

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: March 16, 2020

CASE: 2019-00037R

Citation: Rafael Barreto-Rivera v. Metropolitan Toronto Condominium Corporation No. 704, 2020 ONCAT 7

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

Member: Angelique Palmer, Member

The Applicant

Rafael Barreto-Rivera

Self-represented

The Respondent

Metropolitan Toronto Condominium Corporation No. 704

Ellen Vanstone, Agent

Hearing: June 19, 2019 to January 10, 2020, Written on-line hearing

REASONS FOR DECISION

A. OVERVIEW

- [1] This hearing concerned a records request under section 55 of the *Condominium Act, 1998* (the “Act”). The online hearing was held from June 19, 2019 to January 10, 2020. The Applicant and the Respondent participated in the hearing and made written submissions.
- [2] Rafael Barreto-Rivera (the “Applicant”) is a unit owner of Metropolitan Toronto Condominium Corporation No. 704 (“MTCC 704” or the “Respondent”). MTCC 704 is a small condominium consisting of eight residential units.
- [3] The Applicant made a Request for Records to MTCC 704, dated June 1, 2018, under the *Condominium Act, 1998* (the “Act”), requesting a copy of the Board resolution regarding its approval of a \$598.90 payment issued around October 26, 2017 to Mr. Ben Singbeil for repair(s) which he carried out on a ceiling (or ceilings) located inside a unit.
- [4] MTCC 704 did not respond to the Request for Records within thirty days as required under Ontario Regulation 48/01 (the “Regulation”).

- [5] The Applicant emailed reminders to the Respondent on July 3, 2018 and December 6, 2018, stating that no response was received to the Request for Records.
- [6] The parties exchanged communications between June 1, 2018 through to December 6, 2018 about the repair work which is the subject of the Request for Records, related events and their respective positions. However, no response was received from the Respondent to the Request for Records as required under the Regulation.
- [7] Ultimately, the Respondent did not provide the Applicant with copies of the resolution regarding the Board's approval of a \$598.90 payment issued around October 26, 2017, because the resolution did not exist. Based on the facts of this case, the Tribunal does not have jurisdiction to decide on whether the Board's policy of not creating resolution for expenditures under \$1,000, is appropriate, properly established and documented, or reasonable. Absent a determination of the legitimacy of the Board's policy, there is no basis to determine that the Applicant is entitled to a resolution.
- [8] A penalty is awarded to the Applicant in the amount of \$200.

Respondent's Objection to Size of Applicant's Submission

- [9] The Respondent raised an objection to the length of the Applicant's submissions. The Respondent contends that the Applicant's Reply Brief is four times longer than the 7 double-spaced pages that was stipulated by me, and that the Applicant's Postscript is six times longer than the 1 double-spaced page stipulated by me, and was submitted 3 days past the November 12, 2019, deadline, and that, therefore, neither is inadmissible.
- [10] The Applicant provided no response to the Respondent's objections.
- [11] I agree with the Respondent that detailed instructions for submissions issued by me on October 27, 2019 to the parties, setting page limits, with which the Applicant has not complied.
- [12] The Respondent's objection is sustained in part. The Applicant's submissions will not be barred in their entirety. All submissions filed by the parties that fall within the requirements of the briefing schedule will be reviewed and considered. Any

portion of the submissions that go beyond the page limit requirements will not be reviewed or considered.

[13] Regarding the missed deadline, the record shows that there were technical difficulties with the CAT-ODR system. I find that all submissions made by the parties were filed on time.

B. ISSUES & ANALYSIS

Issue: Is Mr. Barreto-Rivera entitled to receive the resolution regarding the Board's approval of a \$598.90 payment issued around October 26, 2017 in response to the records request?

Applicant's Position

[14] In addition to making his Request for Records, the Applicant states that on nine different occasions over a period of more than twenty months he asked the Respondent for information regarding interior repairs on two privately owned units in the building. These units are not owned by the Applicant.

[15] The Applicant submits that the Respondent has no reasonable excuse for refusing to produce a copy of the Board resolution requested. Further, he submits that the Respondent has no reasonable excuse even if no resolution exists, as it is a core record that must be kept and made available upon request.

[16] The Applicant also contends that the Respondent's disregard of his request and insistence that the resolution is not a required record under the Act, its regulations, or by the declaration or the condominium's by-laws, are a sufficient basis to impose a penalty.

[17] The Applicant requests the following:

1. A penalty of \$1000 for the Respondent's persistent contravention of subsection 55(3) of the Act;
2. Under section 1.44(1)(7), imposition of a \$500 penalty for not responding to the June 1, 2018 Request for Records via a completed mandatory Response to Requests for Records form;
3. Under section 1.44(1)(4) payment of \$200 for the cost of the application;
4. Under section 1.44(1)(7) payment of \$537.50 for the 22.4 hours of work done related to adjudication of the application;

5. Under section 1.44(1)(7) compensation for the Applicant's condominium unit's share of lawyer or paralegal fees the Respondent may have paid related to this matter;
6. To ensure that the Applicant does not have to pay any portion of the penalty and costs awards, that the Applicant be given a credit toward the common expenses attributable to the Applicant's unit in the amount equivalent to the Applicant's proportionate share.

Respondent's Position

- [18] The Respondent states that the Applicant requested copies of numerous documents concerning the expenditure, which the Board had no obligation to provide.
- [19] It asserts that the Applicant's demands for copies of records are the latest example of an ongoing campaign of aggression against the Board. There are affidavits from the other owners attesting to the nature of the Applicant's campaign and their confidence in the Board.
- [20] The Respondent submits that section 55(3) of the Act does not require the Board to provide copies of every document that the Applicant might like to see, but only requires that the Board provide copies of documents enumerated in section 55(1).
- [21] The Respondent's position is that resolutions of the Board are not one of the documents enumerated in section 55(1), and, therefore, the Board had no obligation to provide a copy of the requested resolution to the Applicant. In any event, the Respondent submits that since such resolution was not required under the Act, or the Respondent's declaration or by-laws, it does not exist.
- [22] Regarding the Applicant's additional request for copies of estimates for the repairs in question, the Respondent again argues that those documents are not included in the enumerated documents in section 55(1) and therefore need not be provided.
- [23] The Respondent explained that its longstanding practice is that expenditures under \$1000 can be made by the Board without a vote, and therefore no resolution is necessary in relation to such expenditures. The Applicant acknowledges being fully aware of this in his submissions to the Tribunal.
- [24] Since the Applicant is aware that no resolution exists, the Respondent submits that the Application to this Tribunal is frivolous, vexatious and not made in good faith.

The Respondent further submits that the Application lacks merit and should be dismissed as it is a misuse of the CAT process for an improper purpose and is part of the Applicant's decade-long campaign of aggression against successive Boards and fellow Owners.

Analysis:

[25] Section 55(1) of the Act requires a condominium corporation to keep adequate records and sets out a list of records, which is not exhaustive and includes: financial records of the corporation; a minute book containing the minutes of owners meetings and the minutes of board meetings; a copy of the declaration, by-laws and rules; and a copy of all agreements entered into by or on behalf of the corporation.

[26] Section 55(1)12 further states that the condominium corporation is also required to keep any additional records specified in the by-laws of the corporation.

[27] 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:

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).

[28] 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).

[29] Section 32 of the Act requires that no business of the corporation be transacted except at a meeting of the board. In the application of this requirement it would be necessary to keep a record of the resolutions of the board, which are the corporate decisions of the corporation. Therefore, decisions of the board, specifically resolutions, should be recorded in the minutes consistent with the requirement of Section 32 of the Act.

- [30] It is possible for a corporation's by-laws to dictate different record keeping requirements in addition to what is called for under the Act. I have reviewed the Respondent's by-laws which have been provided as evidence at hearing. I find that there is no evidence to show that the condominium corporation's by-laws require that resolutions be kept.
- [31] The Board acknowledges, with supporting affidavits from the other remaining owners, that a policy exists that does not require a Board resolution where an expense is under \$1,000. As a result, the Board admits that no resolution exists based on this practice. Therefore, no record can be produced.
- [32] That said, in addition to seeking the resolution, the Applicant also wants a decision from the Tribunal on whether it was necessary for the Board to keep a resolution for expenses under \$1,000. This determination would consist of a review of the Board's practice of not keeping resolutions under \$1,000 and require a determination of whether the Board's practice is in the best interest of the corporation and appropriate under the Business Judgment Rule.
- [33] I find that the Tribunal does not have jurisdiction to determine whether the Board's policy is appropriate, properly established and documented, or reasonable. Absent a determination of the legitimacy of the Board's policy (the reason why no resolution exists) there can be no basis for determining that the Applicant is entitled to a resolution. Therefore, for the purposes of this hearing, it is accepted that the non-existence of the resolution is at least justified by the existence of that policy.

Costs:

- [34] The award of costs is in the Tribunal's discretion under paragraph 1.44(1)4 of the Act and Rule 30.1 of the Tribunal's Rules of Practice. In exercising the Tribunal's discretion concerning costs, it is necessary to consider first, if costs are appropriate and second, what amount of costs should be awarded. The Tribunal may order a party to pay any reasonable expenses related to the use of the Tribunal. In this case, the factors affecting the decision to award costs and the amount of those costs are the same.
- [35] Based on the above finding, there is no evidence of a violation by MTCC 704 under Section 55(1) of the Act. I also see no evidence of conduct demonstrating an abuse of process, needless delay, egregious or bad faith conduct.

[36] Nevertheless, it is clear from the evidence that the Applicant knew that the resolution did not exist, and that there could be no order for production of the record when he initiated the CAT process.

[37] The Applicant utilized the CAT process, as is his right to do so, but his goal was not to obtain a record. Rather, it was to bring greater exposure and query to the conduct of the Board. He has been successful in that regard.

[38] However, where an Applicant consciously chooses to pursue the CAT process for his specific purpose, and the Respondent's conduct is to participate timely and in good faith, I find that an award of costs is not appropriate.

Penalty:

[39] Paragraph 1.44(4) of the Act allows for an order directing a party to the proceeding to pay the costs of another party to the proceeding. The Tribunal should consider the purpose of the penalty, as it communicates to all interested parties and the public what conduct is unacceptable.

[40] In my view, the evidence shows that MTCC 704 did not respond timely or in the form dictated by the Regulation.

[41] Subsection 13.8(1) of the Regulation requires a corporation to provide a written response to a Request for Records clearly indicating whether the record is available, reasons explaining the response to the request, and estimated costs associated with the request, within thirty days of receiving the request.

[42] It is apparent from the evidence that the Respondent did not respond to the Request for Records in writing within the required thirty days, as set out in the Regulation. Although there is evidence of communications going back and forth between the parties regarding the Request for Records and a myriad of other issues, there is no evidence to show that any of these communications met the requirements for a response to a Request for Records as specified under the Regulation.

[43] As a result, the Respondent failed to satisfy the requirements for a response within the thirty days as required, or for that matter, any time prior to initiation of this Application. I find that the Respondent failed to follow the requirements of the Regulation in not filing a timely response to the Request for Records.

[44] Even in the instance where a condominium corporation believes that it has not violated Section 55(1), the condominium corporation must still respond to the Request for Records in line with the Regulation's requirements. There is no waiver of a condominium corporation's responsibility to respond within the time specified under the Regulation.

[45] Based on the facts of this case and weighing the factors, the penalty imposed should be proportional to the nature and severity of the conduct. The Respondent's failure to respond to the Request for Records caused the Applicant to file this Application with the Tribunal. Accordingly, the Respondent should reimburse the Applicant for the costs of the Application. I find that a penalty at a lower range is appropriate. A penalty in the amount of \$200 against MTCC 704 is awarded to Mr. Barreto-Rivera.

CONCLUSION & ORDER

[46] The Tribunal does not have jurisdiction to decide on whether the Board's policy of not creating resolution for expenditures under \$1,000, is appropriate, properly established and documented, or reasonable.

[47] No costs are awarded to either party.

[48] Pursuant to the authority set out in section 1.44(4) of the Act, the Tribunal orders that MTCC 704 shall pay a penalty in the amount of \$200 to Mr. Barreto-Rivera within 30 days of the date of this decision.

[49] The Applicant shall be given a credit toward his next monthly contribution to common expenses equal to his proportionate share of the \$200 penalty as if he has prepaid the same.

Angelique Palmer
Member, Condominium Authority Tribunal

Released On: March 16, 2020