CONDOMINIUM AUTHORITY TRIBUNAL

DATE: August 11, 2020
CASE: 2020-00069R
CITATION: Kulik v. York Region Condominium Corporation No. 772, 2020 ONCAT 27

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

Member: Janice Sandomirsky, Member

The Applicant,
Oleg Kulik
Self-Represented

The Respondent,
York Region Condominium Corporation No. 772
Represented by Rachel Fielding, Counsel

Hearing: Written Online Hearing – June 1, 2020 to July 16, 2020

DECISION AND ORDER

A. INTRODUCTION

[1] The Applicant, Oleg Kulik, is a unit owner of York Region Condominium Corporation No. 772, the Respondent. The sole issue in this case is whether the Tribunal ought to impose a penalty on the Respondent and, if so, what is the appropriate amount of the penalty.

[2] For the reasons set out below, I order the Respondent to pay the Applicant a $300 penalty and $200 in costs.

B. BACKGROUND

[3] There is little factual disagreement between the parties. On January 4, 2020, Mr. Kulik sent a Request for Records form to the Condominium Board of Directors (the "Board") requesting electronic access to core and non-core records. The condominium property manager acknowledged receipt of the request the same day. The Board reviewed the request at its monthly January meeting and sent a Response to Request for Records form to the Applicant on February 3, 2020. The response form requested payment for the cost of preparing and producing the core records before releasing them to the Applicant.

[4] On February 7, the Applicant emailed a letter to the Board and condominium manager, noting that the request for payment for core records was inconsistent with the requirements of the *Condominium Act*, *1998* (the Act) and Ontario Regulation 48/01 (the Regulation). The Applicant set out the provisions of Section 13.3 (8)4 of the Regulation which provides that no fee is to be charged for providing core records if requested in an electronic version. The Applicant asked the Board to re-issue its response in compliance with the Act.

[5] The Applicant did not receive a response to his February 7 letter. He sent another email to the Board and condominium manager on February 17, 2020, asking for confirmation of receipt of the February 7 letter. The condominium manager confirmed that he received the letter and that it would be reviewed at the February Board meeting.

[6] Copies of the minutes from the Board's February 25th meeting show that the Applicant's letter was in fact not presented to the Board. The minutes specifically state "*There has been no response from the Owner since Paul [the condominium manager] explained the process and cost for obtaining the records*".

[7] The Applicant heard nothing more from the condominium manager or the Board and filed an application with the Tribunal on March 17. Through the course of the mediation, the Respondent provided access to the requested records.

[8] The Respondent presented evidence from the condominium manager who handled the request for records. He confirmed that he received the Applicant's Request for Records on January 4 and, after presenting it at the January Board meeting, sent a Response to Request for Records form on February 3. The condominium manager also confirmed that he received the February 7 letter from the Applicant via email. However, he did not present that letter to the February Board meeting. He explained that it must have been misplaced in his inbox. In his witness statement he noted the following: "*There is no explanation for this other than it was likely overlooked through [in]advertent error. I/we receive voluminous messages and emails daily. At no time, was there any intention to disregard the communication either on my part or on the part of the Board*."

[9] In response to questions about the Board's request for payment before providing access to the core records, the condominium manager stated in his evidence that he believed the condominium corporation was entitled to charge reasonable labour costs for core records. He stated, "*We have always been under the impression that any corporation(s) could charge reasonable labour costs for review and copying costs for core records…*" and that "*during the CAT proceeding, once the mediator*

pointed out the error at the mediation stage, we provided all core…immediately." Again, he said, if there was an error, it was unintentional.

C. ISSUES & ANALYSIS

[10] Section 1.44 (1) 6. of the Act gives the Tribunal the discretion to make 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*." Where a penalty is awarded, subsection 1.44 (3) provides that the specific amount of the penalty is in the discretion of the Tribunal, subject to the statutory limit of $5,000.

[11] The issues I must decide, therefore, are whether the Respondent refused to provide the requested records to the Applicant, and, if so, whether it had a reasonable excuse for such refusal. Finally, if a penalty is warranted, what is the appropriate amount of the penalty.

[12] Did the Board refuse to provide the requested records? I find that it did. Although not a direct refusal, the request for payment before allowing access to the record and the failure to respond to the Applicant's follow up letter, for whatever reason, was, in effect, a refusal. In reaching this conclusion, I note the following comments in *Bryan Mellon v. Halton Condominium Corporation No. 70, 2019 ONCAT 2*,

> *It is, of course, possible for a condominium corporation to use the threat of high fees to discourage or intimidate unit owners from requesting records, or to make the pretense that desired records will at some future time be freely disclosed in order to avoid such requests being made. It might also be reasonable, in some cases, to view such conduct as being effectively or functionally the same as a refusal to provide such records when requested.*

I also note *Mariam Verjee v. York Condominium Corporation No. 43, 2019 ONCAT 37*, where the Tribunal found that the Respondent's delay in replying to the Applicant's request for records was equivalent to an initial refusal to provide the record.

[13] The next question is whether the Respondent had a reasonable excuse for not providing access to the records. The Respondent submitted that the delay resulted from an unintentional error and that it had an honest intention to comply with the *Act*. It noted that the Board's Response to Request for Records form was properly completed and sent to the Applicant within the 30-day period. The condominium manager admitted that he erred by requesting payment for access to the records,

but he believed it was the correct procedure because it had been done in the past. After being informed of the mistake at mediation, he provided the Applicant with all the core records. The Respondent submitted that, while its compliance with the Act was not perfect, it acted reasonably and in good faith.

[14] The Applicant submitted that the Respondent did everything possible to obstruct his access to the records. He argued that the condominium manager's evidence that his February 7 letter was lost, despite the confirmation of receiving it, was not believable. In his view, the condominium manager ignored his February 7 letter, which clearly outlined his entitlement to access core records at no cost, as a tactic to delay the request. He submitted that the condominium manager's view that requesting payment for access to records was proper because it had been done in the past demonstrates a lack of diligence in dealing with such requests and a failure to understand the Board's obligations under the Act.

[15] Did the Respondent have a reasonable excuse for failing to provide the Applicant with access to the requested records? I find it did not for two reasons. First, requesting payment for access to the core records based on past practices does not constitute a reasonable excuse. It is the Board's responsibility to know its obligations under the *Ac*t and this was a clear error. As noted in *Patricia Gendreau v. Toronto Standard Condominium Corporation No. 1438, 2020 ONCAT 18*, "*It is also not reasonable for condominium boards to make decisions based solely on past practice or policy, without any consideration of relevant circumstances*."

[16] Second, I do not accept that characterizing the condominium manager's actions as honest or unintentional errors provides a reasonable excuse. By failing to present the Applicant's letter to the February Board meeting, the request for access was essentially dropped. Nothing more would have happened if the Applicant did not take further steps. The lack of attention and diligence resulted in a denial of access.

[17] Having found that the Respondent did not have a reasonable excuse for failing to provide the Applicant with access to the requested core records, what is the appropriate amount of the penalty? The Applicant submitted that $3000 was an appropriate penalty, noting the case of *Surinder Mehta v. Peel Condominium Corporation 389, 2020 ONCAT 9,* which states *"… the purpose of a penalty is to impress upon condominium corporations that they must be aware of their responsibilities under the Act, understand what is involved in meeting these responsibilities, and take these responsibilities seriously*."

[18] The Respondent submitted that a review of the caselaw indicates that there are two predominant considerations in determining a penalty: whether the corporation

acted in good faith in its effort to comply with the *Act*; and, whether it participated fully in the proceeding. The Respondent argued, but for an honest error by the condominium manager, the Board acted in good faith and was fully cooperative once its error was identified. On this basis, it requested that I exercise my discretion to not award a penalty or, alternatively, if a penalty is to be awarded, it should be nominal.

[19] In determining the quantum issue, I take guidance from the comments in *Shaheed Mohamed v York Condominium Corporation No. 414, 2018 ONCAT 3*, which states that a penalty "*should proportionately reflect the nature or severity of the refusal…*" and should be "*substantial enough to act as a reminder to the Respondent to apply more care and diligence, and especially to be more mindful of its legal obligations, when responding to unit owners' requests for records*."

[20] In most cases before the Tribunal, the penalty issue forms part of a larger determination regarding access to records. In this case, the Applicant was provided with the requested records at mediation and the penalty is now the only issue in dispute. A similar fact situation was considered in *Maureen Moloney v. Durham Condominium Corporation No. 124, 2020 ONCAT 3,* where the respondent agreed to provide the requested records at mediation and the applicant asked the Tribunal to order a penalty. The decision found that a two-month delay in providing the records due to inadvertence of the condominium manager amounted to a refusal without a reasonable excuse and ordered a $250.00 penalty.

[21] I find that this a similar situation occurred here. The access to records was delayed because the Respondent asked for payment and then failed to follow up with the Applicant after he pointed out the process was incorrect. The handling of the access request demonstrated a lack of care, diligence and understanding of the Board's legal obligations under the *Act* and applicable Regulation. I also take note, however, that the Respondent cooperated fully with the Tribunal at every step and, indeed, provided the Applicant with the requested documents at mediation. It appears that the experience of participating in the Tribunal process has put the Respondent on notice "*to apply more care and diligence*" in its response to records requests. Balancing all these considerations, I conclude that $300 is a reasonable penalty in this case.

D. COSTS

[22] Under s.1.44 (1) 4. of the Act, the Tribunal may direct a party to pay the costs of another party to a proceeding. The Tribunal Rules of Practice provides that, where a Tribunal member makes a final decision, the unsuccessful party will be required

to pay the successful parties fees and reasonable dispute-related expenses, unless the member decides otherwise.

[23] The Applicant was successful in this case. The Respondent is ordered to pay his $200 Tribunal filing fee.

ORDER

[24] The Tribunal Orders that:

1. The Respondent shall pay a penalty of $300 to the Applicant within 30 days of the date of this decision.

2. The Respondent shall pay costs of $200 to the Applicant within 30 days of the date of this decision.

3. In the event that the penalty is not provided to the Applicant within 30 days of this Order, the Applicant will be entitled to set-off those amounts against the common expenses attributable to the Applicant's unit(s) in accordance with Section 1.45 (3) of the Act.

4. In order to ensure that the Applicant does not have to pay any portion of the penalty award, they will also be given a credit toward the common expenses attributable to their unit(s) in the amount equivalent to their proportionate share(s) of the penalty and costs awarded.

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Janice Sandomirsky
Member, Condominium Authority Tribunal

Released on: August 11, 2020