Court File No. SC-11-00124793-0000

SUPERIOR COURT OF JUSTICE
SMALL CLAIMS COURT

B E T W E E N:

IAN G. STEWART

Plaintiff

and

TORONTO STANDARD CONDOMINIUM CORP. NO.1591

Defendant

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R E A S O N S F O R J U D G M E N T

BEFORE HER HONOUR DEPUTY JUDGE S. SEEVARATNAM
on JUNE 7, 2012, at TORONTO, Ontario

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APPEARANCES:

M. Nam — Counsel for the Plaintiff

B. Chaplick — Counsel for the Defendant

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SUPERIOR COURT OF JUSTICE

T A B L E O F C O N T E N T S

WITNESS:	Exam. in-Ch.	Cr-exam.	Re-exam.

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R E A S O N S F O R J U D G M E N T

S. SEEVARATNAM D.J. (ORALLY):

THE COURT: Okay this is the decision for the matter between Ian G. Stewart and Toronto Standard Condominium Corporation Number 1591. It's trial number SC-11-00124793-0000. The plaintiff issued a claim on October 6, 2011 against the defendant for two reasons. First, the defendant to produce a copy of the minutes of the annual general meeting dated June 22nd, 2011, this went to section 55.5(10) of the *Condominium Act of 1998*. And second, a penalty towards the defendants for non-compliance in the amount of $500.

During the viva voce evidence by the plaintiff, Ian Stewart, it became evident that he was not referring to the draft minutes of June 22nd, 2011 annual general meeting but the personal notes of the note-taker who was a third party employed by Note Takers Incorporated and not a member of the condominium corporation.

The first question to be determined is, do the notes of note-takers form the record of the corporation as defined in section 55(1) of the *Condominium Act*. The response is no. As counsel for the defendant articulately stated

the notes of the note-taker are a work product and not a record. In the *Condominium Act* of 1998, in section 55(1) it says under the subheading records, "A corporation shall keep adequate records including the following records," and it specifies 10 detailed records that should be maintained. The legislation clearly states what entails records. It does not mention drafts, work in progress, rough copies, et cetera. In examining case law, specifically those of a similar nature, in a small claims court, the jurisprudence clearly states that it is necessary to look at the facts surrounding each request to determine whether the condominium corporation had a reasonable excuse in not providing the records for examination.

First, it has been established on the facts that, based on the definition in the legislation, that the notes of the note-taker are not a record of the corporation.

Secondly, there is no evidence before this court that the draft minutes of June 22nd, 2011 annual general meeting notes were available, or in the possession of the board when the plaintiff made his first request by email on July 18th, 2011 and the defendant subsequently threatened with a lawsuit for non-production on September 27th, 2011.

Third, not having possession of the draft minutes is a reasonable explanation for non-production of the document.

Fourth, in addition, similar to the *Lahrkump* case, decided by my colleague, Justice Godfrey, on October 29th, 2010, the plaintiff in the current case is also on a pure fishing expedition, without evidence to support his suspicion of impropriety by the members of the board of revising, to their benefit, the minutes that were taken at the annual general meeting held on June 22nd, 2011.

Fifth, furthermore it became evident that the primary motive by the plaintiff in pursuing this matter against the condo corporation was that he was deeply offended that he was asked by the chair of the annual general meeting to sit down on several occasions, and he wanted to display his displeasure. The plaintiff testified that he was concerned that among the 226-unit dwellers about 40 were non-resident in the condo units and he stated that perhaps the wrong forms were being used for proxy voting. The plaintiff had no information as to whether any of the proxy forms were used, at the annual general meeting in 2011, to elect the two new directors. And in fact if none of the forms were used, the whole issue of proxy becomes a matter of moot. However, Ms. Schuber, the president of the board, testified under oath that the board had

recognized and acknowledged that the forms needed to be replaced and all condo unit owners were apprised of the situation. This is indicative that the concern raised by the plaintiff was effectively remedied but the plaintiff insisted that he was not satisfied and he wanted the full opinion letter, provided to him by his lawyer, which is Exhibit 2, should have been formed as part of the body of the draft minutes of the 2011 annual general meeting.

Given the fact that there are 226 residential dwellings it is unreasonable to expect every opinion letter, every word uttered by each individual unit holder, to form part of the minutes. The minutes are intended to be an accurate summary of the events that took place not a verbatim transcript.

On the issue of railings, the plaintiff stated that he had concerns with the safety and costs that was mentioned in paragraph 8(e) of the annual general meeting minutes which is Exhibit 1, tab 2, and it appeared to summarize the plaintiff's concern.

If further remedies are being sought by the plaintiff he would be provided the opportunity to correct the draft minutes on June 12th, 2012 at the annual general meeting which will take

place in a couple of weeks.

In the past the plaintiff has indicated his concerns with the accuracy of certain elements of the minutes and this is evident in paragraph 4.1(b), which is Exhibit 1, tab 2, which refers to page 9 of the 2010 AGM minutes, where his concerns were addressed and the plaintiff acknowledged under oath when he was cross-examined that he was satisfied with the resolution regarding the 2010 minutes. Counsel for the plaintiff attempted at the last minute on the day of trial, to submit 2010 annual general minutes as well as the 2009 annual general minutes. She argued that it was relevant to show a history of issues and concerns by the plaintiff. The central issue in the plaintiff's claim, as indicated in her own draft of the claim, related only to the 2011 annual general meeting minutes and both counsels were asked to keep the evidence and questions relevant to the issue at hand.

The Court notes that the plaintiff is an intelligent 85-year old man who meticulously reviews every word of the minutes. It is evident he is concerned about the proper running of the condo corporation but it also became evident that being critical and looking for ways to find the board to be negligent has become a sport for Mr. Stewart. The court suggested

that if he is so concerned, that he should become a member of the board of directors and manage the condo corporation as he feels appropriate. It was clear from his response that he does not want to take on the responsibility of running the condominium corporation but appears to enjoy standing on the sidelines waiting for an opportunity to condemn and criticize the functioning of the board. On this issue the court would like to comment on section 37.1 which refers to the standard of care to be exercised by the directors and officers of the corporation in discharging their duty. The plaintiff has failed to establish that the directors and officers of the corporation in this matter have neglected to act honestly and in good faith and failed in their duties of care, diligence, and skill. The plaintiff accused the board members of revising the minutes and notes taken by the note-taker to their benefit. Ms. Schuber testified under oath, that on the issue of proxies and section 4.1 in Exhibit 1, tab 2, the name of the plaintiff was inserted as a substitute for the word "resident" and another tense of a word was amended on the issue. And on the issue of railings which is in section 8(e) which is also in Exhibit 1, tab 2, no changes were made. In fact both Ms. Schuber, who is the president of the board, and the property manager, testified under oath that no amendments were made to the

previous annual general minutes of 2010.

Finally, the issue of the penalty for non-compliance. The plaintiff has failed to establish on a balance of probabilities that one, the notes of the third party note-taker is a record of the corporation as defined in section 55.1 of the *Condominium Act*. Second, the plaintiff has failed to establish on a balance of probabilities that he requested a payment of $500 in writing and the request was denied. And third, the plaintiff has failed to establish that the board members and officers breached the duty of care required of them under section 37.1 of the *Condominium Act*. Accordingly, this action is dismissed.

Now, regarding costs, we never discussed it earlier. Did you want to make some submissions regarding that counsel?

MR. CHAPLICK: Yes, I would like to rely on the *Mishicoff* (ph) 2001 case which actually awarded $1,000 in costs.

THE COURT: That might be from my colleague, Feldman?

MR. CHAPLICK: By, yes, Justice Feldman of this court. So there was that case, there were two claims, and you can see from the endorsement, one claim was for $500, a section 55 claim, and then there was another action tried at the same time, for some plumbing issues where he wanted

$1332. And so despite the small size of those claims, Justice Feldman ordered $1000 because she wanted to send a message to the public that nuisance actions can attract a punitive award of costs in certain circumstances. I would submit that this is one of those nuisance cases and then I also have an offer to settle. So, Your Honour, I'm passing up an offer to settle and an affidavit of service.

THE COURT: Thank you.

MR. CHAPLICK: This was made seven days before the trial.

THE COURT: Okay Ms. Nam, do you have a copy of this? Did you receive a copy of this settlement?

MS. NAM: Yes I did receive a copy.

THE COURT: Okay thank you. Okay counsel.

MR. CHAPLICK: And the offer is a dismissal without costs. And that offer was not accepted. So I would submit that I've done better than my offer you know, and the purpose of making this was, at the time my client would not have had to incur the costs of preparing and for me attending today.

THE COURT: I understand.

MR.CHAPLICK: I think my client's actual costs from beginning to end in this matter will exceed $5,000 and I submit that, from the very beginning we've told the plaintiff that this is not a record of the corporation and that is

exactly what Your Honour has held. We've been completely vindicated in our position in refusing to provide the record. The *Condominium Act* calls for indemnification in certain circumstances and the Small Claims Court allows the court discretion. I can take you to the rule for unreasonable conduct by litigants. At least part of the motive of this litigation was the pride of Mr. Stewart and his sport of taking pot shots at the board and that's not, I think that that purpose should not be condoned by this court. It's a not just a waste of the court's time but it's also a waste of all the parties; Ms. Schuber who is a volunteer and her time, the property manager who has duties to attend to. The fact that you heard evidence that they spend the majority of their time just responding to Mr. Stewart, Mr. MacGirr, this is just one example of that. And so because of all that I'm suggesting that costs would be appropriate in the amount of $2500.

THE COURT: Thank you and how about disbursements counsel?

MR. CHAPLICK: Well, I was just kind of saying all in. But I think the disbursements in this case would be close to $500, just themselves.

THE COURT: Okay. Now what happens typically if there's litigation involving a condo corporation, will the funds come out of...

MR. CHAPLICK: It'll be taken...

THE COURT: ...the funds?

MR. CHAPLICK: ...out of unit owners collectively.

THE COURT: Oh.

MR. CHAPLICK: So all of the other owners have to pay for this and I mean I'm not saying that the expectations in the Small Claims Court are for 100 percent cost imdemnity, they're not, clearly they're not. But there is discretion and Justice Feldman has exercised her discretion, for me, in the past and awarded a $1000 in a case that was almost identical to this one and I think that we can go even a little bit higher than that today.

THE COURT: Do you have any comments Ms. Nam?

MS. NAM: Certainly, Your Honour.

THE COURT: Sure.

MS. NAM: I was going to request that the court keep fixed costs in accordance with the limits that are set out in the Small Claims Court Rules, mainly 19.02, where any power under this rule toward costs is subject to section 29 of the *Courts of Justice Act* and than that says, "the award of costs in the Small Claims Court other than disbursements shall not exceed 15 percent of the amount claimed, unless it considers it necessary in the interest of justice to penalize a party or a party's representative for unreasonable behaviour in the proceeding." The client maintains that he was merely asking for a document that he felt he was entitled to under section 55.5 of the *Act* that, it's not a behaviour that should be penalized or

one that is unreasonable, so we ask that the court fix costs in accordance with the limits that are set out in the Small Claims Court Rules.

THE COURT: You may sit down Ms. Nam. It is not unreasonable for a condo unit owner to ask for a record of the corporation. If you recall at the commencement of trials today, given the list, I was trying to narrow down the issues in the interest of time, efficiency, and people not having to come back, who are witnesses. I acknowledge the fact that people have taken time off work, they have other duties to attend to, and the reality is to settle or narrow the issues, is always to the benefit rather than to come in and litigate. What can I say, he has the right to ask for the record and I asked counsel to perhaps clarify for him what the record entails and if it was a legal requirement.

Now, Mr. Stewart's behaviour is not acceptable. I find it should not be sanctioned. He has done nothing but to instigate, criticize almost every act of the board since at least 2009. That became evident when counsel tried to, at the last minute, submit the minutes from 2009 onwards. From the time his friend was no longer the president of the board. I do take note of that. So even though the friend, I believe it was Mr. MacGirr I believe...

MR. CHAPLICK: Mr. MacGirr, Your Honour.

THE COURT: ...he's not here in the body of the court but it is evident that since he stepped down as president it has been a sport for the two of them to get together. They have the luxury of time to do nothing but find ways to criticize the actions of the board. You know what, instead of criticizing I would have had more respect for the plaintiff if he had taken the initiative and perhaps had become a board member, or come up with solutions on how to better run the board than to stand on the sidelines and do nothing but criticize. So given that, I am going to use my discretion to impose a higher amount than is typically awarded because I do not want this behaviour to continue and I don't want another litigation beyond the 2012, June 12 AGM meeting, and I don't want it to continue every year as long as he's occupying a unit in that building, or any other unit in any other condo corporation. I think it does interfere with the functioning and the proper running of the board and I wonder if you look at the whole picture if it was to the best interest of all the unit dwellers to bring an action, not settle it when there was an opportunity to settle, which is clearly indicated by the written documentation counsel, Mr. Chaplick, has provided and the other board members, sorry the other unit dwellers also have to now share the cost of this litigation. It's been an all day trial, three witnesses were heard and two counsel on the record. So accordingly, just

give me a few minutes and I'm going to come up with the amount which I think is reasonable.

I'm cognizant of the fact that the case law that Mr. Chaplick referred to, which involved another colleague, involved two matters. This is one matter so I'm going to be reasonable in terms of the amount even though it's sanctioned, it's not a revenge tactic. I do not entertain that type of behaviour. So I acknowledge the fact that there is one action but however I do acknowledge the fact that there was an opportunity to settle and that was - so the double costs.

Okay, "The action is dismissed. The plaintiff to pay costs of $1,500 awarded to the defendants and $500 in disbursements. Pre-judgment interest at the rate of three percent, commencing October 6th, 2011 until June 7th, 2012; post-judgment interest at the rate of three percent commencing June 7th, 2012."

Thank you, counsel, for your assistance. The matter is now concluded. Please stand by and you'll get a copy of this endorsement.

MR. CHAPLICK: Thank you, Your Honour.

THE COURT: You're welcome.

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Certification

I, Suzanne Bender, certify that this document is a true and accurate transcription of the recording of,

Stewart v. TSCC 1591,

in the Superior Court of Justice, Small Claims Court, held at 45 Sheppard Ave East, Toronto, Ontario No. 4816-111-20120607-091244 which has been certified in Form 1.

July 24/2012
(Date)

S. Bender
Suzanne Bender
Court Reporter

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