

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: April 11, 2019

CASE: 2018-00408R

Citation: Margaret Samuel v. Metropolitan Toronto Condominium Corporation No. 979 and Metropolitan Toronto Condominium Corporation No. 989, 2019 ONCAT 9

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

Adjudicator: Mary Ann Spencer, Member

The Applicant

Margaret Samuel

Self-represented

The Respondents

Metropolitan Toronto Condominium Corporation No. 979

-and-

Metropolitan Toronto Condominium Corporation No. 989

Roseann Gore, Agent

Hearing: Written electronic hearing February 20 to April 6, 2019.

REASONS FOR DECISION

A. OVERVIEW

- [1] Margaret Samuel (the “Applicant”) is the owner of a parking unit of Metropolitan Toronto Condominium Corporation No. 979 and of a unit of Metropolitan Condominium Corporation No. 989. On November 5, 2018, she submitted a Request for Records to each of the condominium corporations (the “Respondents”) asking for an electronic copy of its Record of Owners and Mortgagees.
- [2] On November 19, 2018, the Respondents provided electronic copies of the requested records. The Applicant disputes that the records were complete because they did not include the e-mail addresses of those owners and mortgagees who had provided them to the Respondents.
- [3] The Applicant’s position is that the e-mail addresses form part of the Record of Owners and Mortgagees and are not confidential. She requests an Order from the Tribunal directing the Respondents to provide her with the e-mail addresses. She also requests that the Tribunal assess a penalty to the Respondents for refusing to provide these records. Finally, she asks for her costs in this matter.

- [4] The Respondents' position is that e-mail addresses do not form part of the Record of Owners and Mortgagees. Further, the *Condominium Act, 1998* (the "Act"), which requires corporations to maintain a record of owners' agreements to receive notices electronically, specifically excludes these agreements from a corporation's obligation to provide records. The Respondent requests its costs in this matter.
- [5] I find that the Applicant is not entitled to examine or obtain copies of e-mail addresses of owners and mortgagees and, for the reasons set out below, I assess no penalty or costs in this matter.

B. BACKGROUND

- [6] On November 5, 2018, the Applicant submitted a Request for Records to each of the Respondents requesting an electronic copy of its Record of Owners and Mortgagees.
- [7] On November 19, 2018, the Respondents' Senior Condominium Manager, Nasser Mendoza, e-mailed electronic copies of the Records of Owners and Mortgagees to the Applicant. The Applicant responded noting that the record was incomplete as it did not include addresses for non-resident owners or e-mail addresses where those had been provided to the corporation. Mr. Mendoza advised that this information had been redacted from the records because it was considered confidential. On November 20, 2019, following further correspondence with the Applicant, Mr. Mendoza provided revised records which included the addresses of non-resident owners. However, he indicated again that e-mail addresses were confidential and would not be provided.
- [8] On November 21, 2018, the Applicant wrote to Mr. Mendoza again and indicated that the corporations were estopped from claiming confidentiality because e-mail addresses had been provided to owners as part of a Notice of Meeting of Owners sent by the Respondents on October 16, 2018. Mr. Mendoza responded that those e-mail addresses had not been disclosed by the corporations but had been voluntarily set out by some owners in the owners' Requisition for Meeting, a copy of which the corporations were required by the Act to attach to the Notice of Meeting. He again refused to provide the Applicant with e-mail addresses on the basis that the Respondents were required only to keep a record of owners' consents to receive notices electronically.
- [9] On November 23, 2019, Ms. Samuel filed cases with the Tribunal against each Respondent. On February 11, 2019, with the consent of the Applicant and both Respondents, the Tribunal ordered that the cases be joined.

C. ISSUES

- [10] The issues to be addressed are:

1. Do e-mail addresses which have been provided to the Respondents with the consent of unit owners/mortgagees form part of the Record of Owners and Mortgagees?
2. If the e-mail addresses do form part of the Record of Owners and Mortgagees of the Respondents, is an owner entitled to examine and/or obtain copies of them?

D. SUBMISSIONS

- [11] The Applicant submits that e-mail addresses do form part of the Respondents' Records of Owners and Mortgagees. Section 46.1(3)(d) of the Act requires a corporation to keep a record of the owner's name and "a statement of that method" when an owner has agreed in writing to service of documents by electronic communication. The Applicant argues that the record of the "statement of that method" includes both the manner of electronic communication and the electronic address. She further argues that owners have the right to examine and/or obtain copies of this record and that it is not excluded by section 13.11(2) of Regulation 48/01 ("O. Reg. 48/01). She referred me to *Shaheed Mohamed v. York Condominium Corporation No. 414*, 2018 ONCAT 3 (Canlii) ("*Mohamed*") and submitted that this case "entitles owners to all records under section 46.1 including e-mail addresses."
- [12] The Applicant further submits that owners' privacy and confidentiality are protected because owners are not obligated to provide corporations with their e-mail addresses. Finally, she referred me to *Hemming v. JAZZ FM. 91 Inc*, 2018 ONSC 7781 (Canlii) and submits that this case indicates "electronic communication has become the norm and preventing owners from obtaining the tools necessary to communicate with each other electronically in effect tosses 'roadblocks in the way of democracy'."
- [13] The Respondents submit that section 46.1(3)(d) of the Act requires only that the corporations maintain the name of the owner and a statement of the method of electronic communication which they argue requires them to keep a record of the "manner by which an owner has agreed to receive electronic communications" and not the electronic address. They also rely on the decision in *Wu v. Carleton Condominium Corporation*, 2016 30525 (ON SCSM) (Canlii) ("*Wu*") which they assert found that e-mail addresses do not form part of the Record of Owners and Mortgagees.

F. EVIDENCE AND ANALYSIS

- [14] The evidence comprised documents submitted by the Applicant and the Respondent, the written testimony of the Applicant and her two witnesses and the written testimony of the Respondent's witness.
- [15] Some of the Applicant's evidence related to the benefits of electronic communication. For example, witness Brenda Hardiman testified that she believes the Residences of the World Trade Centre Homeowners' Association, which I note is an association representing some owners of the Respondent corporations, should have the option of receiving communication by e-mail. The Applicant also submitted evidence relating to the use of e-mail addresses by the Respondents. The issues before me are ones of statutory interpretation. The evidence relating to the benefit of electronic communication and to the past use of e-mail addresses is not relevant to these issues and therefore is not addressed in this decision.

Issue 1: Do e-mail addresses which have been provided to the Respondents with the consent of unit owners form part of the Record of Owners and Mortgagees?

- [16] Section 55(1) of the Act requires a condominium corporation to keep adequate records and sets out a list of those records, which includes "the records required under subsection 46.1(3)...."
- [17] Section 46.1(3) requires a corporation to keep a record of owners and mortgagees including the name, unit number and address for service in Ontario. There are additional record keeping requirements if the owners and mortgagees have agreed to electronic delivery of notices by the corporation:

46.1(3)(d) if an owner described in clause (a) agrees to a method of electronic communication under clause 47(4)(c) and communicates that agreement to the corporation in writing, the name of the owner **and a statement of that method**; and

(e) if a mortgagee described in clause (c) agrees to a method of electronic communication under clause 47(5)(c) and communicates that agreement to the corporation in writing, the name of the mortgagee **and a statement of that method**.

(Emphasis added)

- [18] The issue before me is one of statutory interpretation. Specifically, does "the statement of that method" referred to sections 46.1(3)(d) and (e) of the Act include electronic addresses?
- [19] The Applicant's witness Gordon Wells, a student of information technology, testified that "in order to send documents or notices by electronic communication to a particular recipient, it is necessary to have both a record of the method of electronic communication and a record of the electronic address." While I note that Mr. Wells is not a qualified expert, there is no question that corporations must have electronic addresses in order to send notices to those owners who have agreed to electronic communication. However, the issue before me is not whether the Respondents have any record of owners' electronic addresses. Rather, it is

whether those addresses form part of the Record of Owners and Mortgagees, that is the specific record that sections 46.1(3)(d) and (e) of the Act require the Respondents to maintain.

- [20] The Applicant argues that “the statement of that method” referred to in sections 46.1(3)(d) and (e) of the Act includes both the method of electronic communication and a record of the electronic address and submits this is confirmed by the Ministry of Government and Consumer Services’ form, the “Agreement to Receive Notices Electronically.”
- [21] I do not agree with the Applicant’s reasoning. For the reasons set out below, I find that the Record of Owners and Mortgagees does not include electronic addresses.
- [22] I note that the primary purpose of section 46.1 of the Act is to record an owner’s name, unit and address for service in Ontario. Section 47 of the Act sets out the requirements for service of notices and includes that these be sent to the address for service on record or by electronic communication if an owner or mortgagee has signed an agreement to permit this. The requirements for the agreement to a method of electronic communication are set out in section 47(6) of the Act.
- [23] The Ministry of Government and Consumer Services’ form, “Agreement to Receive Notices Electronically”, sets out three boxes, “E-Mail”, “Facsimile” and “Other”, under the title “Method the corporation will use to deliver notices to me”. Below each box is a separate indented line for the provision of additional detail. The line below the “E-Mail” box reads “My e-mail address is.” The form provides some guidance to those completing it:

In order for your condominium corporation to enter into this agreement, the board of your corporation must have passed a resolution to determine the methods of electronic communication that it will use for serving notices on owners or mortgagees. Before filling out this form, you should consider contacting the corporation to find out what those methods are.

The information set out above clearly indicates that the statutory reference to “method” is to a manner of communication, which the corporation first determines, and not to specific addresses, which are supplied by the owners or mortgagees after the corporation has made its determination.

- [24] The Respondents referred me to the decision in *Wu* with respect to whether addresses for service include e-mail addresses. The Applicant argues that the decision in *Wu* is no longer relevant because it was issued before the Act was amended on November 1, 2017.
- [25] The plaintiff in *Wu* requested owners’ addresses for service and wanted e-mail addresses included. Section 47(2) of the Act then in force required a corporation “to maintain a record of the names and addresses for service” of owners and mortgagees who had provided these to the corporation in writing. The Court decided that e-mail addresses did not form part of the addresses for service that a

corporation was required to maintain as part of the Record of Owners and Mortgagees. At paragraph 27, the Court wrote:

Section 47(7) reinforces by my conclusion. It provides that service by facsimile or electronic mail is an alternative to service by prepaid mail addressed to “the owner at the address for service that appears in the record”.

I note that Section 47(7) of the Act allowed for notices to be served electronically if an owner had agreed in writing.

[26] The Act as amended on November 1, 2017 continues to provide for service by a method of electronic communication as an option:

47(4) A notice that is required to be given to an owner shall be,

(a) delivered to the owner personally;

(b) sent by prepaid mail addressed to the owner at the address for service that appears in the record of the corporation required by section 46.1 or that is required by that section to appear in that record;

(c) sent by facsimile transmission, electronic mail or any other method of electronic communication if,

(i) the owner agrees, in accordance with subsection (6), that the party giving the notice may give the notice by that method, and

(ii) a statement of that method of giving notice appears in the record of the corporation required by section 46.1 or that is required by that section to appear in that record

[27] The distinction the Court made in *Wu* is maintained in the current Act. Section 47.4(b) of the Act refers to the Record of Owners and Mortgagees section 46.1 requires be maintained by the corporation. Section 47.4(c) requires that the method of communication to which an owner agrees be added to that record. The method, which must first be determined by the corporation, is the manner of communication; that is, facsimile, e-mail or other. There is no basis to conclude that an owner’s or mortgagee’s specific address is to be included in the record under section 46.1.

[28] The Court also addressed privacy concerns associated with releasing e-mail addresses in *Wu*. Paragraph 28 states:

I also agree with *York Condominium Corp. No 42 v. Hashmi et al*, 2012 ONSC 4533 (CanLII) that releasing e mail addresses raises privacy concerns... However, I will not speculate as the Privacy Commissioner has (defendant’s submissions para 27) as to what uses e mail address may be put to. There is no evidence before me on which I could conclude that the Privacy Commissioner’s concerns have any merit in this particular case. Her fears may or may not materialize in this case but of course that does not mean that the fears are not well founded in the abstract. For me it is sufficient to resolve the issue based on the reading of section 55 of the Act applying

the modern rule of statutory interpretation was put succinctly by E. A. Driedger in *Construction of Statutes* (2nd ed. 1983), at p. 87:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. .: Rizzo & Rizzo Shoes Ltd. (Re), 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at paras. 21 and 23.

[29] Driedger's principle is that the words of an Act should be read in "their grammatical and ordinary sense". With respect to the requirements to maintain a record, section 46.1(3)(d) states "if an owner...agrees to a method of electronic communication ...and communicates that agreement to the corporation in writing, the name of the owner and a statement of that method." While the Applicant submits that "a statement of that method" includes "both a record of the method of electronic communication (example, e-mail) and a record of the electronic address (example, e-mail address)", I find that the ordinary and grammatical sense of "a statement of that method" is simply to the antecedent phrase "method of electronic communication", that is e-mail, facsimile or some other electronic manner.

[30] The Applicant argued that owners' privacy is protected because they do not have to provide their e-mail addresses to corporations. I agree that it is up to owners and mortgagees to decide if they wish to receive electronic communication from corporations. However, as set out above, the Act does not require them to forfeit their privacy in doing so.

Issue 2: If the e-mail addresses do form part of the Record of Owners and Mortgagees of the Respondents, is an owner entitled to examine and/or obtain copies of them?

[31] The right of an owner to examine or obtain copies of the corporation's 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).

[32] Section 55(4) of the Act sets out exclusions to an owner's right to examine or obtain copies of records:

(4) The right to examine or obtain copies of records under subsection (3) does not apply to,
 ...
 (d) any prescribed records.

[33] The records prescribed for purposes of s. 55(4) of the Act are listed in section 13.11(2) of O. Reg. 48/01:

(2) The following are prescribed records for the purpose of clause 55(4)(d) of the Act:

1. A record of the method of electronic communication set out in an agreement described in clause 47(4)(c) or (5)(c) of the Act.

- [34] I have determined that the “statement of that method” of electronic communication section 46.1 of the Act requires be maintained as part of the Record of Owners and Mortgagees does not include electronic addresses. However, I note that even if I had not made this determination, the Applicant would not be entitled to receive copies of those addresses. The exclusion set out in section 13.11(2) of O. Reg. 48/01 is very clear. Owners are not entitled to examine or receive copies of the record of the method of electronic communication.
- [35] The Applicant submits that because section 13.11(2) of O. Reg. 48/01 only refers to the “method of electronic communication”, it does not exclude the “record of electronic address” and “owners retain the right to view the record of electronic address.” I note that neither the Act nor O. Reg. 48/01 makes any reference to a “record of electronic address.” This record is the creation of the Applicant.
- [36] The Respondents do keep the e-mail addresses provided to them by owners. Nasser Mendoza testified that the Respondents use Condo Control Central software to store e-mail addresses which have been extracted from resident information forms. Owner e-mail addresses may also have been set out on a written agreement to receive electronic communication. The software allows the Respondents to distinguish resident and non-resident owners as well as those owners who have agreed to a method of electronic delivery of notices.
- [37] I note that the records of e-mail addresses which the Respondents maintain on Condo Control Central would also be excluded from an owner’s right to examine or obtain copies of records; section 55(4)(c) of the Act excludes records relating to specific units or owners.
- [38] Finally, the Applicant submitted that the decision in *Mohamed* supports her position that she is entitled to all records under section 46.1 including e-mail addresses. However, I find no basis for this. While the Applicant in *Mohamed* requested the Record of Owners and Mortgagees, that decision does not address whether that record includes e-mail addresses.

G. DECISION

- [39] The Applicant is not entitled to examine or receive copies of the e-mail addresses of owners and mortgagees. I find that the statement of the method of electronic communication which sections 46.1(3)(d) and (e) of the Act require corporations to maintain as part of the Record of Owners and Mortgagees does not include e-mail addresses. Further, in accordance with section 55(4)(d) of the Act and section 13.11(2)1 of O. Reg. 48/01, the Applicant is not entitled to examine or obtain the record of method of electronic communication.

[40] The Applicant requested that I assess a penalty against the Respondents for non-compliance with the Act. The Tribunal may order a penalty to be paid if it finds that the corporation has, without reasonable excuse, refused to permit a person to examine or obtain records. In this case, the Respondents properly provided the Applicant with their Records of Owners and Mortgagees. The Applicant's Request for Records has been fulfilled and there is no basis for penalty.

H. COSTS

[41] The Applicant requests that the Tribunal award her costs of \$5,275.00 representing the fees she paid to the Tribunal and compensation for her time. The Respondents request costs of \$1,126.66 representing the legal fees they incurred in this matter.

[42] Rule 32.1 of the Tribunal's Rules of Practice (effective July 1, 2018) states that the Tribunal may order a User to pay any reasonable expenses related to the use of the Tribunal. However, Rule 33.1 states "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."

[43] The Respondents submit that there are exceptional reasons to award legal costs in this case; the Applicant's position is meritless and the Respondents explained this to her before she filed her applications with the Tribunal. I note that the Applicant prepared and submitted lengthy documents and detailed arguments to the Tribunal and I do not find that her application was frivolous. While that application has not been successful, I do not find this to be an exceptional reason to award costs. Therefore, I order no costs in this matter.

G. CONCLUSION

[44] The Respondents properly provided the Records of Owners and Mortgagees requested by the Applicant in her November 5, 2018 Requests for Records and I award no costs in this matter. Accordingly, I issue no order and this matter is now concluded.

Mary Ann Spencer
Member, Condominium Authority Tribunal

Released on: April 11, 2019