

**CONDOMINIUM AUTHORITY TRIBUNAL
MOTION ORDER**

DATE: December 5, 2019

CASE: 2019-00041R

Citation: 2342941 Ontario Inc. v Toronto Standard Condominium Corporation No. 2329, 2019 ONCAT 48

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

Member: Patricia McQuaid, Member

The Applicant (respondent on the motion)
2342941 Ontario Inc.

XianChen An, Counsel

The Respondent (applicant on the motion)
Toronto Standard Condominium Corporation No. 2329

Natalia Polis, Counsel

MOTION DECISION

A. OVERVIEW

[1] Toronto Standard Condominium Corporation No. 2329 (“TSCC 2329”) brought a motion to reopen this case pursuant to Rule 31.2 of the Tribunal’s Rules of Practice on November 11, 2019. The request to reopen follows the release of the Tribunal’s decision on October 23, 2019 in which the Tribunal ordered that TSCC 2329 provide all of the records requested by 2342941 Ontario Inc. (“the unit owner”) in its Records Request of March 8, 2019 and that it pay a penalty of \$3000 and costs of \$150.

[2] Rules 31.1- 31.3 read as follows:

Reopening a Case After a User Failed to Participate

31.1 The CAT may review its final Order or decision and reopen all or part of a Case if the decision was made after a User:

- a) failed to appear or participate in all or part of a Case; or
- b) failed to respond to a request or communication from the CAT.

31.2 A User has 20 days after receiving the final Order or decision to ask the CAT to review a decision under this Rule. The User must deliver their request to the

CAT. The CAT-ODR system will notify other Users about the request. The User's request must give details about:

- a) why the User failed to appear or participate, or failed to respond; and
- b) why it is unfair for the User if the Case is not reopened.

31.3 The CAT may respond to the request for review without hearing from the Users, and the CAT does not have to give any reasons for its response.

- [3] TSCC 2329 did not participate in any stage of the Tribunal proceedings. In making this request, TSCC 2329 asserts that its condominium management provider, Larlyn Property Management Ltd. ("Larlyn") failed to notify the Board of the proceedings before the Tribunal. TSCC 2329 does not assert that Larlyn was unaware of the proceedings.
- [4] The Tribunal permitted counsel for the unit owner to file a response to the motion. The unit owner opposes the request stating that to do so would be contrary to the principles of fairness, justice and efficiency and seeks costs of \$1000. Counsel for TSCC 2329 then asked for an opportunity to make reply submissions, which was granted.
- [5] After carefully considering the parties' submissions, I deny TSCC 2329's motion to reopen the case.

B. ANALYSIS

- [6] In addressing the first factor for consideration under Rule 31.2, TSCC 2329 asserts that due to the actions of Larlyn, which it has now terminated, it was not aware of the Tribunal proceeding. TSCC 2329 does acknowledge that Larlyn was the condominium management provider listed on the Condominium Authority Ontario public registry. In submissions, counsel also acknowledges that the Board of TSCC 2329 and counsel were aware of the unit owner's original request for records and that the Board believed that "Larlyn had responded to such request and had fulfilled the requirements of same..."
- [7] In essence, TSCC 2329 relied on its condominium management provider to deal with the request, which it failed to do. Yet in reply submissions, TSCC suggests that the unit owner "knew or ought to have known" that communications were not being provided to the Board and that the unit owner was aware of respondent counsel's prior involvement and ought to have contacted her. In other words, TSCC asserts that there was an onus on the unit owner and its counsel to ensure that Larlyn, who was the recognized condominium management provider, was

doing its job in communicating with its principal, TSCC 2329, but no obligation on TSCC 2329 to follow up with Larlyn when it knew of this records request. Basically, TSCC 2329 suggests that it acted properly when it relied on Larlyn, as a professional and experienced condominium management provider, to perform its duties, but that the unit owner was in the wrong to have also done so and ought to have questioned Larlyn's performance. To allow the case to be reopened on that basis would be an unreasonable outcome.

- [8] The second consideration is whether it would be unfair for TSCC 2329 if the case is not reopened. On this point, TSCC 2329 reiterates that it was never made aware of this case, which I have addressed in the preceding paragraphs. TSCC 2329 also states that notwithstanding this motion to reopen, it is in the process of compiling the records ordered to be provided with the exception of one record – the copy of the settlement agreement reached between TSCC 2329 and the developer in relation to Court file no. CV-15538102. TSCC 2329 states that this record relates to litigation.
- [9] Despite TSCC 2329's nonparticipation in the Stage 3 proceeding, the issue of whether this was a document to which the exemption from disclosure set out in s.55(4) of the Act applies was specifically addressed in paragraphs 16-19 of the Tribunal decision. The civil action was commenced by TSCC 2329 on its own behalf and on behalf of all unit holders of TSCC 2329. Litigation updates were provided to the unit owners by Larlyn and at its conclusion, by their litigation counsel, presumably to be transparent to the unit owners who had supported and funded the litigation. Any litigation privilege that might be said to attach ends with the litigation in any event.
- [10] TSCC 2329 also submits, as a basis for reopening the case that the potential impact on the confidentiality provisions of settlement agreements needs to be addressed. But, as stated in the decision, this was an agreement negotiated to resolve litigation which was asserted on behalf of this unit owner and others and about which counsel communicated to those unit owners. If there is a concern about the dissemination of the settlement agreement to persons beyond those involved in the litigation itself, surely that concern may be addressed in a professional manner between counsel. These are ongoing relationships which are in the parties' interest to preserve. I am not persuaded that there is 'unfairness' to TSCC 2329 in this situation.
- [11] As noted above, the unit owner has requested legal costs on a partial indemnity basis. Legal fees are generally not recoverable under the Tribunal's Rules. While

motions such as this may be relatively unusual and do result in a party incurring additional legal costs, I do not find that the motion was frivolous or vexatious as suggested by the unit owner's counsel. I do not find that there are exceptional reasons to award costs as per Rule 33.1.

[12] For the reasons set out above, the request to re-open the case is denied.

Patricia McQuaid
Member, Condominium Authority Tribunal

Released On: December 5, 2019