

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: February 22, 2019

CASE: 2018-00343R

CITATION: Emerald PG Holdings Ltd. v. Metro Toronto Condominium Corporation No. 2519 2019 ONCAT 5

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

Adjudicator: Lai-King Hum, Member

The Applicant
Emerald PG Holdings Ltd.

Cameron Thomson,
Representative

The Respondent
Metro Toronto Condominium Corporation No. 2519

Hearing: January 11 to January 14, 2018
Online written hearing

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”). This decision is made without the Respondent’s participation, given that the Respondent did not participate at all at any stage of this Case.
- [2] Emerald PG Holdings Ltd. (the “Applicant”) is the owner of two commercial/retail units of the condominium managed by Metro Toronto Condominium Corporation No. 2519 (the “Respondent”). The Applicant requests an Order from the Tribunal directing the Respondent to deliver the following records (the “Records”):
 - a. Aged receivables report by owner, for the period between May 1, 2016 and April 30, 2017 (the “Aged Receivables Report”); and
 - b. Details of revenue received by Enercare with calculation spreadsheet (the “Enercare Revenue Spreadsheet”).
- [3] The Applicant also seeks costs against the Respondent in the amount of \$150.00 pursuant to paragraph 4 of 1.44(1) of the Act, as well as a penalty against the Respondent pursuant to paragraph 6 of 1.14(1) of the Act, in the amount of \$1,000.00.
- [4] There is no dispute that the Records fall within the definition of “records” for the purposes of section 55 of the Act.

- [5] The Respondent has failed to respond at any stage of this Case. As such, the facts as alleged by the Applicant are assumed to be true. The hearing was held electronically, and evidence was produced via documents and witness statements. I also received written submissions from the Applicant's representative.
- [6] The issue to be decided by this Tribunal is whether the Respondent was legally justified in refusing access to and copies of the Records to the Applicant. If the Respondent is wrong, then the remaining issues are what the reasonable fees would be for providing a copy of the Records to the Applicant and whether the Applicant is entitled to the costs and penalty as requested.

B. DECISION

- [7] 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 to the extent that the Records contain any information related to specific units or owners. The Respondent is not required to provide unredacted copies of the Records.
- [8] I find that the Applicant is entitled:
- a. A copy of the Aged Receivables Report, redacted as to specific units or owners other than the Applicant; and
 - b. A copy of the Enercare Revenue Spreadsheet, redacted as to specific units or owners other than the Applicant.
- [9] I find the Applicant is also entitled to \$150.00 in costs, but I have determined that a penalty is not warranted in the circumstances.

C. ISSUES

- [10] The issues are:
- a. Whether the Respondent is justified in refusing copies of the Records to the Applicant;
 - b. If the Respondent is not justified, what are reasonable costs for producing the Records; and
 - c. If the Respondent is not justified, whether the Applicant is entitled to costs of \$150.00 pursuant to paragraph 4 of subsection 1.44(1) of the Act, together with a penalty of \$1,000.00 pursuant to paragraph 6 of subsection 1.44(1) of the Act.

D. ANALYSIS

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

Evidence

[11] This Case arises from the Applicant's Request for Records, dated February 28, 2018.

[12] The Respondent agreed, in its Response to Request for Records, to provide the Applicant with copies of most of the records that formed part of its Request for Records, specifically:

- a. Toronto Hydro bills from June 6, 2017 to present;
- b. Enbridge gas bills, from July 24, 2017 to present;
- c. City of Toronto water bills, from March 21, 2017 to present;
- d. Elevator maintenance agreement; and
- e. Security Contract (First Service Residential Property Services).

[13] However, the Respondent refused to provide the Applicant specifically with copies of the Records, claiming:

- a. That the Records relate to specific unit owners, and therefore the Applicant is not entitled to examine those records, pursuant to section 55(4) of the *Condominium Act, 1998*, S.O. 1998, c. 19 (the "Act"); and
- b. That the request does not reasonably relate to the purpose of the Act, as required by section 13.3(1) of Ontario Reg. 48/01, General.

[14] During the course of the hearing, the Applicant presented a total of seven exhibits for my review:

- a. Exhibit 1: Request for Records;
- b. Exhibit 2: Response to Request for Records;
- c. Exhibit 3: The Complaint in Case No. 2018-00343R;
- d. Exhibit 4: Aged Receivables Report by Owner, as part of Financial Statement (example);
- e. Exhibit 5: Defense response in earlier Small Claims Court action;
- f. Exhibit 6: Statement of Evidence of Sam Campione; and
- g. Exhibit 7: Statement of Evidence of Faith Eroltu.

[15] The Applicant clarified the scope of its request for the Records, which I summarize as follows:

- a. The Aged Receivables Report constitutes a part of the Respondent's financial statements, as shown by Exhibit 4,

“Financial Statements (unaudited) for the Month of June 2018”, and the Applicant is requesting the same class of records as the aged receivables report, current as of June 2018, that was attached to the Financial Statements.

- b. The Applicant produced Exhibit 4 as an example to verify its claim that the requested Aged Receivables Report by Owner constitutes part of the Respondent’s regular financial statements, which are core records, and therefore anything attached to a core record should also be accessible to all unit owners.
- c. With respect to the Enercare Revenue Spreadsheet, the Applicant provided details of an Easement and Cost Sharing Agreement (“ECSA”) between the Respondent, the Toronto Standard Condominium Corporation No. 2501 (“2501”), and other parties, that result in a sharing of various expenses, including hydro and Enercare costs, pertaining to certain shared portions of the common elements of both the Respondent and 2501. In seeking to review the records requested, including the Records, the Applicant wishes to determine whether or not the Respondent (and, therefore, the Applicant, along with other unit owners of the Respondent) has paid more than its fair share under the ECSA.

[16] The first ground of the Respondent’s denial of the Records is that they relate to specific unit owners, and therefore the Applicant is not entitled to examine those records, pursuant to section 55(4) of the Act. The second ground is that the Applicant’s request for the Records is not reasonably related to the purpose of the Act, as required by section 13.3(1) of Ontario Reg. 48/01, General.

The Law

[17] 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).

[18] The right to examine records is broad, but not without limits. Records that relate to “specific units or owners” fall into one of the exceptions to the right to examine or obtain records, as set out in section 55(4)(c):

55(4) The right to examine or obtain copies of records under subsection (3) does not apply to,
 [...]

- (c) subject to subsection (5), records relating to specific units or owners;

[19] However, section 55(5) provides that the exception in section 55(4)(c) would not apply to prevent a unit owner from examining or obtaining copies of records that relate to the unit owner:

55(5) Clause (4) (c) does not prevent,

- (a) an owner, a purchaser or a mortgagee of a unit or an agent of one of them duly authorized in writing from examining or obtaining copies of records under subsection (3) if the records relate to the unit of the owner, the unit being purchased or the unit that is subject to the mortgage, as the case may be;
- (b) an owner of a unit or an agent of the owner duly authorized in writing from examining or obtaining copies of records under subsection (3) if the records relate to the owner; or
- (c) an owner, a purchaser or a mortgagee of a unit or an agent of one of them duly authorized in writing from examining or obtaining copies of the record that section 46.1 requires the corporation to maintain. 2015, c. 28, Sched. 1, s. 51 (8).

[20] Based on the evidence presented, the Records do relate to the Applicant as a unit owner. However, the Records also contain information that relate to other specific units and owners.

[21] The fact that the Respondent may have previously provided the Applicant with un-redacted records as part of a prior financial statement, as found in Exhibit 4, does not bind this Tribunal. The Respondent may have acted contrary to the law in the past by providing a record that related to specific units or owners, but this does not now create an obligation for it to continue to do so.

[22] The Respondent also specified a second ground for refusing the Records, that the request does not reasonably relate to the purposes of the Act.

[23] Although the unit owner is not required to specify a purpose when making the request for records, according to section 13.3(1) of Ontario Regulation 48.01, General, the request must be “solely related to that person’s interests as an 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
- (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). *[emphases added]*

- [24] The Respondent did not join this Case, so there is nothing more than its bare allegation that the Applicant's request for the Records does not reasonably relate to the purposes of the Act. Where a Respondent relies upon this exception in the Act, it is incumbent upon the Respondent to explain or show how the request does not relate to the purposes of the Act. It has not done so.
- [25] By contrast, the Applicant has submitted written statements from Sam Campione and Faith Eroltu, who are both officers of the Applicant. The Applicant's representative, Cameron Thomson, also provided written submissions. These statements and submissions support the Applicant's position that it has an interest as an owner in ensuring that the condominium is effectively and properly managed.
- [26] In the absence of any evidence to the contrary from the Respondent, I accept that the Applicant's request for the Records is solely related to the Applicant's interests as a unit owner.
- [27] I should also mention that the Applicant, through its witnesses and its representative, raised an issue about the distinction between the Respondent condominium corporation and its property management firm, FirstService Residential ("First Service"). The Applicant alleges that it is First Service that is refusing the request for the Records, and not the Respondent, and presented Exhibit 3 as evidence of the conflation, in practice, of the interests and intentions of the Respondent and FirstService Residential. I find that it is not necessary to consider or decide this issue in the context of this records request, and I have therefore not made any findings on this issue.
- [28] In the circumstances, I find that the Applicant is entitled to the Records, but those Records need to be redacted so that no information relating to specific units or owners, other than the Applicant, is disclosed.

Issue 2: What are reasonable fees for the Records?

- [29] The Respondent is entitled to charge reasonable fees and labour costs associated with the review and provision of the Records to the Applicant. The Respondent's original Response to Request for Records, produced as Exhibit 2 by the Applicant, had provided for copy charges of \$ 0.20 per page and \$60.00 per hour for labour for the records that it did not deny. The Applicant did not dispute the reasonableness of those fees.

[30] The Applicant requested both an electronic and paper copy of the Records. In providing the paper copy of the redacted Records to the Applicant, the Respondent may charge fees of no more than \$ 0.20 per page and \$60.00 per hour for labour.

Issue 3: Is the Applicant entitled to costs and a penalty, as requested?

[31] The Applicant seeks costs against the Respondent in the amount of \$150.00, as well as a penalty against the Respondent in the amount of \$1,000.00.

Costs

[32] The requested costs of \$150.00 represents filing fees incurred by the Applicant in this Case: \$25.00 application filing fee, and \$125.00 to move the Case to Stage 3, Tribunal Decision.

[33] The Rules provide the following:

Recovery of Fees and Expenses

23.1 The CAT may order a User to pay to another User or to the CAT any reasonable expenses or other costs related to the use of the CAT, including:

- (a) any fees paid to the CAT by the other User;
- (b) the other User's expenses or other costs that were directly related to this other User's participation in the Case; and
- (c) the other User's or the CAT's expenses or other costs that were directly related to a User's behaviour during the Case that was unreasonable or for an improper purpose, or that caused an unreasonable delay.

[34] The Respondent failed or refused to join this Case. The Tribunal processes are designed to first assist the Users to attempt a resolution, including with the assistance of a Tribunal Member through a formal mediation. Most cases settle through these initial processes (i.e., at Stage 1 or Stage 2 of the Tribunal's Online Dispute Resolution process). Only failing any resolution is a case put over to a hearing (Stage 3). Costs incurred by the Applicant to put this Case over to a hearing are reasonable, as the cost is directly related to the Respondent's behaviour during the Tribunal process that caused an unreasonable delay.

[35] As such, pursuant to paragraph 4 of subsection 1.44(1) of the Act and Rule 32.1, an award of costs in favour of the Applicant, in the requested amount of \$150.00, is warranted.

Penalty

- [36] The Applicant also submits that a penalty of \$1,000.00 is appropriate, given the Respondent's negligence in failing to join this Case, together with the Respondent's cavalier, unreflective, relatively unargued refusal to provide the Records when requested deserves a penalty, one which will "bring home to the Respondent the importance of taking this and related matters seriously".
- [37] In accordance with the Act, in order for this Tribunal to consider a penalty, the Respondent's refusal to grant access to, or provide copies, of the Records to the Applicant must have been without reasonable excuse.

1.44 (1) Subject to subsection (4), in a proceeding before the Tribunal, the Tribunal may make any of the following orders:

[...]

6. An order directing a corporation that is a party to a proceeding with respect to a dispute under subsection 55 (3) to pay a penalty that the Tribunal considers appropriate to the person entitled to examine or obtain copies under that subsection if the Tribunal considers that the corporation has without reasonable excuse refused to permit the person to examine or obtain copies under that subsection. *[emphasis added]*

- [38] As described above, the Respondent responded to the Applicant's original request for records, granted access to and provided copies of most of the records requested, and refused access to the Records identified in this Case, for reasons described in paragraph [12] herein. The Respondent did not willfully disregard the request for records, nor did it remain willfully blind to the legal requirements in relation to the request.
- [39] Although I have decided that the Records must be released, redacted as to information relating to specific units and owners, I conclude that a penalty for failure to produce the Records is not warranted, as I do not consider that the Respondent acted "without reasonable excuse" in refusing access to the Records. The Respondent distinguished the Records from the other records requested and provided a reasonable excuse, based on exceptions found in the Act, for its refusal to produce the Records.

E. ORDER

[40] Pursuant to the authority set out in section 1.44(1) of the Act, the Tribunal orders that:

1. The application for copies of the Records is partially granted, and the Respondent shall within 30 days of this decision provide the Applicant with:
 - a. A copy of the Aged Receivables Report, redacted as to specific units or

- owners except for the Applicant; and
- b. A copy of the Enercare Revenue Spreadsheet, redacted as to specific units or owners except for the Applicant.
2. The Applicant shall pay reasonable costs of copying and labour, which shall not exceed \$0.20 per photocopy and \$60 per hour for applicable labour.
 3. The Respondent shall pay costs in the amount of \$150.00 to the Applicant, within 30 days of this decision.
 4. In order to ensure that the Applicant does not bear any portion of the costs award hereby made in its favour, the Applicant shall be given credits toward its next monthly contributions to common expenses in respect of each of the Applicant's units, equal to each such unit's proportionate share of the \$150.00 costs award, as if the Applicant has prepaid the same.

Lai-King Hum

Member, Condominium Authority Tribunal

RELEASED ON February 22, 2019