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Case Law Update

Decisions From the Courts

- Chargebacks Do Indeed Constitute Common Expenses
- Mask Policy Strikes a Balance Between Owners and Community
- Little Substance in Formalistic Errors Made By the Board

O'Regan v Carleton Condominium Corporation 169 et al, 2021 ONSC 945

In 2018, Mr. O'Regan left his condominium unit while cooking eggs on his stove. The eggs burned, causing a foul odour and smoke to radiate from his unit into the hallway. The superintendent was notified, and he entered Mr. O'Regan's unit, removed the eggs from the stove and aired out the unit.

Carleton Condominium Corporation 169 ("CCC 169") retained a contractor to fix the smoke damage in the hallway and remove the odour. The services cost $8,637.03, however, the CCC 169 requested that Mr. O'Regan pay $5,000.00 – an amount equal to CCC 169's insurance deductible.

On January 31, 2020, CCC 169 demanded payment within 30 days. Mr. O'Regan did not pay, and CCC 169 registered a lien against his unit pursuant to section 85 of the Condominium Act, 1998, S.O. 1998, c. 19 (the "Act").

Mr. O'Regan moved for partial summary judgment, challenging the lien registered against his unit. Specifically, Mr. O'Regan challenged the validity of the lien due to CCC 169's failure to mediate prior to registering the lien, and the timing of its lien registration. Section 85 of the Act creates a lien against an owner's unit when an owner defaults in his/her obligation to pay common expenses. Mr. O'Regan argued that the chargeback did not constitute a "common expense" and that CCC 169 should have obtained a compliance order under s.134 of the Act. Mr. O'Regan argued that had CCC 169 pursued an application under s.134 of the Act, it would have been required to mediate before doing so.

The Court held that s.134 was inapplicable in the circumstances, as s.134 applies to compliance orders - orders to enforce compliance with the Act or a condominium's governing documents. CCC 169 did not require an order to enforce compliance. As such, the Court concluded that CCC 169 was not required to participate in a mediation before registering the lien.

The Court rejected Mr. O'Regan's argument that the chargeback did not constitute "common expenses". The Act defines common expenses as expenses which are specified as common expenses in the Act, in the regulations or in a declaration. CCC 169's declaration deems expenses incurred by CCC 169 to repair damage to common elements caused by an owner to be common expenses. Therefore, CCC 169 was entitled to chargeback Mr. O'Regan for the remediation work as a common expense.
Pursuant to s.85 of the Act, a lien against Mr. O'Regan's unit was created upon his default to contribute to common expenses. A lien must be registered within 3 months of default, and 10 days' written notice of the lien must be given to the unit owner.

The Court held that a "default" occurs when a unit owner fails to pay the obligation relied upon to invoke the lien. Therefore, until CCC 169 charged back Mr. O'Regan for the remediation costs, he had no obligation to pay and was not in default. Mr. O'Regan's default occurred on March 1, 2020. Since CCC 169 gave notice of, and registered the lien within 3 months of the default, the lien was found to be valid.

The Takeaway

The Act aims to place the financial burden created by a unit owner's conduct (or misconduct) on him/herself rather than on a condominium corporation (which would effectively pass the financial burden onto innocent unit owners). Due to this objective, a unit owner's actions which cause damage to the common elements of a condominium corporation can give rise to an automatic lien right under s.85 of the Act for the cost of remediating the damage.

Under s.85 of the Act, a default does not occur until payment is demanded from a unit owner and such unit owner fails to remit payment. The default event does not occur

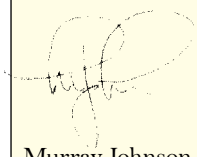
ILLUSTRATION BY JASON SCHNEIDER

President's Message

Continued from page 3

written yet and with only 25% of my tenure behind me who knows what's around the next corner for CCI-Toronto and Area Chapter. If we can accomplish as much as we have in the past six months I am excited to see what the next eighteen months have in store for us.

Enjoy your summer, wear a mask and wash your hands. Be positive but test negative. Physically distance, get your shot and above all be kind to each other. Until next time, I'm Murray Johnson and this has been your condo connection! CV



Murray Johnson
GL, CCI (Hon's)

when a condominium corporation pays for the remediation of damages.

Halton Condominium Corp. No. 77 v. Mitrovic, 2021 ONSC 2071

In July 2020, Halton Condominium Corp No. 77 ("HCC 77") introduced a mask policy, as required by the City of Burlington By-Law 62-2020 ("By-Law"). The mask policy required all residents to wear a mask while in any enclosed common space such as the lobby, hallways, stairs, garage and elevators. The mask policy contained multiple exemptions, including an exemption for persons with an underlying medical condition which inhibits their ability to wear a mask.

Vily Mitrovic and Zoran Zupanc ("Respondents") are owners of a unit at HCC 77. The Respondents did not abide by the mask policy, and did not wear a mask while traversing common spaces. They alleged that they had a medical condition which justified not wearing a mask, but that they did not have to disclose the medical condition.

As a result of this non-compliance, HCC 77 brought a compliance application against the Respondents, and sought an order that they be required to wear a mask while using the common spaces.

In a decision dated March 19, 2021, Justice Gibson did not fully grant the Order as requested.

Justice Gibson noted that the Reopening Ontario Act, as well as the By-Law contained provisions stating that a person who claims to be exempt from wearing a mask shall not be required to provide proof of the exemption. Furthermore, the By-Law contained a broader class of exemptions to wearing a mask, including an exemption for wearing a mask if "the person may experience a negative impact to their emotional well-being or mental health."

Justice Gibson noted that he found the medical evidence submitted by the Respondents to be "very thin", but that the law of general application did not require the Respondents to further substantiate their assertions.

Justice Gibson noted that this was a case in which the rights of the individual unit owners had to be balanced against the rights of the community as a whole. In the result, he attempted to fashion a balanced remedy, and concluded that the Respondents did not

have to wear a mask while travelling "by the most direct route from their unit to the main entrance of the building or to their parking spot." However, Justice Gibson found that they would have to wear a mask in the common spaces in any other case.

As Justice Gibson found that both parties were partially successful, no costs award was made.

The Takeaway

The Respondents' refusal to obey the mask policy in this case appeared to be flagrant and intentional. As such, this case represents a significant caution for condominium corporations that wish to enforce mask policies. Even in clear cases where a mask policy is being ignored, there is no guarantee of a cost award, and the innocent unit owners may be forced to absorb the legal fees for obtaining a compliance order. The best tools to enforce a mask policy appear to be education, signage and encouraging compliance.

Tharani Holdings Inc. v. Metro. Toronto Condo. Corp. No. 812, 2021 ONSC 1125

The case of Tharani Holdings Inc. v. Metro. Toronto Condo. Corp. No. 812, 2021 ONSC 1125 ("Tharani") is part of an ongoing saga between a unit owner and a condominium corporation. The history between the two parties includes numerous applications to the Condominium Authority Tribunal of Ontario as well as previous proceedings before the Superior Court of Justice.

The relationship and disputes between the unit owners and corporation are best summarized by the Court's overview of the case "The relief sought in this Application, and the grounds on which that request is based, are almost impossible to summarize …The entire Application is a lengthy list of what appear to be formalistic errors made by the Condo Corp board that amount to little in substance."

Some of the "highlights" of the unit owner's allegations were that:

- Three of the directors failed to correctly identify themselves on the disclosure forms required under Section 11.6 of O. Reg 48/01 under the Condominium Act, 1998 (the "Act"), and accordingly should be disqualified from the Board. The Court found that any issues with respect to identification were immaterial, for instance a director whose legal first name was "Guiseppe" but used the name "Joe" on the disclosure form.

- Metropolitan Toronto Condominium Corporation No. 812 ("MTCC 812") failed to hold Annual General Meetings between 2011 and 2019 and that there were voting irregularities at the 2019 Annual General Meeting.

- The reserve fund was improperly used to pay for water bills. While the Court found that this did occur and was improper conduct, there was no real remedy to be imposed as the funds were used for MTCC 812's needs. It characterized this use of the reserve fund as an administrative error that should not be repeated, but found that it was not a matter that required judicial intervention.

- Audits had not been completed for a number of years. Again, while the Court found that this did occur, it also noted that audits for previous years were in the process of being completed. On that basis, the Court found that there was no need for judicial intervention.

The unit owner sought a number of orders, including the appointment of an inspector, a declaration that all acts of the Board since the 2019 Annual General Meeting were null and void and damages.

The Court in Tharani noted that there were various technical breaches of the Act, but focused on the question of whether the applicant unit owners actually suffered any prejudice. The Court was ultimately critical of the unit owner's failure to recognize any difference between a non-substantive technical breach of Act and prejudicial conduct. The application was dismissed in its entirety, with no costs awarded to either party.

The Takeaway

Despite what could be characterized as a favourable outcome for MTCC 812, the takeaway from Tharani should not be that technical breaches of the Act will not result in judicial intervention into the affairs of the corporation. The Court noted that MTCC 812 brought the application on themselves and were their own worst enemy.

With that said, the decision in Tharani illustrates that a Court is hesitant to punish a condominium corporation for technical breaches that do not result in prejudice. Part of the Court's rationale appears to be that the current Board members were working to correct the mistakes of the past, such as the lack of audited financial statements. Mistakes such as technical breaches of the Act should be avoided, but when they occur they will not necessarily rise to the level of actionable wrongdoing. Working to remedy or at least acknowledge those mistakes will place a condominium corporation in a more favourable light before the Court.

*Special thanks to Kayla Sommerville who assisted with the preparation of this article.

Editor's Message

Continued from page 5

minium corporations and their respective boards of directors should make in consultation with legal counsel.

I am of the view that patently false comments which are not directed at bettering the condominium community and which are aimed solely at abusing the target individual(s) should be strongly discouraged. At a minimum, those responsible for the comments (if known), should be asked to retract such comments and issue an apology. In the case of long-term campaigns of malicious harassment and defamation intended to cause misery to the subject individual(s), condominium communities may wish to consider legal recourse as a last resort.

For various reasons, Canadian tort law prior to Caplan was inadequate in responding to internet defamation and harassment. Ultimately, it is my hope that condominium corporations dealing with online harassment campaigns are in the minority. However, for those that must address this issue, Canadian tort law appears to be developing in such a way that the victims of online harassment can obtain relief.

Brian Horlick
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