CONDOMINIUM AUTHORITY TRIBUNAL

DATE: May 25, 2020
CASE: 2019-00192R
Citation: Gary Nakashima v Metropolitan Toronto Condominium Corporation No. 818, 2020 ONCAT 17

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

Adjudicator: Kathryn Kertesz, Member

The Applicant Gary Nakashima	Self-represented
The Respondent Metropolitan Toronto Condominium Corporation No. 818	Michael Solomon, Paralegal

Hearing: November 17, 2019 to April 27, 2020, written on-line hearing

REASONS FOR DECISION

A. OVERVIEW

[1] Gary Nakashima (the "Applicant") is a unit owner of Metropolitan Toronto Condominium Corporation No. 818 (MTCC 818 or the "Respondent"). On July 23, 2019, he submitted a Request for Records (the "Request") to MTCC 818 under s. 55 of the (the "Act"). He requested the following records in electronic format: Periodic Information Certificates ("PIC") from July 23, 2018 to July 23, 2019 and Board meeting minutes ("Minutes") for the same time frame, from July 23, 2018 to July 23, 2019.

[2] The Request, on the mandated form under subsection 13.3(3) of Ontario Regulation 48/01 (the "Regulation"), was personally delivered to the management office for MTCC 818 on July 23, 2019, with a cover letter that outlined the Applicant's request for the aforementioned core records. A confirmation e-mail was received by the Applicant, on the same date, from the MTCC 818 office, more specifically, from Irena Matu, the office administrator, confirming receipt of said records request.

[3] MTCC 818 did not respond to the Request for Records within thirty days as required by s. 13.3(6) of the Regulation. On August 26, 2019, Mr. Nakashima sent another email addressed to both the management office of MTCC 818 and each of its directors, repeating his request of July 23, 2019. On September 1, 2019, Mr. Nakashima made an application to this Tribunal.

[4] In addition to seeking the requested records, the Applicant has asked the Tribunal to order that MTCC 818 pay a penalty to him in the amount of $3000, pursuant to s.144 (1) 6 of the Act

B. Result

[5] For the reasons set out below, I find that the Applicant is entitled to the records requested. The Respondent is ordered to pay a penalty in the amount of $750 for its refusal to provide the records without reasonable excuse.

[6] Further, pursuant to s.144 (1) 4 of the Act, I award costs of $200 to the Applicant representing the filing fees paid to the Tribunal by the Applicant.

C. ISSUES & ANALYSIS

Issue 1: Is Mr. Nakashima entitled to receive the following records, and if so, is he required to pay a fee for the records:

a. Periodic Information Certificates from July 23, 2018 to July 23, 2019
b. Board meeting minutes from July 23, 2018 to July 23, 2019.

[7] There was no dispute regarding the Applicant's entitlement to requested core records.

[8] Respondent witness Mr. Wroblewski, President of the Board of Directors, testified that requested records were offered to the Applicant but that none of them were actually received by the Applicant. He explained that Mr. Nakashima was provided with two options:

> "1. The Applicant could pay for redacting requested records (either by coming to the Corporation's office or by sending a cheque) and then receive the electronic version of the records.
> 2. To pay for redacting requesting records and photocopies (either by coming to the Corporation's office or by sending a cheque) and then receive the printed version of the records."

[9] The Respondent stated that if documents were provided in paper form, then the cost for photocopying would be at $0.25 per page for a total of $30.

[10] The Respondent explained that no requested documents were provided either in hard copy or electronically to the Applicant since there was no payment made by the Applicant.

[11] With respect to photocopying charges, I find that no fees should be charged in this case. The requested records are core records. The Applicant asked that they be provided in electronic format. No fee is to be charged for providing copies of core records that are requested to be delivered in electronic format.

Issue 2: Should the Respondent be Required to pay a penalty under s.1.44 (6) of the Act for failure to provide the Applicant with the records requested without reasonable excuse, and if so, in what amount?

[12] The first issue for me to consider and about which I received much evidence from the parties, is whether MTCC 818 has failed to provide the records without reasonable excuse. I will first summarize each of the parties' evidence and submissions on this point.

Has the corporation provided a reasonable excuse for not providing the requested records?

<u>Applicant's Position</u>

[13] The Applicant provided evidence both in his testimony and documents in support of his position that he appropriately followed all the prescribed steps under the Act when submitting his records request dated July 23, 2019.

[14] The Applicant submits that the Respondent has no reasonable excuse for not providing the requested core records. He disputes the Respondent's assertions that:

a) He failed to inform the individual board members adequately of his records request and, therefore, in not doing this, the request, due to office management staffing shortages, could not be dealt with in a timely manner.

b) He should have known, as a resident, that this is a self managed condominium and there were office staffing shortages during the time he submitted the records request which contributed to delays in responding to his request.

c) Adam Wroblewski's (President of the Board of Directors, MTCC 818) first knowledge of the Applicant's request occurred on or around September 5th and only once he received notice of invitation to join this case.

[15] The Applicant highlighted MTCC 818's lack of adherence to its obligations under the Act to provide the requested core documents as well as their willful failure to participate in a consistent manner throughout the specific stages of the Tribunal processes. Mr. Nakashima asserts that at no point did he engage in harassing behavior as suggested by the Respondent.

[16] The Applicant confirmed that he has not received the core records he had requested electronically. He stated that partial records became available for "pick up" in MTCC 818's office on September 30, 2019. The balance of the requested records were made available on October 29th. The Applicant clarified the distinction he was making when he stated that the documents were "available" versus "received". He stated that when all of documents became available on October 29th, the Stage 2 mediation was still in progress and he was awaiting a response from MTCC 818 regarding potential settlement options, and therefore did not pick up the records made available to him. The Applicant did not attend to pick up requested records until he could be sure there was acceptance by both parties of a binding settlement in order to not void the possibility of said settlement.

Respondent's Position

[17] The Respondent asserts that the Board members only became aware of the request when they received the notice to join the case at the Tribunal and after an e-mail was sent by the Applicant to all the board members advising of same.

[18] The Respondent stated that it was having staffing issues during the months July – October 2019. According to staffing time sheets provided as an exhibit, MTCC 818 asserts there is legitimate documentation of staffing shortages which therefore constitutes a reasonable excuse that gave rise to delays in responding to Applicant's request within the prescribed time. The Respondent submitted that the office administrator "had extended absences between July and August 2019 and then eventually left her position in early September". As a result, "the Board was left cleaning up a disastrous slough of paperwork."

[19] The Respondent described itself a self managed condominium “run by volunteers.” MTCC 818 stated that the Applicant ought to have known that a more practical and time-efficient response would have been possible, if the Applicant’s method of delivery of his request had included direct electronic communication to the Board of Directors, rather than hand-delivering his request to the Administrative Office only.

[20] The Respondent through its two witnesses (Mr. Wroblewski and Mr. Cary Pang) reiterated its position that it first became aware of the Applicant’s request in early September 2019 and that additional or multiple avenues of requests would have been preferred in order to expedite the Applicant’s request. Mr. Pang was privy to one conversation between Mr. Wroblewski and the Applicant in September 2019 about the requested records. The Respondent stated that if the Applicant had pursued additional avenues to make the Board aware of request (as noted in closing submissions: “he ought to have brought forwards his concerns to the appropriate email, person or by leaving copies of his request with concierge”) that would have in turn facilitated a timely response to his request.

[21] The Respondent asserted that once Mr. Wroblewski and the Board became aware of the request in early September, the requested documents were then made available within a timely manner for the Applicant to pick up. The Respondent states that since the Applicant did not follow the steps that he ought to have known would lead to fulfillment of his request, he instead was instrumental in creating unnecessary delays and not “mitigating his damages” with respect to this matter. The Respondent’s position is that the Applicant could have avoided any and all frustration by sending his request to the Board directly, but instead may be classified as a “vexatious litigant” whose case should be dismissed for being frivolous.

Analysis

[22] The process for submitting a Request for Records is set out in subsection 13. 3 (4) of Ontario Regulation 48/01:

> The request for records and any other communication between the requester and the corporation in respect of the request must be delivered to the corporation and is sufficiently delivered if it is,
> (a) sent by prepaid mail to,
> (i) the address for service of,
> (A) the corporation,

(B) the condominium management provider or the condominium manager, if any, with whom the corporation has an agreement to receive condominium management services, or
(C) any other person responsible for the management of the property, or

(ii) an address that the board has, by resolution, decided is an address for receiving delivery of the request;

(b) sent by courier delivery to an address described in clause (a) that is capable of receiving courier delivery;
(c) deposited in the mail box for an address described in clause (a); or
(d) sent by facsimile transmission, electronic mail or any other method of electronic communication if the board has, by resolution, decided that it is a method for receiving delivery of the request. O. Reg. 180/17, s. 17 (1).

[23] The process for responding to a Request for Records is set out in subsection 13.3 (6) of Ontario Regulation 48/01:

> When the corporation receives a request for records in accordance with this section, the board shall determine whether the corporation will allow the requester to examine or obtain a copy of the record that the requester has requested and shall respond to the requester within 30 days in a form specified in the Table to section 16.1. O. Reg. 180/17, s. 17 (1); O. Reg. 428/19, s. 12 (2).

[24] Much of the evidence relates to who received notice of the request and whether the Applicant followed the correct steps when submitting his request. In this case, there is an assertion made by the Respondent that the Applicant "ought" to have known that he should have given notice of his request to the Board of Directors directly in order to ensure that his request would be dealt with in a timely manner.

[25] Based on the evidence before me, I find that the Applicant's request was validly made as per s. 13.3(4) of the Regulation. He submitted his request to MTCC 818's office administrator in person on July 23rd and received a written confirmation letter confirming receipt of his request for records. Following this confirmation to the Applicant, there was no additional communication, formal response to the requested records nor any update regarding the request, until the Applicant followed up. On August 26th Mr. Nakashima, because of lack of a response to his request, sent an e-mail addressed to the Board of Directors to bring to their attention "notice of issues" as per his original request dated July 23rd.

[26] The Respondent's position that the request was not received exemplified a lack of communication between its office administrator and the Board. The Respondent's

testimony that the Applicant “ought to have known” to use multiple avenues of contact and/or direct contact of the Board to ensure timely processing highlights this lack of communication. Evidence of a short-staffed Corporation office after the office administrator’s departure fails to justify the delay in responding to the Applicant, especially given Mr. Wroblewski’s evidence in cross-examination that despite staffing shortages, new procedures were put in place to ensure that MTCC 818 was still able to fulfil its legal obligations under the Act.

[27] The earliest documented date, confirmed by both the Applicant and the Respondent in testimony, when all the records (not just partial records) requested were available, was October 29th. Although the Respondent’s documentation supports partially available records (as per Exhibit 4), relating to the PIC, on September 30, the balance of the records were only made available on October 29th. The Respondent failed to provide all the records requested within the prescribed timeline of 30 days as per the Regulation. The Respondent’s claim that once the Request was received, it acted efficiently and within the prescribed period, is not substantiated by the evidence. According to Mr. Wroblewski, the earliest date that he became aware of the Applicant’s request was September 5th, and the complete records were offered to the Applicant on October 29th, which also exceeds the prescribed timeline of 30 days, even by the Respondent’s timeline. Nevertheless, having accepted that the Records Request was delivered to the Respondent on July 23th, I find that the entirety of the records were not available until October 29th, far exceeding the 30 days prescribed by the Regulation. And, further, the evidence does not establish a reasonable excuse for the failure to provide the records. The delay, in the circumstances of this case, constitutes a refusal for the purposes of s. 1.44(1) 6 of the Act.

[28] The Respondent submits that its staffing issues present a reasonable excuse for its failure to provide the requested records. It is a self-managed condominium that had retained the services of an office administrator who, the Respondent’s witnesses testify, but there were issues with the administrator that resulted in the board not being informed of the request in a timely manner. The Respondent asserts that as soon as the board itself became aware of the request, which was not until the administrator left her position in September, 2019, it responded expeditiously to provide the records. The Respondent further asserts that the Applicant was aware of the problems the board faced communicating with its administrator, and ought to have taken this into account when submitting the request by delivering it directly to the board and not the administrator.

[29] Section 13.3(4) of the Regulation sets out the required manner of delivery of a request for records. Hand-delivery by the Applicant to the administrator satisfies the requirements of this section. The Applicant also received written confirmation of receipt from the administrator. The Applicant had no reasonable grounds for presuming the request would not be passed on to the board, and, in any case, was not responsible for that. The responsibility to manage its staff, internal communications and other administrative processes belonged to the Respondent.

[30] The Respondent made other allegations regarding the Applicant's conduct, which the Applicant rejects and that, in any event, I find are not relevant to an assessment of whether or not the Respondent's failure to provide the records in accordance with its requirements under the Regulations was reasonable.

What is the appropriate penalty?

[31] Paragraph1.44(1) 6 of the Act gives the Tribunal jurisdiction to order a penalty be paid by MTCC 818 to the Applicant if the Tribunal considers that it refused to provide the applicant with the records he requested without reasonable excuse. To reiterate, the Applicant had a clear entitlement to the records and MTCC 818 had no reasonable excuse to refuse those records. The next issue to be decided is the amount of the penalty.

[32] In deciding on the amount of the penalty to be imposed, it has been noted in both Terence Arrowsmith v Peel Condominium Corporation No. 94 2018 ONCAT 10 and Shaheed Mohamed v. York Condominium Corporation No. 414, 2018 ONCAT 3 that the intended purpose for imposing a penalty should be considered. Previous decisions of the Tribunal have noted that the imposition of a penalty should encourage condominium corporations to take their legal responsibilities under the Act seriously and in such a way that respects the values of the Tribunal, namely providing fair, efficient and timely dispute resolution.

[33] Here, I have considered the evidence which suggests a variety of contradictory explanations as to why Mr. Nakashima has not received the records he requested. As stated above, I do not accept that the Respondent did not receive proper notice of the Applicant's Request, nor do I accept the submission that the Corporation's staffing issues are a reasonable excuse for not providing requested records. In closing submissions, the Respondent goes as far as acknowledging that matters could have easily been rectified between the Applicant and the Respondent. The Respondent in not providing the requested records in a timely manner prescribed by the Act has failed to diligently fulfill their obligations under the Act.

[34] The Applicant cited 2342941 Ontario Inc. v Toronto Standard Condominium Corporation No. 2329, 2019 ONCAT 44 in support of his request for a $3,000 penalty. He submitted that the facts before me are similar: as in that case, there was a lack of participation by the Respondent and the Respondent " wilfully disregarded its legal obligations under the Act relating to the Applicant's request." The Applicant urged me to follow the result in that case and award a high penalty.

[35] I do not find the case cited to be similar in its facts so as to warrant support for the penalty requested by the Applicant in this case. Although late, the records were made available to the Applicant before Stage 3. This suggests that the Respondent did not disregard the request rather, it was shown to not be diligent in dealing with the request.

[36] I have considered the Respondent's submissions regarding the Applicant's conduct after all the records were made available to him on October 29, in assessing the appropriate amount of the penalty. The Applicant, in his testimony, stated that in order to avoid interference with a potential settlement garnered through Stage 2 Mediation underway at that time, he chose not to pick up the records. I do not find this to be a particularly persuasive reason for the decision to not pick up records once they were all made available to him. The Applicant became more focused on the Tribunal process itself securing receipt of the requested records. I note here too that the Applicant attempted to introduce the Respondent's unresponsive behaviour in the previous stages of this proceeding as a factor for me to consider. I explained that prior stages of the Tribunal's process are confidential and I would not be considering what occurred there. Having said that, the Respondent could have provided the requested records, once available, electronically at any point to the Applicant, however, it continued to insist on payment for paper copies. For these reasons, I find that a penalty of $750 against the Respondent is warranted in this case.

Issue 3: Is the Applicant entitled to costs?

[37] The award of costs is in the Tribunal's discretion under paragraph 1.44(1) 4 of the Act. In exercising this discretion, it is necessary to consider first, if costs are appropriate and second, what amount of costs should be awarded. MTCC 818 failed to provide the records to the Applicant which had the effect of forcing him to proceed through all three stages of the Tribunal's dispute resolution process despite his clear entitlement to the records. It is appropriate in these

circumstances for MTCC 818 to pay costs to the Applicant. This includes the cost incurred by him in initiating each stage of this proceeding, in the amount of $200.

ORDER

[38] For the reasons set out above, the Tribunal orders that:

1. MTCC 818 shall provide Mr. Nakashima with the following records within 30 days of this decision:

   a. Periodic Information Certificates from July 23, 2018 to July 23, 2019.
   b. Board meeting minutes from July 23, 2018 to July 23, 2019.

2. These records will be provided in electronic format. If not available electronically, the records will be provided in paper copy. There will be no cost to Mr. Nakashima for the records.

3. MTCC 818 will pay a penalty in the amount of $750 to Mr. Nakashima within 30 days of this decision.

4. MTCC 818 will pay costs in the amount of $200 to Mr. Nakashima within 30 days of this decision.

5. In the event that the penalty or costs are not provided to Mr. Nakashima within 30 days of this Order, he will be entitled to set-off this amount against the common expenses attributable to the Applicant's unit(s) in accordance with Section 1.45 (3) of the Act.

6. In order to ensure that Mr. Nakashima does not have to pay any portion of the penalty and cost awards, he will also be given a credit toward the common expenses attributable to his unit in the amount equivalent to his proportionate share of the penalty and costs awarded.

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Kathryn Kertesz
Member, Condominium Authority Tribunal

Released On: May 25, 2020