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Sarah Computer Consulting Inc. v. Peel **Condominium Corporation** No. 421

Sarah Computer Consulting Inc., Malcolm Gonsalves and Shiroon Gonsalves, Applicants and Peel **Condominium Corporation** #421, Respondent

Ontario Superior Court of Justice

Ricchetti J.

Heard: June 13, 2012
Judgment: June 22, 2012
Docket: CV-11-2377-00

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Counsel: K. Hood, for Applicants

I. Latimer, for Respondent

Subject: Property

Real property.

Ricchetti J.:

The Application

1 This is an application by the Applicants seeking:

- (a) A declaration that the Respondent's actions were oppressive, unfairly prejudicial or unfairly disregarded the interests of the Applicants under s. 135 of the *Condominium Act*;
- (b) Compensation under s. 135(3) (b) of the *Condominium Act*;
- (c) Reimbursement of monthly common expenses;
- (d) General damages for discrimination;
- (e) Declaration that Rule 27.3 of condominium's rules is void and unenforceable;
- (f) Declaration that the board of directors of the Respondent did not act honestly and in good faith; and

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(g) Costs.

2 The Respondent seeks a dismissal of the application with costs.

The Facts

3 The Respondent is Peel **Condominium Corporation #421** (PCC #421) with a high-rise condominium project at 45 Kingsbridge Garden Circle. As all condominium projects, the building has common areas for use by residents and guests visiting the building. Access to the building and the garage is through the use of FOBs and clickers provided to residents.

4 The building also has recreational facilities which are restricted to "residents" and a guest. (s. 35 of the PCC #421 Rules)

5 Owners of the condominium units who are not residents, are not entitled to use common elements and facilities except for the purpose of visiting their units or dealing with the management. (S. 16.01 of By-Law No. 7)

6 PCC #421 uses Resident Information Forms to identify who the residents of the condominiums units are. Resident Information Forms are not always completed for each unit. The forms are required by PCC #421 where an issue arises regarding the identity of the resident(s).

7 On January 26, 2010, the owner of condominium unit 3411 was Sarah Computer Consulting Inc. ("Sarah Computing"). However, somehow, the unit had four FOBs and three clickers issued to it, mostly in Malcolm Gonsalves' name.

8 Malcolm Gonsalves had reserved the squash court for the evening of January 26, 2010. He decided to go and cancel the reservation and re-book the squash court for the next evening. When he attended, he was told he couldn't book the squash court for the next evening. Mr. Gonsalves became upset when he learned he would not have been able to play on January 26, 2010, in any event, as the squash court had previously been booked for yoga classes.

9 Mr. Gonsalves immediately wrote to the management and the board of PCC #421 on the evening of January 26, 2010. He raised two complaints: the first was an issue with respect to an alleged unannounced or unapproved attendance in the condominium unit - which allegation is not being pursued in this application; and the second the issue with the squash courts.

10 PCC #421's management looked into the matter. At the time there was no completed "Resident Information Form" for unit 3411 but, to management from its records, it appeared that only Sarah (Mr. Gonsalves' daughter) and Zac (Sarah's boyfriend) were the only residents of unit 3411. Management also noted the number of FOBs and clickers exceeded the number of residents.

11 On January 27, 2010, PCC #421's management decided to deactivate the FOBs and clickers of Mr. Gonsalves and his wife because it was "the fastest way of getting somebody from a unit to meet with management or security to get any access concerns corrected." PCC #421 did not deactivate the FOBs and clickers for Sarah and Zac. No prior notice was given to Mr. Gonsalves or his wife of this proposed action or even notice after the action had been taken by PCC #421 management.

12 The next morning, on January 28, 2010, PCC #421 management wrote to Mr. Gonsalves addressing both issues. With respect to the squash courts, management looked into the matter and wrote to Mr. Gonsalves:

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Only residents of the building can use the facilities. Sarah or Zac (residents on record - suite 3411) can book the squash court and invite you to play with them.

13 PCC #421 did not tell Mr. Gonsalves that his and his wife's FOBs and clickers had been deactivated.

14 Mr. Gonsalves attended the building on January 28, 2010 and discovered that his FOBs and clickers had been deactivated. Mr. Gonsalves went to the security desk upset and threatening a variety of inappropriate actions. Mr. Gonsalves was asked to complete a Resident Information Form which would identify the residents in unit 3411. All FOBs and clickers were immediately reactivated.

15 Mr. Gonsalves refused to complete a Resident Information Form despite being told that if he completed it and identified himself as a resident, management would accept the form and re-instate his resident's rights and privileges. Mr. Gonsalves left without completing the Resident Information Form.

16 I do not accept Mr. Gonsalves evidence that he completed and provided the Resident Information Form to PCC #421. His explanation is totally inconsistent with the subsequent events. Mr. Gonsalves wrote to PCC #421's Board and Management on January 29, 2010 but makes no mention that he completed the Resident Information Form but goes on at length stating that he was a resident and wanted to stop management "falsifying" resident information. Mr. Gonsalves' comments make no sense if he had completed the Resident Information Form. He would have said he has shown as a resident on the form he had completed and submitted just the day earlier. Further, on February 9, 2010 Mr. Gonsalves' counsel who wrote to the PCC #421's Board, but again there was no mention of completion of the Resident Information Form and asks for restoration of Mr. Gonsalves and Mr. & Mrs. Gonsalves as residents of the condominium unit. The completed form would have been significant to counsel's demand.

17 Mr. Gonsalves produced a copy of a Resident Information Form dated January 28, 2010 in his supplementary affidavit which was prepared after PCC #421's affidavit materials were filed where Ms. Morton stated under oath that Mr. Gonsalves refused to complete a Resident Information Form on January 28, 2010. Why Mr. Gonsalves had not produced this or even referred to this in his prior material was never explained. Further, the policy at PCC #421 was to stamp all documents received with the date and initialled by the person receiving the document(s). The Resident Information Form produced by Mr. Gonsalves had no such receipt stamp. The clear implication was that the Resident Information Form was prepared after the fact. I repeat what I stated above, if Mr. Gonsalves had prepared and handed in the Resident Information Form on January 28, 2010, this would have figured prominently on what subsequently occurred between counsel, in the correspondence, in the application and in Mr. Gonsalves' first affidavit. There is no mention of it whatsoever.

18 PCC #421 management wrote to Mr. Gonsalves on February 16, 2010 asking Mr. Gonsalves to provide "a photocopy of one of the above noted identifying document for proof of residency at 45 Kingsbridge Garden Circle. Upon receipt, Security will reactivate access to the recreational facilities to the FOBs issued under your name." Mr. Gonsalves' statement that this was not a "legitimate requirement or demand" by PCC #421 is simply not correct. PCC #421 was acting reasonably and trying to avoid the litigation the parties now find themselves embroiled in. PCC #421 simply wanted some proof of Mr. Gonsalves' residence. Mr. Gonsalves' refusal to provide this proof was unreasonable.

19 Mr. Gonsalves provided nothing to PCC #421. Just to be clear, Mr. Gonsalves did have access to his unit and parking garage from January 28, 2010 onwards. It is only the recreational facilities that he was not able to access as a non-resident.

20 PCC#421's counsel responded to Mr. Gonsalves' counsel on February 23, 2010 essentially stating that "If Mr. Gonsalves complies with section 27.4 of the Rules, PCC 421 will reconsider its position." The letter mistakenly re-

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ferred to 27.4 instead of 27.3 of the condominium's rules.

21 Mr. Gonsalves continued to provide nothing to PCC #421.

22 Mr. Gonsalves' counsel wrote back on April 13, 2010 stating:

My clients appreciate the offer from your client to reinstate their residency status upon the production of one (1) of the four (4) Residency Documents and my clients can easily produce same. However, my clients believe that all rules should be followed strictly and they do not want to break the rules by not producing all four (4) documents, yet still be considered residents.

23 This was a very strange and unreasonable position for Mr. Gonsalves to take. All Mr. Gonsalves had to do was produce one piece of identification, which he said he could "easily do," but chose instead to continue the dispute through counsel.

24 On April 16, 2010 PCC #421's counsel once again wrote to Mr. Gonsalves' counsel asking him or Mr. Gonsalves to provide the evidence of residency.

25 Mr. Gonsalves had a driver's license (it was issued on May 4, 2010) showing the condominium unit as his address. However, Mr. Gonsalves, for some reason, only known to him, did not provide it to PCC #421.

26 Mr. Gonsalves continued to be upset and refused to provide the requested identification.

27 Mr. Gonsalves arranged for the transfer the condominium from Sarah Computer to Sarah Computer, his wife and himself on May 18, 2010. Now Mr. Gonsalves was an owner but he had still not established that he was a resident of the building.

28 This application was commenced on June 10, 2011. When the application materials were served, it contained a copy of Mr. Gonsalves' driver's license referred to above showing the building as his address. Mr. Gonsalves' use of the facilities was re-instated on June 22, 2011. PCC #421's letter of June 22, 2011 re-instating Mr. Gonsalves' use of the recreational facilities also became an issue for Mr. Gonsalves. Mr. Gonsalves suggests this letter is a fraudulent letter done after the fact. I do not accept this. It follows within days of PCC #421 receiving, albeit in the application materials, the requested identification for Mr. Gonsalves.

29 The historical and subsequent use of the squash court is indicative that the issue became one of principle rather than negatively impacting Mr. Gonsalves:

- 2009 - someone from unit 3411 used the squash court 4 times;
- 2010 - no use by anyone from 3411; and
- 2011 - no use by anyone from 3411.

30 Access by Mr. Gonsalves does suggest, as set out by his lawyer in his correspondence, that Mr. Gonsalves does not reside at the condominium on a regular full time basis. Clearly, his daughter and her boyfriend do.

The Issue

31 The only issue pursued by the Applicants is that the actions of PCC #421 oppressed, were unfairly prejudicial

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or unfairly disregarded the rights of the Applicants.

32 The Applicants claim they are entitled to remedies under s. 135 of the *Condominium Act*.

33 The relief in paragraph 1 (e) and (f) above were not pursued.

The Law

34 S. 135 of the *Condominium Act* provides:

135. (1) An owner, a corporation, a declarant or a mortgagee of a unit may make an application to the Superior Court of Justice for an order under this section.

(2) On an application, if the court determines that the conduct of an owner, a corporation, a declarant or a mortgagee of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant, it may make an order to rectify the matter.

(3) On an application, the judge may make any order the judge deems proper including,

(a) an order prohibiting the conduct referred to in the application; and

(b) an order requiring the payment of compensation.

35 Justice O'Marra provided a comprehensive review of the law regarding oppression remedies in the context of condominium in *Hakim v. Toronto Standard Condominium Corp. No. 1737, 2012 ONSC 404* at paragraphs 30 through 43:

On application to the Superior Court, if it is found that the conduct of an owner, a corporation, a declarant or a mortgagee of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant, an order to rectify the matter may be made.

The judge may make any order deemed proper including:

a) an order prohibiting the conduct referred to in the application; and

b) an order requiring the payment of compensation. s.135(1) (2) & (3)

Section 135 of the *Act* came into effect in 2001. Courts in Canada have dealt with oppression remedies for many years in the context of company law. Those cases have considered whether the conduct complained of falls under the three types enumerated under statute, namely:

i) oppression;

ii) unfair prejudice; or

iii) unfair disregard.

The courts have not drawn clear lines between any of the three statutory tests and have often found that conduct

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may fit into one or more of the categories. Unfair prejudice and unfair disregard are less rigorous tests than oppression. *Niedermeier v. York Condominium Corporation No. 50* (2006), 45 R.P.R. (4th) 182, at para. 4 ("Niedermeier")

Oppression is conduct that is coercive or abusive. Oppression has also been described as conduct that is burdensome, harsh and wrongful, or an abuse of power which results in an impairment of confidence in the probity with which the company's affairs are being conducted.

Unfair Prejudice has been found to mean a limitation on or injury to a complainant's rights or interests that is unfair or inequitable.

Unfair Disregard means to ignore or treat the interests of the complainant as being of no importance. *Niedermeier, supra*, at paras. 5-8.

Courts in Ontario have held that the use of the word "unfairly" to qualify the words "prejudice" and "disregard" suggest that some prejudice or disregard is acceptable provided it is not unfair. *Niedermeier, supra*, at para. 9.

The oppression remedy is broad and flexible, allowing any type of corporate activity to be subject of judicial scrutiny. Nevertheless, the legislative intent of the oppression remedy is to balance the interests of those claiming rights from the Corporation against the ability of management to conduct business in an efficient manner. *McKinstry v. York Condominium Corporation No. 472*, 2003 CanLII 22436 (ON SC), (2003), 68 O.R. (3d) 557 (S.C.), at para. 31 ("McKinstry")

Section 135 protects legitimate expectations and not individual wish lists, and the court must balance the objectively reasonable expectations of the owner with the condominium Board's ability to exercise judgment and secure the safety, security and welfare of all owners and the condominium's property assets. *McKinstry, supra*, at para. 33.

The duties of the condominium Board include the following:

1. The corporation has a duty to control, manage and administer the common elements and the assets of the corporation. s.17(2)
2. The corporation has an obligation to enforce the *Act*, Declaration, bylaws and rules against owners and occupiers of a unit. s.17(3)
3. The corporation, the directors, officers and employees of a corporation, a declarant, the lessor of a leasehold **condominium corporation**, an owner, an occupier of a unit and a person having an encumbrance against a unit and its appurtenant common interest shall comply with the *Act*, the declaration, the bylaws and the rules. s.119(1)

It must be recognized that the Board is charged with the responsibility of balancing the private and communal interests of the unit owners, and their behaviour must be measured against that duty. The court does not look at the interaction between the Board and the applicant in isolation. The conduct of the corporation must be viewed in light of the behaviour of the applicant. *Orr v. Metropolitan Toronto Condominium Corporation No. 1056*, 2011 ONSC 4876, at paras. 158-160, 165 & 166 ("Orr")

The court in exercising its discretion must balance the reasonable expectations of an owner with the duties of the Board to the ownership at large. *Orr, supra*, at para. 171.

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The test for oppression is two-pronged. The claimant must first demonstrate that there has been a breach of its *reasonable* expectations. If that is established, the court must consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard". , 2008 SCC 69 (CanLII), 2008 SCC 69, at para. 56 ("*Debentureholders*")

The concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue and the entire context, including the fact that there may be conflicting claims and expectations. *Debentureholders, supra*, at para. 62.

Analysis

36 There are really two separate complaints which the Applicants advance:

- a) Denial of access to the condominium unit from January 27-28, 2010; and
- b) Denial of access to the recreational facilities from January 27, 2010 until June 22, 2011 or September 2011 when Mr. Gonsalves says he became aware of his access rights to the recreational facilities had been re-instated.

Denial of Access to the Unit

37 Section 16.01 of PCC #421 By-Law No.7 expressly denies to all, except the residents of the units, including the owners of the units, the use of the common element amenities and facilities "in any way whatsoever." However, the provision goes on to state that this provision "shall not prevent a unit owner from entering the building for the purpose of visiting his or her unit or tenants(s),"

38 There is no dispute that Sarah Computing was the owner at the relevant time. However, PCC #421 had treated Mr. Gonsalves as the owner and residents for years. Mr. Gonsalves and his wife were the only directors, officers and shareholders of Sarah Computing. Mr. Gonsalves had had access to the building, all its common facilities including the recreational facilities, for years.

39 The sole issue that PCC #421 had on January 27, 2010 was the number of FOBs and clickers and who were the residents. This was a legitimate issue from PCC #421's perspective.

40 There can be no doubt that Mr. Gonsalves had a reasonable expectation to have continued uninterrupted access to his unit as owner and resident subject to reasonable demands by PCC #421. Further, it was a reasonable for Mr. Gonsalves to expect that he would have received notice there were too many FOBs and clickers, a Resident Information Form needed to be completed, and he needed to confirm he was a residents of unit 3411.

41 I agree with Mr. Gonsalves' counsel that the issue here is the manner in which PCC #421 dealt with the issues.

42 PCC #421 did not pursue its legitimate interest in identifying who the residents of unit 3411 were in a reasonable manner when it denied Mr. Gonsalves access to the building by unilaterally deactivating his FOB's and clickers without notice:

- a) that PCC #421 intended to take this action if a Resident Information Form was not completed. Notice could have easily been given to Mr. Gonsalves with a deadline within which to complete the Resident Information

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Form;

b) that PCC #421 intended to deactivate the FOBs and clickers in advance of doing so;

c) that PCC #421 had deactivated the FOBs and clickers when it was done; or

d) that Mr. Gonsalves needed to attend at management's office to have the FOBs and clickers re-activated.

43 The only explanation offered by PCC #421 was that this was the quickest way to get the owner's attention. That is simply unreasonable. One can only imagine what might have happened if access was sought in the middle of the night or for some emergency.

44 PCC #421's actions on January 27, 2010 were, not only contrary to the By-Laws of the **condominium corporation** in depriving a recognized owner of access to his unit, the actions were oppressive, unfairly prejudicial and unfairly disregarded Mr. Gonsalves' interest as an owner and previously recognized as a resident of the building.

45 However, I do wish to stress that the actual impact on Mr. Gonsalves from PCC #421's actions was fairly minimal in that, upon the first attempted use by Mr. Gonsalves of his FOBs and clickers, he immediately went to the security officer and his access was restored despite his continued failure and refusal to complete a Resident Information Form.

Denial of Use of the Recreational Facilities

46 There is no doubt that the condominium documents, read as a whole, draw a distinction between owners and residents. It is a legitimate interest of the **condominium corporation** to know and record who the residents are in the condominium units. It is the residents and their guests who may use the common areas, including recreational facilities. Non-residents may not have access to the building or use of the common areas. Owners who are not residents, may go to see their units or management, but otherwise also may not access to the building or use the common areas including recreational facilities.

47 No one suggested that the provisions in the condominium documents are unreasonable or unfair. They are reasonable and necessary to protect the residents and owners from unauthorized use of the building and its amenities.

48 The Applicants do suggest that the use of the Resident Information Form is unfairly used by the PCC #421 management because it does not require all units to have a completed form with identification from each tenant.

49 In my view, it is not unreasonable that PCC #421 does not necessarily enforce the completion of the Resident Information Form from all units. It would have been preferable. But it is clear that PCC #421's management only requests completion of the form with identification if an issue arises. It is important to keep in mind that compliance, when requested by management, is very easily complied with. It takes a matter of moments to complete the form. All the resident has to do is provide a copy of an ID showing his address as the building. As a result, I conclude the manner in which PCC #421 operates or requires completion of its Resident Information Forms is reasonable in the circumstances.

50 While Mr. Gonsalves may have had a reasonable expectation of using the recreational facilities in the building, it was subject to reasonable requests from PCC #421 which would include completion of the Resident Information Form if requested and production of ID to show residency.

51 There is no dispute a request was made for Mr. Gonsalves to complete the Resident Information Form on

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January 28, 2010. He was not asked to produce ID on that date. PCC #421 management told him they would accept the completed form and his word he was a resident. It could not have been easier for Mr. Gonsalves to comply.

52 The inability of Mr. Gonsalves to access the recreational facilities after January 28, 2010 was entirely of his own doing. He could have easily completed the form on January 28, 2010. He could later have easily provided a copy of his ID showing the building as his address. Instead, Mr. Gonsalves chose to threaten lawsuits, retain counsel and commence this application. To now complain that he didn't have access to the recreational facilities from January 28, 2010 until June 2011 appears to be his choice and not because of the actions of PCC #421.

53 As a result, I am not persuaded that Mr. Gonsalves had a reasonable expectation to be entitled to use the recreational facilities without completing a Resident Information Form if requested. Further, even if he had such a reasonable expectation which was breached, in the circumstances of this case PCC #421's actions were neither oppressive, unfairly prejudicial or unfairly disregarded Mr. Gonsalves' interests.

Damages

54 As set out above, the court has wide discretion when dealing with remedies for oppression under s. 135 of the *Condominium Act*.

55 Based on the above, Mr. Gonsalves was technically denied access to the unit and the recreational facilities from the time the FOBs and clickers were deactivated on January 27, 2010 until January 28, 2010 when Mr. Gonsalves first tried to gain access. While this period may be as long as one day, it is important to note that Mr. Gonsalves was never really denied access to the unit. He was able to access the unit but only after he had to go to the security office. No doubt this was an inconvenience and a delay in the exercise of his right to access his unit for a short period of time.

56 There is no evidence that Mr. Gonsalves' wife was impeded or delayed from entering the building at all.

57 Any damages would and should be nominal at best given the limited impact of PCC #421's actions in deactivating the FOBs and clickers.

58 Mr. Gonsalves' claims damages on the basis that PCC #421's actions have caused him health issues, stress, mental anguish, aggravation, humiliation, embarrassment and anxiety, as well as the denial of access to the squash courts has put his physical well being in jeopardy (Para 2 (v) and (w) of the Application). These damages are rejected. Even if true, they were caused by Mr. Gonsalves' own actions from January 28, 2010 onward.

59 Mr. Gonsalves seeks a reduction or return of some of his condominium fees. There is no evidence as to what portion of the condominium common area and maintenance expense relate to use of the recreational facilities or what the cost would have been for Mr. Gonsalves going to another recreational facility.

60 Mr. Gonsalves' claim for an order preventing PCC #421 from denying access to their unit in the future is too broad as circumstances may arise where the Applicants may not have a right to access their unit.

Conclusion

61 The following order is made:

- a) PCC #421 wrongfully denied access to Mr. Gonsalves and his wife to their unit from January 27, 2010 to January 28, 2010; and

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b) PCC #421 shall provide to unit 3411 a one-time credit in the amount of \$500 being nominal damages in the circumstances.

Costs

62 Either party seeking costs may make written submissions (limited to 3 pages of submissions) together with any attached Bill of Costs and authorities, which submissions shall be served and filed within 2 weeks from the date of the release of these reasons.

63 A responding party may make written submissions within one week thereafter, which submissions will be subject to the same limitations on length.

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