

## CONDOMINIUM AUTHORITY TRIBUNAL

**DATE:** December 18, 2020

**CASE:** 2020-00104R

**Citation:** Kamyshan v. York Condominium Corporation No. 465, 2020 ONCAT 46

Order under section 1.41 of the *Condominium Act, 1998*.

**Member:** Ian Darling, Chair

**The Applicant,**

Aleksandr Kamyshan

Represented by Dmitry Zubarev, Paralegal

**The Respondent,**

York Condominium Corporation No. 465

Represented by Inderpreet Suri, Counsel

**Written Submissions:** November 23, 2020 to December 9, 2020.

### **DISMISSAL ORDER**

- [1] Aleksandr Kamyshan (“the Applicant”) is an owner of a unit in York Condominium Corporation No. 465 (“the Respondent”). The Applicant is also a member of the corporation’s board of directors.
- [2] The Applicant submitted a records request to the Respondent on March 13, 2020. The Respondent did not provide the records, so the Applicant filed an application with the Tribunal. The case proceeded to Stage 1 - Negotiation on May 13, 2020. There was no dispute over the entitlement to the records. The only issue in dispute was how the corporation would provide access to the records.
- [3] On May 22, 2020, the Respondent uploaded the requested records to the Tribunal’s online platform (CAT-ODR). Soon after that, negotiation over the issues ceased; however, the Applicant continued to post messages and documents. These documents and messages were not about the requested records. These activities did nothing to advance efforts to resolve the case.
- [4] Under Rule 17.1 of the CAT’s Rules of Practice, the CAT can close a case in Stage 1 - Negotiation if the CAT determines that the Applicant filed a case for an improper purpose.

- [5] On November 17, 2020, the Tribunal notified the parties of its intent to dismiss the case for the following reasons:
- The only issue in dispute when the application was filed was obtaining copies of the condominium records requested on March 13, 2020.
  - The Respondent uploaded the requested records as documents in the CAT-ODR platform on May 22, 2020. This resolved the single issue in dispute.
  - Although the Applicant continued to post messages and documents, there have been no substantive negotiations on the issues between the parties using the CAT-ODR platform since July 2020.
- [6] The parties were given an opportunity to respond to the notice. The Applicant objected to closing the case. The Respondent requested the Tribunal dismiss the case and order the Applicant to reimburse their costs.
- [7] There are two issues to decide in this case:
1. Should the case be dismissed under Rule 17.1 of the Tribunal Rules?
  2. Should costs be awarded? And if so, what amount?

**Issue 1: Should the case be dismissed under Rule 17.1 of the Tribunal Rules?**

- [8] Rule 17.1 of the Tribunal's rules allows the Tribunal to dismiss a case at any stage in the process, specifically:
- (c) Where the Applicant(s) is using the CAT for an improper purpose.
- [9] The Applicant submitted that as a member of the board of directors, he wanted to test the corporation's ability to respond to records requests. He indicated that the case should not be closed because he questioned the Respondent's authorization to participate in the case.
- [10] The Respondent argued that the case should be closed because the requested records were provided in May, and there had been no negotiation since that point. They indicated that when the request was submitted, the only hesitancy in providing the records was a dispute over which email address would be used to send the records. They indicated that this was no longer an issue since the records were uploaded to the CAT-ODR platform.

[11] In support of their request to close the case, the Respondent submitted that:

- As a director of the condominium, the Applicant is entitled to receive and review all condominium records. The Applicant commenced the case to receive records that were never denied to him.
- Instead of withdrawing the application after receipt of the requested records, the Applicant continued to keep the case active for over six months and posted irrelevant messages and documents, discussing matters that are minor, false, unusual, and do not relate to records.
- That the documents and messages were unreasonable, and delayed prompt resolution of the case.

[12] I conclude that the case should be closed because the Applicant is using the Tribunal for an improper purpose. The Applicant submitted that the records request was a test, wherein he, as a board member, submitted a request to see if the corporation could respond appropriately. Under section 13.3(1)(a) of Ontario Regulation 48/01, the right to examine or obtain a copy of a record under subsection 55 (3) of the *Condominium Act, 1998* (the Act) does not apply unless,

“an owner, a purchaser or a mortgagee of a unit requests to examine or obtain the copy and the request is solely related to that person’s interests as an owner, a purchaser or a mortgagee of a unit, as the case may be, having regard to the purposes of the Act;”

While a board member may have a legitimate reason to bring a case to the Tribunal, this “test” is not “solely related to that person’s interest as an owner.” The Tribunal process is not a tool to be used when neither enforcement nor access is an issue.

[13] If I were to accept that the initial application was valid, the only issue when it was filed was access to the records. The Applicant now has the records. In the time since the records were uploaded in May, the Applicant has submitted numerous messages and documents that were not relevant to the record request. I accept the Respondent’s characterization that the documents and messages were irrelevant, discussing matters that are “minor, false, unusual, and do not relate to records.” The Applicant’s actions since May 22 demonstrate that the case is being used for an improper purpose.

[14] I find that this case was filed with the CAT for an improper purpose, and order it dismissed.

- [15] The Applicant submitted several additional motions after the original deadline for submissions. These include a motion to the Tribunal to produce a list of contacts the Applicant's representative had with Tribunal staff, a motion to compel the respondent to produce the same records already uploaded to CAT-ODR, and to delay the decision on the original Notice. I have reviewed each of these motions. I deny these requests, as they are in substance the same issues that were decided in this case, or do not provide compelling reasons to further extend the case.

## **Issue 2: Should the Tribunal award costs? And if so, what amount?**

- [16] In the Respondent's response to the Tribunal's November 17, 2020 notice, they requested the case be closed, and the Tribunal award costs. They asserted that the Applicant "used the ODR system to take repeated unreasonable steps, make countless false and inflammatory accusations regarding the Condominium, its counsel and the CAT itself, and delay the prompt resolution of this matter."
- [17] The Respondent justified the request by contrasting the Applicant's behaviour in this case with the decision in *Mara Bossio v. Metro Toronto Condominium Corporation 965*, 2018 ONCAT 6, where the Member, in discussing the recovery of legal fees under the CAT Rules, wrote:

To find 'exceptional reasons', I would need evidence that the Applicant had been grossly unreasonable, or had taken positions that unduly complicated or had acted in bad faith or with malice, or took some other step beyond being unsuccessful and unreasonable.

- [18] In court, the principle for assigning costs is that generally a successful party is entitled to costs. The Tribunal is not a court. Tribunals generally operate under the *Statutory Powers Procedure Act, 1990* (SPPA). The SPPA allows Tribunals to award costs, but establishes a different cost regime from courts. Costs do not automatically follow the outcome of a case. Section 17.1(2) of the SPPA establishes that a:

tribunal shall not make an order to pay costs under this section unless,

(a) the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious or a party has acted in bad faith; and

(b) the tribunal has made rules under subsection (4). 2006, c. 19, Sched. B, s. 21 (2).

- [19] Section 1.44 (2) of the Act establishes that decisions on costs are to be determined in accordance with the Tribunal rules. Under Rule 45.1, the Tribunal may order a User pay another User costs directly related to a User's behaviour if that behaviour

was unreasonable, for an improper purpose, or caused an unreasonable delay. According to Rule 46.1, the Tribunal will not order a User to pay to another User any fees charged by that User's lawyer or paralegal, unless there are exceptional reasons to do so.

[20] The Applicant did not respond to the question of whether costs should be awarded. I infer from their submissions that they believe the Application was legitimate, and their actions were justified. The Tribunal rules establish the limited circumstances where the Tribunal can award costs. The Tribunal determined that the Applicant used the Tribunal for an improper purpose, so it is appropriate to award costs.

[21] I further find that it is appropriate in this case for costs to include legal fees due to the exceptional nature of the case. The Respondent contends that the Applicant used the ODR system unreasonably, making false and inflammatory accusations regarding the Condominium, its counsel, and delayed resolution of the case. In this case I find that these behaviours constitute exceptional circumstances which justify awarding costs to cover some legal expenses.

[22] The next question is what amount should be awarded. The Respondent requests reimbursement of legal costs incurred after the records were uploaded on May 22, 2020. In their submission, the Respondent stated that Condominium does not seek recovery of costs prior to May 22, as they were incurred while properly responding to this case.

[23] The Respondent asserted that after May 22, 2020, the Applicant did not engage in the case in a reasonable and good faith manner. The Respondent submitted invoices demonstrating that the Respondent incurred a further \$8,682.92 in legal costs after May 22, 2020.

[24] The Respondent supplied legal invoices to support their claim that the costs incurred are reasonable. The costs relate directly to this case. The Respondent submitted that the case was mostly handled by an associate with a lower hourly billing rate to minimize legal costs. Invoices show charges correspond to when the Applicant or his representative posted messages or uploaded documents. The Respondent submitted that initially they responded to every new message and document, then eventually stopped responding as the messages and documents did not contain any new information. The Respondent submitted that this was to minimize the legal costs.

[25] The Tribunal has one previous case where costs were awarded following an improper application. In *Lahrkamp v Metropolitan Toronto Condominium Corporation No. 932, 2019 ONCAT 4* (CanLII), the Tribunal awarded costs at a

level that was “sufficiently substantial to convey to the Applicant and other users that a vexatious application should not to be brought, while encouraging condominium corporations to be judicious in incurring legal fees.”

[26] It is not customary to award total costs to a successful party, nor is it appropriate to use costs awards to penalize every type of improper behaviour. It is appropriate for costs awards to reflect the improper conduct of a party during the proceedings, particularly where they cause the proceedings to become complicated, delayed or unnecessarily extended. The Respondent has not requested its full costs of participating in the CAT process be awarded. Although I understand the frustration of the Respondent and its counsel, and have in mind the unfairness there appears to be that the innocent unit owners also have to bear the burden of paying for these unnecessary legal expenses, I am not inclined to award more than a usual proportion of the costs incurred on account of the Applicant's conduct.

[27] The Respondent has submitted its invoices arising after May 22 – the date the records. I note that the Respondent could have chosen to stop responding earlier, or could have submitted a motion requesting the case be dismissed rather than waiting for the Tribunal to initiate a motion to close the case. The invoices total \$8682.92. I have found that less than 50% of those costs relate to the Applicant's conduct between May 22 and November 17. The Respondent incurred approximately \$5440 in costs after November 17 responding to the Tribunal's motion to dismiss the case, and preparing its submission on costs. I have determined that these expenses of responding to the Tribunal's Notice, should not be subject to a cost award. This leaves \$3240 in expenses that can be directly attributed to the Applicant's improper purpose. I award \$3240 to cover the legal fees claimed from May 22 to November 17, 2020.

## **ORDER**

[28] The Tribunal orders that:

1. This case is closed in Stage 1 - Negotiation under Rule 17.1 of the Tribunal Rules.
2. Costs of \$3240 awarded in this case under Rule 45.1, payable to the Respondent within 60 days of this order.

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Ian Darling  
Chair, Condominium Authority Tribunal

Released on: December 18, 2020