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Case Law Update

Decisions From the Courts

- Are Short Term Rentals a Right of Ownership?
- Disability, Service Dogs and Discrimination
- Can Small Claims Court Award Excessive Costs?

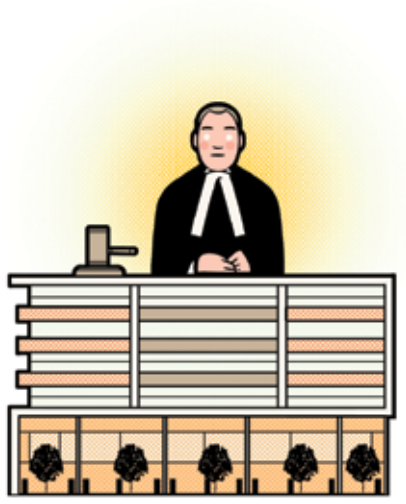

ILLUSTRATION BY JASON SCHNEIDER

Toronto Standard Condominium Corporation No. 1556 and No. 1600 v. Owners of Toronto Standard Condominium Corporation No. 1556, et al. (Ontario Superior Court of Justice, November 2, 2017)

Two sister condominium corporations sought an order amending their declarations to eliminate provisions that expressly permit short-term rentals within the condominiums. The developer/declarant of the condominiums in question is part of a group of companies that is also in the business of providing short-term rental accommodations, condominium rental management, and condominium management service. It also admitted to deliberately including the leasing provisions to protect its business model. There was no evidence that short-term rentals had caused any complaints or problems within the applicant condominium corporations. It was argued by the condominium corporations that the nature of short-term rentals has changed because of organizations like Airbnb. They sought to eliminate the leasing provisions to avoid future problems. The condominium corporations argued that the leasing provisions were inconsistent with the Condominium Act, with the applicable zoning by-law, and with a restrictive covenant registered on title to the lands on which the condominiums are situate. The Court dismissed the applications for the reasons below.

A) Are the declarations inconsistent with the Condominium Act?

The Court accepted that the Condominium Act does not allow a declaration to provide rights with respect to occupancy and use of the units or common elements. The Court rejected, however, the argument of the condominium corporations that the provisions at issue created any such rights. The right to rent a property short-term, or at all, was found to be a right of ownership. The provisions at issue did not, therefore, create any new and impermissible rights with respect to the occupancy and use of the units and common elements. Instead, the leasing provisions functioned to limit the scope of any restrictions otherwise imposed on the occupancy and use of the units and common elements, and ensured that any restrictions on occupancy and use did not restrict the right to rent.

It was also held that the declarations were not inconsistent with the Condominium Act because they interfered with the ability of the condominium board to make rules. The Court confirmed that the Condominium Act and caselaw provide a hierarchy among the sources of provisions restricting owners and affecting units in a condominium: the Condominium Act, the declaration, the by-laws of the condominium corporation, and the rules passed by the condominium board. The declaration is higher on the hierarchy than the rules passed by the condominium board. It was therefore permissible for the declarations to limit the ability of the condominium board to make rules respecting short term leasing.

B) Are the declarations inconsistent with the zoning by-law?

The Court found no inconsistency between the declarations and the zoning by-law. The declarations read that the permitted uses (that is, occupancy and leasing) must be "in accordance with the provisions of the applicable zoning by-law(s) of the Governmental Authorities, as may be amended from time to time". The Court found that the declarations were, therefore, consistent with the zoning by-law to the extent that any use had

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to comply with the zoning by-law. Any inconsistencies between the use of a unit and the applicable zoning by-law could, therefore, be addressed by the remedies provided under s.380 of the City of Toronto Act.

C) Are the declarations inconsistent with the restrictive covenant?
The lands on which the condominiums are situate were subject to a restrictive covenant that restricted the construction of commercial gross floor area. The condominium corporations argued that the short-term rental of units was inconsistent with the restrictive covenant. The Court found, however, that the restrictive covenant provided no clear restriction on the commercial use of non-commercial gross floor area, such as the short-term rental of units.

Author's Note: *In this case the Court confirms that declarations that protect the rights of owners to lease units on a short-term basis are not inconsistent with the Condominium Act. The Court adds that condominium corporations do have a remedy to remove unwanted provisions by amending the declaration pursuant to s. 107 of the Condominium Act; and that if the threshold of owners that must consent to an amendment is "unreasonably high" at 80 percent of the units, then the proper remedy to that issue is legislative change.*

We note that this case is also interesting in light of the decision of the City of Toronto to implement new licensing and registration regulations on short-term rentals starting June 2018. The new rules will, among other things, restrict operators to leasing only their principal residence on a short-term basis. This change may address the concerns of the condominium corporations in the above case, and those other condominium corporations that are similarly concerned by the short-term leasing of rental of units that are not otherwise used as a principal residence.

Kayla Pollock v. Carolyn Wilson (Human Rights Tribunal of Ontario, November 8, 2017)

In this case a resident of a condominium unit brought an application against another resident of the condominium corporation. The applicant resident is a diabetic who uses a service dog trained to recognize symptoms dangerous to people with diabetes, including low blood sugar. The respondent made multiple complaints to the property management of the condominium because the applicant had affixed a battery-operated doorbell and signs on the door to her unit, including a sign stating "service dog inside. Attention EMS: There is a legal service dog inside this apartment." The respondent argued that the signs "lower the tone of the building" and demanded their removal.

The property management, in response to the first complaint, asked the applicant to remove everything from the door to her unit. The applicant explained that she required the sign concerning the service dog; and proceeded to plaster the door with documents and newspaper articles about the use of service dogs. The property management removed all the documents and papers from the door. The applicant put everything back up. The respondent then made more complaints. The dispute continued until police explained to the property management that the applicant was entitled to post certain signs, and in particular the sign warning emergency services that there was a service dog inside the unit.

The Tribunal held that the actions of the respondent had subjected the applicant to a poisoned environment because of her disability. This was not, according to the Tribunal, just a case about inappropriate signs posted on the common elements of the building. The evidence suggested that the respondent had discriminated against the applicant because of her disability, which forced the applicant to advocate for her rights to the property management and with the respondent. The respondent was ordered to pay the applicant a nominal award of $200 in recognition of the inherent right to be free of discrimination. The Tribunal declined, however, to order any significant award for damages or to order the respondent to provide a letter of apology.

Author's note: *This case highlights the responsibilities and challenges faced by property management and condominium corporations when caught in the middle of*

"...the applicant's decision to insist on litigation when alternative dispute mechanisms were available to it informs my decision to reduce the costs owing to the applications."

- Michael G. Quigley, J.
Toronto Common Element Condominium Corporation No. 1508 v. William Stasyna, 2012 ONSC 1504 (CanLII)

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a dispute between residents. It is to be noted that the condominium corporation was not a respondent in this case; and there is nothing to suggest that the applicant was seeking any remedy against the condominium corporation for its role (such as it was) in the dispute. Cases concerning the failure to accommodate in housing are most often brought against the condominium corporation and/or the property management because they are the entities generally considered to 'permit occupancy' for the purposes of the Human Rights Code. This case is unusual because it was an application between neighbours. That being said, the applicant was only found to be subjected to a poisoned environment because the property management had acted on the complaints of the respondent. This begs the question of whether the condominium corporation in this case – through the actions of property management – could also have been liable for failing to accommodate the applicant.

The case offers a corollary. The Tribunal found that the applicant was not adversely affected by a separate complaint that the respondent had made to the property management alleging, among other things, that the applicant's dog was crying. This was because the property management did not take any action against the applicant or otherwise communicate this later complaint to the applicant. The board of the condominium corporation instead sent a reply to the respondent advising that her complaints amounted to bullying and it had to stop.

Norma Wexler v. Carleton Condominium Corporation No. 28 (Ontario Superior Court of Justice (Divisional Court), September 25, 2017)

This case is an appeal by the unit owner of costs granted to the condominium corporation by the Small Claims Court. It was an appeal with leave. The condominium corporation had successfully defended the unit owner's claim of $2,525.14 at the Small Claims Court. The Small Claims Court granted costs of $20,000.00 to the condominium corporation because the unit owner unnecessarily prolonged the trial because she was unprepared and disorganized. The Small Claims Court also granted the costs because the declaration, by-laws, and rules of the condominium corporation provided for full indemnity; and because it would be unfair that the unit owners of the condominium corporation should cover all the costs of an unnecessary trial.

Section 29 of the Courts of Justice Act ("CJA") caps the amount of costs that the Small Claims Court can award at 15 percent of the amount claimed, unless the court finds it necessary in the interests of justice to penalize a party or a party's representative for unreasonable behaviour in the proceeding. The Divisional Court found that the unprepared and disorganized behaviour of the unit owner did not meet the test of unreasonable behaviour per s. 29 of the CJA. The unit owner had no lawyer; she did not know the rules of the court; and she was not a vexatious litigant.

The Divisional Court also found that the Small Claims Court erred in awarding costs above the 15 percent cap because of the indemnification provision in the corporation's declaration; and because it would be unfair that the unit owners should cover all the costs of the trial. The indemnification provision was limited by the language of the declaration to cases where an act or omission of an owner caused a loss, costs, damage, injury or liability suffered or incurred with respect to the common elements and/or all other units. The Divisional Court determined that the declaration did not apply in this case. The action at the Small Claims Court did not cause any loss, costs, damage, injury or liability suffered or incurred with respect to the common elements and/or other units.

The Divisional Court allowed the appeal and replaced the award of costs with 15 percent of the unit owners claim for $2,525.14 as per s. 29 of the CJA.

Author's Note: *This case is helpful in understanding the treatment of costs in condominium matters at the Small Claims Court. Condominium corporations should expect to be treated like any other party; and should not rely on any indemnification provision in the corporate documents to provide different treatment.*