CONDOMINIUM AUTHORITY TRIBUNAL

DATE: July 6, 2018
CASE: 2017-00047R
Citation: Mara Bossio v. Metro Toronto Condominium Corporation 965, 2018 ONCAT 6

Order under section 1.44 of the *Condominium Act, 1998*

Adjudicator: Lai-King Hum, Member

The Applicant Mara Bossio	Self-Represented
The Respondent Metro Toronto Condominium Corporation 965	Michael Spears, Counsel

Hearing: April 18 to May 13, 2018
Online written hearing, with telephone conference on May 4, 2018

REASONS FOR DECISION

A. OVERVIEW

[1] This is an application pursuant to section 55 of the *Condominium Act*, 1998, S.O. 1998, c. 19 ("Act").

[2] Mara Bossio (the "Applicant") is a unit owner of the Metro Toronto Condominium Corporation 965 ("the "Respondent"). She requests an Order from the Tribunal directing the Respondent to provide her with paper copies of the following records ("Records") from the Respondent:

a. Report of the 2016 President of MTCC 965 (the "Report"); and

b. Board meeting minutes from 1997 to 2001 (collectively, the "Minutes").

[3] There is no dispute that the Records fall within the definition of "records" for the purposes of section 55 of the Act.

[4] The issue to be decided by this Tribunal is whether the Respondent was justified in refusing disclosure of the Records to the Applicant. If the Respondent is wrong, then the remaining issue is what would be reasonable fees for providing a copy of the Records to the Applicant.

[5] On the one hand, the Respondent has consistently refused to provide the Applicant with copies of the Records, claiming they are justified on the basis of the “actual or contemplated litigation” exception in section 55(4)(b) of the Act.

[6] On the other hand, the Applicant has consistently maintained that the Respondent has an obligation to provide her, as an owner of a unit, with access to the Records, and that the exception in section 55(4)(b) of the Act does not apply. She wants the Records because they relate to a dispute with the Respondent’s Board, against whom she has demanded compensation for damages caused to her unit. She has consistently maintained that there is no “actual or contemplated litigation”. Rather, she wants the Records so that she can proceed by way of the dispute mechanisms in the Act, which she says allows for mediation to resolve all the matters between herself and the Respondent.

[7] She further takes the position that she would proceed to arbitration if mediation fails. The Applicant took the position during the hearing that reserving the right to proceed to arbitration is not “actual or contemplated litigation”, in that arbitration is not litigation.

[8] Given the position taken by the Applicant during the hearing, and the Respondent’s claim that this was a new position being taken, I asked the Users to provide me with a one-page written submission on whether contemplated mediation or arbitration is the same as “contemplated litigation”, as provided in section 55(4)(b) of the Act. In the event that I was to find that the Records should be provided to the Applicant, I also asked the Users to submit their position on (i) what reasonable fees should be in light of sections 13.3(8) and 13.3(9) of Ontario Regulation 48/01 under the Act ("Regulation"); and (ii) the User's position on costs pursuant to Rules 30.1 and 31.1 of the Tribunal’s Rules of Practice (“Rules”).

B. DECISION

[9] For the reasons set out below, with respect to the Records, I find that the exception to an owner’s right to examine or obtain records as set out in s. 55(4)(b) of the Act applies, and the Applicant is not entitled to the Records. The Applicant’s records request is denied.

[10] The Respondent did not seek any fees or expenses pursuant to Rule 30.1, but sought $6,540.00 for partial payment of the legal fees incurred with its lawyer, pursuant to Rule 31.1. For reasons that follow, I find no exceptional reasons warranting an award of legal fees to the Respondent.

C. ISSUES

[11] The Respondent conceded, and I agree, that the Records requested are records as defined by the Act.

[12] The remaining issues are:

a. Whether the Respondent is justified in refusing to permit the Applicant to examine or obtain copies of the Records;
b. If the Respondent is not justified, what are reasonable costs for producing the Records; and
c. If the Respondent is justified, whether there are exceptional reasons for the Applicant to pay legal fees incurred by the Respondent.

D. ANALYSIS

Issue 1: Is the Respondent justified in refusing copies of the Records?

Evidence

[13] During the course of the hearing, a total of four exhibits were introduced: three from the Applicant, including one unsworn affidavit with attached documents, and one affidavit from the Respondent, with attached exhibits, as follows:

a. Exhibit 1: Sworn Affidavit of Timothy Caley, dated March 17, 2018, with attached Exhibits “A” to “C”.

b. Exhibit 2: Applicant’s letter to the Tribunal, dated March 18, 2018, with attached communications between the Applicant and the Respondent;

c. Exhibit 3: Signed but not sworn “Affidavit of Mara Bossio” from the Applicant, dated April 7, 2018, with documents attached which are marked as “A”, “A-1”, and “B” through to “F”; and

d. Exhibit 4: Email communication between the Applicant and Paul Chawla, the Claims Representative for the Respondent, dated April 6, 2018, and the emails preceding this communication, which the Applicant produced to show “board bullying” with respect to a mediation request.

[14] The Applicant testified on her own behalf. There is no doubt that the context in which she seeks the Records is to deal with various disputes she has with the Respondent and the Respondent’s directors. Amongst other things, she alleges damages caused by the Respondent in relation to windows in the terrace of her unit, privacy breach, contraventions of the Act, and legal fees. She testified that she seeks mediation and arbitration to deal with these disputes, but denies that she contemplates any litigation.

[15] In particular, her letter dated February 2, 2017 (Exhibit 4-C), contains the following paragraph about issues dating back to 2010:

> The damages to Ms. Bossio has been the object of repeated harassment and improper and illegal action by the condominium corporation including but not limited to:
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> Pecuniary Losses, Systemic Harassment, Libellous and Defamatory circulation of Video taken by management of Ms. Bossio without consent to Residents, sister Corporation and Colleagues, Physically Accosted, Tarnished Reputation, Social Disadvantages, Caused Distress, Hurt and Humiliation, Injury to Feelings, Mental Pain and Suffering, Physical Endangerment, Fraud, Privacy Breach, Loss of Income, Impoverishment and Loss of Future Income.

[16] In this letter, she demands a total of $141,499.50 from the Respondent on or before March 2, 2017, “at an interest rate of 10% for years 2011 to 2017”.

[17] In her evidence, the Applicant testified that all she wanted was to proceed to mediation, and failing settlement in mediation, then arbitration, as provided in the Act. She seeks to find the directors personally liable for damages and costs if the matter proceeds to arbitration.

[18] Tim Caley, the President of the Respondent’s board, was called as a witness. His testimony focused on two letters: (i) A letter dated May 22, 2013 from Gerry Hyman, the Applicant’s lawyer at the time, to four of the Respondent’s directors (Exhibit 2-C); and (ii) the Applicant’s letter to Mr. Caley, dated February 2, 2017(Exhibit 1-C) [together referred to as the “Letters”]. The Applicant confirmed during cross-examination that the Gerry Hyman letter was written on her instructions. As earlier discussed, the Letters show that there is a significant and long-standing legal dispute between the Respondent and the Applicant that has escalated over the years.

[19] Mr. Caley also testified that the Respondent was prepared to provide copies of the Records to the Applicant, provided that she return a signed Full and Final Release (Exhibit 3-D). He testified that she was only prepared to do so if the following were inserted into the release: “… provided there was no negligence or carelessness on behalf of any or combination of any parties collectively referred to as the Releasees”. As she refused to effectively release the Respondent and members of its board or directors from liability, the Respondent continued to refuse to provide copies of the Records.

The Law

[20] Changes to the Act came into effect on November 1, 2017. The changes maintained and strengthened the "open books" principle regarding access to a condominium corporation's records, creating an easier path for unit owners such as the Applicant to gain access to such records, including a less costly recourse to the Condominium Authority Tribunal, and its primarily online dispute resolution forum, in the event that the condominium corporation refuses to provide such records. Previously, unit owners were obliged to bring an action in Small Claims Court for such records.

[21] The changes in the Act also mean that unit owners are entitled as of right to a condominium corporation's records, without being required to specify the reason for the request, subject to certain specified exceptions in the Act.

[22] As the Applicant repeatedly stated, section 55 of the Act requires a condominium corporation to maintain records, and to permit a unit owner to examine or obtain a copy of the records, without requiring disclosure of the reasons for the request to examine the records.

[23] The right to examine or obtain a copy of records is set out in section 55(3) of the Act:

> **55(3)** The corporation shall permit an owner, a purchaser or a mortgagee of a unit or an agent of one of them duly authorized in writing, to examine or obtain copies of the records of the corporation in accordance with the regulations, except those records described in subsection (4).

[24] However, as also noted in section 55(3) of the Act, the right to examine records is broad, but not without limits. Records that relate to "actual or contemplated litigation" fall into one of the exceptions to the right to examine or obtain records, as set out in section 55(4), and includes records related to actual or contemplated litigation, as determined by the regulations:

> **55(4)** The right to examine or obtain copies of records under subsection (3) does not apply to,
> …
>
> (b) records relating to actual or contemplated litigation, as determined by the regulations, or insurance investigations involving the corporation;

[25] That there are limits to the right to examine records is also set out in section 13.3(1) of the Regulation. Although the unit owner is not required to specify a purpose when making the request for records, the request must be "solely related to that person's interests as owner… having regard to the purposes of the Act".

> **13.3** (1) The right to examine or obtain a copy of a record under subsection 55 (3) of the Act does not apply unless,

> (a) an owner, a purchaser or a mortgagee of a unit requests to examine or obtain the copy and the request is solely related to that person's interests as an owner, a purchaser or a mortgagee of a unit, as the case may be, having regard to the purposes of the Act; or
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> (b) a duly authorized agent of an owner, a purchaser or a mortgagee of a unit requests to examine or obtain the copy and the request is solely related to the interests of that owner, purchaser or mortgagee of a unit, as the case may be, having regard to the purposes of the Act. O. Reg. 180/17, s. 17 (1).
>
> (2) Despite subsection (1), a person entitled to examine or obtain copies of records under subsection 55 (3) of the Act is not required to provide the corporation with a statement of the purpose of the request. O. Reg. 180/17, s. 17 (1).
>
> *[emphasis added]*

[26] More importantly, a person's interests as an owner, having regard to the purposes of the Act, is not the same as a free pass to make unreasonable demands for records. In discussing the "open books" principle or the "Transparency Principle", Deputy Judge Prattas noted in *Lahrkamp v Metropolitan Toronto Condominium Corporation No. 932*, 2017 CanLII 74184 (ON SCSM), confirmed 2018 ONSC 1771 (CanLII):

> [34] However, it is equally clear that the Transparency Principle does not give an owner *carte blanche* to make unreasonable demands for records or to go on a crusade or to go on a fishing expedition as the plaintiff appears to be doing in this case. See *York Condominium Corporation No. 60 v. Brown*, 2001 CarswellOnt 3470 (OSCJ), which even though reversed by the Divisional Court in part, on other grounds, the prohibition of interrogatories seems to have been upheld. (See *York Condominium Corporation No. 60 v. Brown*, 2003 CarswellOnt 793 (Ont Div Crt)).
>
> [35] According to the Act and as confirmed in the OCA Decision the gatekeeper of the corporation's documents and records is an elected Board of Directors (the "Board") drawn from the unit owners.
>
> [36] In exercising that role the Board has been charged with the duty of balancing the private and communal interests between the unit owners and the corporation. It has also been authorized to make decisions on behalf of the collective, on the condition that the affairs and dealings of the corporation and its Board are equally transparent, open and accessible to the unit owners.

> [37] In balancing these competing interests, generally speaking, the corporation may properly refuse a record if access infringes on issues of privacy, privilege or be of a strictly personal nature. It may also refuse a record if the burden and expense to the corporation is in issue or if the motivation or purpose of the request may not be reasonably related to the purposes of the Act.

Conclusion

[27] Based on the evidence and the analysis herein, I find that the Applicant's purpose in obtaining the Records is to obtain evidence to support her claims against the Respondent. She has not presented any other reason for requesting the Records that is related to the purposes of the Act.

[28] The exclusion of records relating to "actual or contemplated litigation" is broader than the common law concept of legal privilege, which includes both protection for solicitor-client communications without the client's consent, and also that of litigation privilege, which prevents disclosure of documents and communications, which have been created during or in anticipation of litigation.

[29] A broad interpretation of s. 55(4)(b) is consistent with the interpretation given to "actual or pending litigation" under the previous version of the Act in *Fisher v. Metropolitan Toronto Condominium Corporation No. 596,* 2004 Carswell Ont 6242, where, at paragraph 16, the Court wrote:

> It appears to me that the purpose of clause 55(iv)(b) is to maintain litigation privilege or solicitor/client privilege with respect to records of the condominium corporation that may relate to litigation or pending litigation between a unit owner and the corporation. It is clear from the evidence before this court that Fisher was making a claim against Condo Corp and contemplating litigation at the time that the requests for the records were made and accordingly, in my view, the exception in clause 55(iv)(b) is applicable. Such records would not have to be produced until they are producible in the course of documentary discovery if not subject to litigation privilege or solicitor/client privilege**.**
>
> [emphasis added]

[30] What is the scope of "actual or contemplated litigation"? Section 13.1(1)5 of O. Reg. 48/01 provides that the condominium corporation keep, "Records that relate to actual or contemplated litigation and that the corporation creates or receives." "Actual or contemplated litigation" is defined in s.1.(2) of O. Reg 48/01 as:

> "actual litigation" means a legal action involving a corporation; ("instance en cours")
>
> "actual or contemplated litigation" means actual litigation or contemplated litigation; ("instance en cours ou envisagée")

> "contemplated litigation" means any matter that might reasonably be expected to become actual litigation based on information that is within a corporation's knowledge or control; ("instance envisagée")
>
> *[emphasis added]*

[31] Not all litigation nor every legal proceeding goes before a court. Redress may also be obtained before administrative tribunals, or through arbitration or mediation mandated by a particular piece of legislation, all of which are legal processes.

[32] After hearing the testimony of the Applicant, and the testimony of Mr. Caley for the Respondent, and having reviewed the exhibits introduced during the hearing, I find that the Respondent was justified in relying on the "actual or contemplated litigation" exception in section 55(4)(b) of the Act.

[33] The dispute dates back to in or about February 2010. At that time, the Respondent's Board determined that windows installed on the Applicant's unit's terrace, which is on a high floor, had to be removed in order for the corporation to access roof anchors necessary for its window washers to perform exterior window cleaning (Exhibit 3-B). Notwithstanding the Applicant's protests, the windows were removed. The Applicant claimed a significant reduction in the value of her unit. Since then, the Applicant has had a long and ongoing dispute with the Respondent, with her claim of damages initially stated in May 2013 to be $31,897.97 (Exhibit 3-C), and increased to $141,499.50 (Exhibit 1-C) by February 2017.

[34] The Applicant's insistence that she neither intends nor contemplates litigation is contradicted by her requests for information to support her allegations that the Respondent and the Respondent's Board of Directors have caused her a litany of damages, for which she seeks monetary compensation.

[35] She states that all she seeks is mediation and arbitration under the Act. However, mediation and arbitration under the Act are only mandatory in certain specific circumstances, as stated in section 132 of the Act. Otherwise, mediation and arbitration may proceed with respect to provisions of the Act, but only on consent of the parties as an alternative to litigation. If the parties do not agree, then their other recourse would be to bring a legal action in Court. In certain more limited circumstances (currently records requests), an application may be filed with the Condominium Authority Tribunal.

[36] Further, not all of the Applicant's listed claims could be determined by mediation or arbitration under the Act. For instance, her claims of systemic harassment, libel and defamation, and damages involving mental pain and suffering and loss of income and future income, would have to be litigated in court if the Respondent does not voluntarily agree to mediate or arbitrate the dispute.

[37] Without the assurance of a release from liability, and given the tone of the Letters, it was reasonable for the Respondent to conclude that the Applicant's listed claims might reasonably be expected to become actual litigation.

[38] The Applicant argued that only asking for mediation or arbitration does not fall under the exception of "actual and contemplated litigation". However, based on my analysis, the submissions of counsel for the Respondent, and the particular facts of this case, most notably that the Letters list a wide range of claims against the Respondent that may only be determined by a court of law, I find that the exception of "actual and contemplated litigation" applies.

[39] In light of the above, I find that the Respondent was justified in refusing the Applicant's records request.

Issue 2: What are reasonable fees for the Records?

[40] The Records requested are not core records, as defined in section 1(1) of the Act. If I had decided that the Applicant was entitled to the Records, the Respondent would have been entitled to charge reasonable fees and labour costs associated with the review and provision of the Records to the Applicant.

[41] Given my decision with respect to the Records, I do not have to deal with this issue.

E. COSTS

[42] The Respondent does not seek recovery of any actual Tribunal fees or expenses pursuant to Rule 30.1 of the Tribunal's Rules. However, based on its written costs submissions, it seeks significant legal fees of $6,450.00, representing partial payment of its actual legal costs to deal with this Application, being $10,899.56, inclusive of disbursements and HST.

[43] The Respondent has submitted the following as exceptional reasons for its request that the Applicant pay part of its legal fees:

a. The Respondent's submissions reference the Letters, as described above. The second of the Letters, dated February 2, 2017, claims compensation or damages of $141,499.00, with interest claimed at 10% per annum for years 2011 to 2017. It was sent to the Corporation as well as to the individual directors. Both Letters advise that if the Corporation does not comply with the Applicant's demands, she would proceed with arbitration seeking to have the directors found personally responsible for damages and costs awarded to her. She further took the position that the directors are not entitled to directors and

officers insurance coverage because they have “failed to act honestly and in good faith”.

b. The Respondent submitted that there is no doubt that the Letters indicate that the Applicant is contemplating litigation. Further, the Applicant only put forward the position that “arbitration is not litigation” recently. In both her evidence in chief as well as under cross-examination, the Applicant admitted that she intended to proceed to arbitration if her claims were not resolved by way of mediation.

c. The Respondent also submitted that it offered to produce the Records in exchange for the Applicant signing a Final Release, releasing the Respondent and its directors from all claims set out in the Applicant’s February 2, 2017 letter. However, the Applicant refused to sign the Final Release unless it were amended to include the following: “provided there was no negligence or carelessness on behalf of any or combination of any parties collectively referred to as the Releasees.” According to the Respondent, this revision would have negated the very purpose of a release.

d. Instead of agreeing to a release, Ms. Bossio brought a request for records application to this Tribunal, notwithstanding that since 2013 she has threatened litigation against the Respondent, in a matter related to the requested Records. The Respondent notes that as a result of her unreasonable position, the Applicant has taken up the time and resources of this Tribunal, and has needlessly exposed her fellow unit owners to significant legal expense.

[44] The Tribunal’s authority to order one User to pay the legal fees incurred by another User is limited by Rule 31.1 which provides:

> *Legal Fees Generally Not Recoverable*
> 31.1 The Tribunal will not order one User to pay to another User any fees charged by that User’s lawyer or paralegal, unless there are exceptional reasons to do this.

[45] The usual analysis for costs awards before our Superior Court of Justice, where a successful litigant can expect to be at least partially indemnified for its actual costs, and in some cases substantially indemnified, are not readily applicable. According to the Court of Appeal for Ontario, in *Serra v. Serra*, 2009 ONCA 395 (CanLII), modern costs rules in court are intended to foster three fundamental purposes: a. to partially indemnify successful litigants for the cost of litigation; b. to encourage settlement; and c. to discourage and sanction inappropriate behaviour by litigants, while also considering that costs awards should reflect what the court views is a fair and reasonable amount that should be paid by the unsuccessful party.

[46] In comparison to the Superior Court of Justice's "costs follow the event" approach where the successful party is generally awarded costs, the Tribunal's default position is not to order any of the Users to pay the other User's legal fees, whether successful or not. The Tribunal's discretion to provide for recovery of legal fees incurred requires that "exceptional reasons" exist, and there is no requirement that the unsuccessful User will be ordered to pay those costs to the successful User. Further, unlike a court of general jurisdiction, the Tribunal was established as a dispute resolution forum on limited issues mandated by statute, where proceedings are conducted in an expeditious and cost efficient manner primarily in an online setting, and the Tribunal's ability to award damages is limited to $25,000.

[47] Against this background, unsuccessful Users on an application before the Tribunal do not anticipate having to pay any legal fees to the successful User, absent "exceptional reasons". Only on a finding of "exceptional reasons" does this Tribunal even enter in an analysis of what would be a fair and reasonable amount for one User to pay to the other User for its legal fees.

[48] What are "exceptional reasons"? I must take into consideration the consumer protection nature of the Act, and its access to justice aim of providing a means to resolving disputes in a manner that is expeditious, fair and convenient. In this context, I determine that the Tribunal's discretion to order that one User recover from the other User its legal fees incurred in "exceptional reasons" must mean more than the other User taking an unsuccessful or unreasonable position.

[49] The Respondent has submitted that the Applicant took an "unreasonable position" on this application for the Records. It is true that the Applicant's request for the Records fell into one of the exceptions under the Act, and her application has been denied. It could seem unreasonable, in hindsight, that she pursued this matter at all. Based on the evidence, and if the Tribunal operated on a "costs follow success" model, there are many reasons, as provided by the Respondent, to hold the Applicant on an ultimately unsuccessful application responsible for part or all of the significant legal fees that the Respondent has incurred. However, that is not the test the Tribunal must consider.

[50] There must be "exceptional reasons", and for that, I must find more than the Applicant not being successful on the Application and taking an unreasonable position. While unsuccessful, the Applicant felt truly aggrieved and believed that she was entitled to insist on the Records so that she could seek remedies by way of mediation and arbitration. Having found that the records fall into the "actual or contemplated litigation" exception, it might in hindsight have been unreasonable for her to have pursued the Application but that by itself is not exceptional. To find "exceptional reasons", I would need evidence that the Applicant had been grossly unreasonable, or had taken positions that unduly complicated this Application, or had acted in bad faith or with malice, or took some other step beyond being unsuccessful and unreasonable. I found no such evidence in this case.

[51] After some deliberation, I find that there are no exceptional reasons to have this Tribunal exercise its discretion to order the Applicant pay part of the Respondent's legal fees. That being said, it should be clear that I have not lightly dismissed the Respondent's request that the Applicant pay part of its legal fees.

[52] Both parties are urged to put this behind them.

F. ORDER

[53] Pursuant to the authority set out in section 1.44(1) of the Act, the Tribunal orders that the application for copies of the Records is dismissed.

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Lai-King Hum
Member, Condominium Authority Tribunal

RELEASED ON July 6, 2018