursuant to section 46 of the *Act*. The issue before me was whether the Requisition complied with the *Act* and whether a meeting should be held in accordance with the *Act*.
- [11] I found that the Requisition was invalid and that forcing YRCC 860 to call a meeting of unit owners pursuant to an invalid Requisition would violate YRCC 860's right to require compliance with the *Act*.
- [12] Section 134(3) states that, on an application, the court may grant the order applied for and grant such other relief as is fair and equitable in the circumstances.
- [13] I agree with the position of YRCC 860 that section 134(3) of the *Act* does not restrict the relief that the court may grant to ensure compliance with the *Act* in the manner suggested by Perper and Lysenko in their costs submissions.
- [14] *Stulberg v. York Condominium Corp. No. 60*, 1981 CarswellOnt 1140 (CA), the decision relied upon by Perper and Lysenko, was decided pursuant to the *Condominium Act, 1978*, which addressed the performance of the duty imposed by that Act and not the broader concept of compliance with the *Condominium Act, 1998*.
- [15] Perper and Lysenko argue that I should exercise my discretion and find that my decision was not a compliance order and that the cost ramifications under section 134(5) do not apply.
- [16] Both parties sought declaratory relief and compliance with the *Act*. I have already exercised my discretion in making the compliance order under section 134. There is no basis for me to now alter the relief I granted so that there are no cost ramifications for the losing party.

Was there a requirement for mediation or arbitration?

- [17] Section 132 of the *Act* applies to specific agreements between a condominium corporation and a unit owner and disagreements concerning the declaration, by-laws or rules. I agree with the position of YRCC 860 that the within application did not concern

- [21] Although I found that Perper and Lysenko, amongst other things, made false and misleading representations in the Letter and Requisition and made inaccurate submissions before me, I am not satisfied that their conduct merits an award of substantial indemnity costs. Although their conduct was improper and their claims against the members of the Board were without basis, I do not find that their conduct can be said to be "reprehensible".
- [22] The application brought by Perper and Lysenko was without merit. However, in exercising my discretion as to the appropriate scale and quantum of costs, I consider that little additional time was required in the determination of Perper and Lysenko's application, given that it proceeded along with YRCC 860's application.
- [23] Accordingly, costs shall be awarded on a partial indemnity scale.

What is an appropriate award of costs?

- [24] As the successful party, YRCC 860 has a prime facie entitlement to costs on a partial indemnity basis. The costs sought on a partial indemnity basis are fees in the amount of \$27,850 and disbursements in the amount of \$4,125, for total fees and disbursements in the amount of \$31,975.
- [25] I have reviewed the costs outline provided by YRCC 860. In particular, I find that the time spent on the initial review of the Letter and Requisition, consultation with the client and correspondence to unit owners, correspondence with the client regarding materials, proceedings and strategy and drafting of the factum is excessive.
- [26] Over 110 hours were spent on the application, including attendances at cross-examinations and three attendances in court. I agree with Perper and Lysenko that this amount is excessive and that it is not fair and reasonable that Perper and Lysenko should pay such costs.
- [27] Any cost award should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of actual costs to the successful litigant: *York Condominium Corp. No. 482 v. Christiansen*, 2003 CarswellOnt 1198 (SCJ), referring to *Zesta Engineering Ltd. v. Cloutier*, 2002 CarswellOnt 4020 (CA).
- [28] Having considered the factors set out in rule 57 of the *Rules of Civil Procedure*, I find that an appropriate award of costs, inclusive of disbursements and HST, is \$18,000.
- [29] Accordingly, Perper and Lysenko are ordered to pay to YRCC 860 its costs of the application in the amount of \$18,000.

QUINLAN J.