CITATION: Carleton Condominium Corporation No. 132 v. Newton, 2023 ONSC 2705
COURT FILE NO. CV-22-88845
DATE: 2023/05/03

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Carleton Condominium Corporation No. 132, Applicant

AND

John Charles Newton, Respondent

BEFORE: The Honourable Justice C.T. Hackland

COUNSEL: David Lu, for the Applicant

Paolo D'Asti, for the Respondent

HEARD: November 4, 2022 (Ottawa)

2023 ONSC 2705 (CanLII)

ENDORSEMENT

[1] This is a dispute between the Applicant Carleton Condominium Corporation No.132 ("CCC 132") and the Respondent, John Charles Newton, who is a unit owner in this 78-unit townhouse condominium. CCC 132 seeks an order allowing it to remove and replace the Respondent's garage door and front door which are part of the condominium's common areas, referred to as "the exclusive use common element area". CCC 132 alleges the Respondent installed a new garage door and front slab door with glass panels in 2020, without notifying or obtaining the approval of the Condominium Board, in violation of the by-laws and has subsequently refused to allow their removal. The Respondent says he obtained a verbal approval for the door replacements from the Board in 2019 and claims he is now being treated unfairly and cross claims for oppression.

[2] The principal issue in this dispute is whether the Respondent engaged in making unauthorized modifications to the exterior of his unit, by replacing the garage door and front door slab without notifying the Condominium Board and obtaining their permission. If so, is CCC 132 entitled to access the unit to remove these modifications and replace them with similar but windowless doors as are present in the other units.

[3] The Respondent has been a unit owner in this condominium for 21 years. His evidence is that in May 2019, he decided to purchase and install a new front door and garage door with windows in them. He wished to increase the natural sun light in his home. He explained:

> In or around May 2019 I reached out to the Board of Directors of CCC 132 verbally to discuss what the requirements and constraints were regarding the replacement of my front door and garage door. I received a verbal

> response which clarified that the new front door and garage door would need to be white and could not be any other colour. I asked specifically what their procedures were and did anything need to be done in writing. I was told there was nothing further needed. I was not asked to complete any paperwork and was not notified of any formal procedure I had to follow to replace my front door or garage door.

[4] The Board, acting through its property manager, declined to accept this explanation, as they had no documentation to substantiate that the Respondent had ever approached the Board about his proposed modifications. The Respondent then advised he obtained "verbal" approval from the Board. When pressed further for details he advised "I spoke to Elva who was communicating on behalf of the Board to the owners. Elva verbally provided me with the Board's decision to approve the changing of my doors. I was given instructions by the Board to keep the doors white and I did my best to comply and follow the procedures in place at the time". The doors were ordered in August 2019 but not installed until 2021.

[5] In an effort to verify the Respondent's version of events, the property manager then spoke to "Elva" who denied ever being involved in the matter. In her affidavit, filed in this proceeding, Elva deposed that she was not a Board member in 2019 and went on to state, "I have never spoken to Mr. Newton about the modifications to his front door and garage door. I also categorically deny his allegation that I acted as a "middle-woman" or "go-between". Her affidavit was supported by another unit owner who has been on the Board for the last 10 years who deposed that "Elva has never been a go-between for communications between owners and Board members".

[6] While I accept that the Respondent may have discussed his door replacement intentions with other unit owners, I think it is quite clear that he never approached the Board directly to obtain permission for the door modifications and indeed never obtained such permission. I accept the affidavit evidence from Elva that she was not a "go-between" between the Board and unit owners and never was involved in anything to do with the Respondent's plans to modify his garage door and front door.

[7] The new property managers who were engaged by CCC 132 in 2020 embarked on an effort to catalogue and document instances where unit owners had made modifications without following proper procedures. The "relaxed approach" (the Respondent's expression) of the previous property management firm employed by CCC 132 resulted in some property modifications occurring without formal Board approvals, according to the Respondent.

[8] Section 98 of the *Condominium Act*, 1998, S.O. 1998, c. 19 recognizes and requires that agreements to modify or alter common elements be in writing and registered on title. CCC 132 had a common elements modification By-Law in place since 2003 (By-Law No. 5) which permitted owners to make modifications to certain aspects of the common elements, subject to prior written approval by the Board. This is the approval the Respondent did not obtain. Subsequently CCC 132 passed a revised common elements modifications By-Law (By-Law No. 9), coming into force on December 17, 2020. Both By-Laws required unit owners to obtain approval from the Board prior to carrying out the modifications.

2023 ONSC 2705 (CanLII)

2023 ONSC 2705 (CanLII)

[9] In an effort to resolve this non-compliance situation and with the co-operation of the property manager, the Respondent applied to the Condominium Board for approval of the door modifications he had made. Considerable efforts were made by the Respondent and certain Board members to reach an agreement, but they were unsuccessful in doing so. These efforts are described at length in the affidavits before the court. I find these negotiations were carried out in good faith. Indeed, this hearing was adjourned for a lengthy period to permit further negotiations. When the negotiations initially failed, CCC 132's lawyers engaged in what I view as appropriate correspondence to the Respondent, explaining the applicable law and seeking his co-operation in allowing the condominium to have their contractor attend the property in order to remove and replace the doors. Significantly, the condominium took the position it would pay for the door replacements.

[10] The Respondent now wishes the court to direct the Board to approve the door modifications on the basis essentially that they are quite similar in colour and appearance to the original doors (except only for the windows) and are not nearly as noticeable as objects in the exterior areas of certain other unit owners. While the Respondent has filed photographs of the frontage of several other unit owner's property, it is unknown whether the By-Law applies or whether modification approvals were obtained.

[11] The Applicant's position on property modifications and the need to maintain a unity of appearance on the exterior of the units, was explained in its affidavit materials as follows: "It is important for CCC132 to maintain a certain standard with respect to the exterior appearance of its units as a uniform appearance is attractive to prospective homebuyers and increases property values at the community".

[12] In any event, it is not the function of the court to stand in the shoes of the condominium Board and make decisions about property management issues (such as what modifications to the common elements should be allowed referable to a particular unit). A unit owner must accept the jurisdiction of a condominium board to make decisions about exclusive use common areas and to enforce rules about maintaining a uniformity of appearance of unit exteriors. This is a core function of a condominium Board.

Oppression Remedy (s. 135 *Condominium Act*)

[13] As noted, the Respondent has cross-claimed against CCC 132 for oppression under s.135 of the *Condominium Act*. The argument is that the Board approved his request in 2019 to make his door modifications and now seeks to back out of that commitment, and in the process is treating him in a discriminatory and oppressive fashion.

[14] The court is unable to accept or agree with that view of the facts. Notwithstanding the Respondent failed to obtain the approval of the Board at any time for the doors he installed in 2020, he was invited subsequently to apply for the Boards approval, which he did, and there followed lengthy negotiations about the modification to his doors. The Board has offered to pay for the new front door and the installation costs. The Respondent has not been treated in a

differential or discriminatory manner from other unit owners with similar compliance issues. The Boards uniformity in appearance concerns are objectively reasonable and in the economic interests of unit owners including the Respondent.

[15] I do not agree with the Respondent's submission that the case of *Noguera v. Muskoka Condominium Corporation* No. 22, 2020 ONCA 46 should apply to the present case. In *Noguera,* a unit owner wished to purchase an adjoining unit and to be allowed to make an opening in their unit to the adjoining unit. The Board considered the application, approved it in writing on a number of conditions, but then failed to register a s. 98 agreement in the registry office. Later, the Board attempted to back out of the agreement and treated Noguera in an offensive and discriminatory manner. The motion judge allowed the unit owners oppression claim and awarded damages. I would distinguish the present case from *Noguera* on the basis there was no Board approval in the first place and no bad faith conduct directed at the Respondent.

2023 ONSC 2705 (CanLII)

[16] The Court of Appeal in Noguera explained the test for oppression, at para 17:

> The Supreme Court [in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69] described the two-part test for oppression. First the claimant must establish that there has been a breach of reasonable expectations and the second, the conduct must be open oppressive, unfairly prejudicial or unfairly disregard the interests of the claimant. The subjective expectation of the claimant is not conclusive, rather the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationship at issue, and the entire context, including the fact that there may be conflicting claims and expectations. The availability of the oppression remedy largely turns on a factual basis.

[17] I am unable to conclude that the Respondent has been treated in an unjust or inequitable fashion in the circumstances of this case and accordingly I dismiss the cross-claim for oppression.

Disposition

[18] The application herein by CCC 132 is allowed and the cross-motion claiming an oppression remedy is dismissed.

[19] The court orders that within 30 days of the release of this endorsement the Respondent shall grant access to the Corporation and its contractors to remove and replace the front door installation and windows on the garage door. Specifically, CCC 132 and its contractors are authorized to remove the Respondents unauthorized front entry door with glass panels and replace it with an authorized front slab entry door and remove the unauthorized glass panels in the Respondent's garage door and replace them with authorized slab panels.

[20] If CCC 132 wishes to seek costs against the Respondent, it shall provide a written submission within 30 days of the completion of the door replacements and the Respondent may file a responding submission within 30 days of receiving the Applicant's written submission. The Applicant's submission is to explain exactly what charges the condominium intends to charge to

the Respondent's unit as compliance costs and there is to be no duplication of legal fees and disbursements in relation to any claim to compliance costs.

[21] Should the Respondent fail to cooperate with the terms of this order, the Applicant may return the matter before me. Similarly, in the event of any dispute as to the terms of the order, a case conference can be arranged before me, through the Trial Coordination office.

2023 ONSC 2705 (CanLII)

Justice Charles T. Hackland

Date: May 3, 2023

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Justice Charles T. Hackland

Released: May 3, 2023