

COURT FILE NO.: CV-09-386314
DATE: 20100610

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Toronto Standard Condominium Corporation No. 1633 v. Baghai Development Limited and Rabba Fine Foods Inc.

BEFORE: Madam Justice L.B. Roberts

COUNSEL: Jonathan H. Fine and Kristen Bailey, for the Applicant

Kevin D. Sherkin, for the Respondent, Baghai Development Limited

Wolfgang Kaufmann, for the Respondent, Rabba Fine Foods Inc.

HEARD: May 26 and 27, 2010

ENDORSEMENT

Overview:

[1] In the present application, Toronto Standard Condominium Corporation No. 1633 seeks a declaration that the respondents are in breach of certain provisions of the *Condominium Act, 1998*, and of the applicant's declaration and rules, by the respondent, Rabba Fine Foods Inc., occupying to the exclusion of others part of the condominium corporation's common elements, namely part of a sidewalk, for the purpose of displaying its merchandise, and an order that Rabba ceases such use.

[2] The respondents contend that the application should be dismissed¹: Baghai Development Limited argues that the relevant limitation period for bringing this application has expired; and Rabba asserts that its registration of a notice of its lease with Baghai², binds the applicant and all unit-owners of the condominium. In the alternative, the respondents maintain that there was an agreement with the applicant to allow Rabba use of the sidewalk or that the applicant should be estopped from denying such an agreement, and that the application cannot be determined without a trial of certain issues.

¹ Baghai withdrew its motion to dismiss the application on the jurisdictional ground that the applicant ought to have proceeded by way of mediation then arbitration.

² Baghai, the builder and declarant of the condominium, is the owner of the commercial units leased to Rabba.

Analysis:

i. Expiry of the Limitation Period:

[3] With respect to the limitation period issue, I agree with the applicant's submission that the relevant two-year limitation period under the *Limitations Act, 2002*³ has not expired with respect to the subject matter of this application.

[4] There is no question that the use of the common elements for any purpose other than "ingress or egress" is expressly prohibited by the condominium corporation's declaration and rules.⁴ There is also no issue that, since 2005, the applicant through its board has complained to Baghai about Rabba's use of the common elements and has asserted the position that it maintains in this application that Rabba's use of the common elements is prohibited by its rules and declaration.⁵

[5] The undisputed evidence establishes very clearly that the manner in which Rabba has been using the common elements for display purposes is not uniform or constant, and has fluctuated since Rabba's use first came to the applicant's attention and became the subject of the applicant's complaints to Baghai from 2005 to the present time. As such, Rabba's impugned use of the common elements is not an isolated act but a series of different and separate uses of the sidewalk for the purposes of displaying its merchandise in various ways, each of which constitutes fresh breaches of the rules, thus giving rise to separate causes of action by the condominium corporation.

[6] These circumstances distinguish the present case from the other cases referred to me: for example, where the impugned use was constant and immutable, such as the installation of a stone embankment⁶ or in the case of a unit-owner keeping a pet for many years⁷; or where the matter complained of was a discrete and independent act, such as a property transaction⁸ or a solicitor's negligent breach of his retainer.⁹

[7] Further, the waiver provisions of section 33 of the declaration, by which Baghai and its lessee, Rabba, are bound, explicitly stipulate that the condominium corporation's failure to take action to enforce any provision contained in the *Condominium Act, 1998*, the declaration, by-

³ S.O. 2002, c. 24, Sched. B, s. 4

⁴ Schedule F of the declaration and rule 9

⁵ Whether or not the applicant entered into some sort of agreement with Baghai and/or Rabba, permitting Rabba's use of the common elements for display purposes, is a different question and one to which I return later in this Endorsement.

⁶ *Chaudiere Machine and Foundry Co. v. Canada Atlantic Railway Co.* (1902), 33 S.C.R. 11

⁷ *Metropolitan Toronto Condominium Corp. No. 601 v. Hadbavny*, [2001] O.J. No. 4176 (Ont. Sup. Ct. J.); and *Metropolitan Toronto Condominium Corp. No. 949 v. Staib*, 2005 CarswellOnt 7105 (Ont. Sup. Ct. J.). These decisions can also be distinguished from the present case for the reason that the condominium corporations in the former failed for years to object to the presence of the pets in question or otherwise take any steps to enforce the condominium's no pet policy until there was a complaint.

⁸ *Bailey v. Canada (Attorney General)*, [2008] O.J. No. 4066 (Ont. Sup. Ct. J.)

⁹ *Ruzicka v. Costigan*, [1984] A.J. No. 2631 (Alta. C.A.), application for leave to appeal dismissed, [1984] S.C.C.A. No. 87

laws or rules, irrespective of the number of violations or breaches which may occur, shall not constitute a waiver of the right to do so thereafter.

[8] The waiver provisions in the applicant's declaration are consistent with the approach applied by the courts in similar cases that the failure of a condominium corporation to complain of noisome or otherwise objectionable conduct that is not in compliance with the *Condominium Act, 1998*, its declaration, by-laws or rules does not by itself waive the rights of the condominium unit owners to insist thereafter on strict compliance with respect to any future breaches.¹⁰

[9] As a result, I find that the applicant commenced its application well within the two-year limitation period that applies to the subject matter of its application.

ii. Registration of the notice to lease:

[10] The registration of the notice to lease between Baghai and Rabba does not bind the applicant and all the unit owners.

[11] First, the notice to lease was not registered against all the units. As such, the deemed notice provisions under section 111(5) of the *Land Titles Act* cannot apply to those units or their owners.

[12] Further, section 4(1) of the *Condominium Act, 1998* provides that if the provisions of the *Land Titles Act* conflict with the provisions of the *Condominium Act, 1998*, the latter prevails. I agree with the applicant's submissions that such a conflict exists in that mere registration on title of the notice of lease is not sufficient where there is no compliance with the disclosure and other notice requirements of the *Condominium Act, 1998*.

[13] The notice to lease expressly provides that Rabba's right to occupy and use the common element sidewalk for the purpose of displaying its merchandise is subject to compliance with all applicable laws, including the *Condominium Act, 1998*, and the condominium corporation's declaration, by-laws and rules.

[14] Rabba's purported right under the lease with Baghai to occupy and use the common element sidewalk for the purpose of displaying its merchandise is not referred to in the condominium corporation's declaration and description or in the disclosure statement that is to be given to purchasers, as required under the *Condominium Act, 1998*.

[15] In particular, notwithstanding that the Regulations¹¹ under the *Condominium Act, 1998* require that Schedule A to the declaration and the description show all easements and other interests appurtenant to the land, Rabba's alleged rights are not referenced therein, nor are they mentioned in the requisite solicitor's opinion that the legal description is correct and that all

¹⁰ *Yuen v. Peel Condominium Corp.* 492, 2000 CarswellOnt 3253 (Ont. Sup.Ct.J.); and *York Condominium Corp. No. 288 v. Harbour Square Commercial Inc.*, 1988 CarswellOnt 663 (Ont. Dist. Ct.)

¹¹ Section 5 of Regulation 48/01 and section 10(1) of Regulation 49/01

easements, rights of way, rights or licences will exist in law upon the registration of the declaration and description.

[16] The impugned provisions of the notice to lease are in conflict with the disclosure statement that no part of the common elements is subject to a lease or licence and, as already noted, to the condominium corporation's rules, which provide that the sidewalks cannot be obstructed and can only be used for ingress and egress.

[17] Having failed to register and disclose Rabba's alleged right under the lease, Baghai cannot impose its private agreement with Rabba on the condominium corporation and unit-owners.¹²

[18] As a result, the registration of the notice of lease does not have the significance asserted by Rabba.

iii. Trial of an issue:

[19] I agree with the respondents' submission that the hearing of some oral evidence is required in order to dispose of the following issues:

- i. Whether the applicant entered into a binding agreement with Baghai and/or Rabba to allow Rabba the use of the common elements to display its goods or, by the applicant's acts or omissions should be estopped from prohibiting Rabba the use of the common elements to display its goods;
- ii. If so, whether Baghai and/or Rabba breached any direct or indirect agreement by the manner in which it displayed its goods.

[20] The parties shall supplement (but not duplicate) the present record with any further affidavits that they deem necessary. All affidavits filed and examinations of witnesses already conducted under Rule 39 shall stand as the respective examinations in chief of those affiants and witnesses. The only oral evidence shall be by way of cross-examination of those affiants and witnesses.

[21] Counsel shall attempt to agree on a joint compendium containing relevant affidavits and other documents.

[22] Following the hearing of the application, Messrs. Fine and Kaufmann participated in a scheduled telephone case conference before me on June 4, 2010 to set the date for the hearing of the trial of the remaining issues in the application. Counsel agreed that the hearing of the trial of the issues would proceed on November 15 and 16, 2010.¹³

[23] A further telephone case conference is scheduled before me commencing at 9:00 a.m. on July 15, 2010. At that time, a timetable for and the order of the parties' exchange of any further

¹² *Carlton Condominium Corporation No. 279 and Rochon*, (1987), 59 O.R. (2d) 545 (Ont.C.A.), at para. 26

¹³ Mr. Sherkin was unexpectedly absent from the telephone case conference but subsequently confirmed his availability on the scheduled dates.

affidavit materials and compendia shall be finalized. In particular, Mr. Sherkin shall confirm whether his client is proceeding with its proposed application and whether he is taking the position that, on behalf of Baghai, he is entitled to cross-examine Mr. Simrod and Ms. Turi at the hearing on November 15 and 16, 2010.

[24] In the meantime, counsel shall confer to try to agree on a timetable, the order of the delivery of any additional affidavits, and the cross-examination of Mr. Simrod and Ms. Turi. If counsel can agree, they may submit to me a draft order through Judges' Administration at 361 University Avenue and the July 15, 2010 telephone case conference will not be necessary. If not, those issues shall be resolved on July 15, 2010.

Costs:

[25] Unless the parties are seeking a determination of the issue of costs at this time, as this matter is ongoing, I am of the view that costs should be reserved to the final disposition of this application.



Roberts, J.

DATE: June 10, 2010