CONDOMINIUM AUTHORITY TRIBUNAL

DATE: July 28, 2021
CASE: 2021-00091R
Citation: Aquilina v. Middlesex Standard Condominium Corporation No. 823, 2021 ONCAT 71

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

Member: Patricia McQuaid, Vice-Chair

The Applicant,
Tracey Aquilina
Self-Represented

The Respondent,
Middlesex Standard Condominium Corporation No. 823
Represented by Stephanie Sutherland, Counsel

Hearing: Written Online Hearing – May 5, 2021 to July 20, 2021

REASONS FOR DECISION

OVERVIEW

[1] This is not the first case before the Tribunal in which the acrimony within a condominium community was at the forefront of a records dispute though here, the level of animosity and ill will reached new heights.

[2] The Applicant requested the record of owners and mortgagees, on the prescribed form, on February 11, 2021. Middlesex Standard Condominium Corporation No. 823 ("MSCC 823" or the "Respondent") responded that it would not provide this record, relying on s. 13.3(1) of Ontario Regulation 48/01 (the "Regulation"); that is, that the Applicant was not entitled to the record because the request was not solely related to her interest as an owner, having regard to the purposes of the *Condominium Act, 1998* (the "Act").

[3] The basis for the Respondent's refusal to provide the record is described in detail in its response and is set out below in full as it provides important context for this dispute, and indeed how this hearing unfolded:

> After reviewing the request, it is the Board's opinion that the request for

> records is not ‘solely related’ to the requester’s interests as an owner. The requester has a history of litigation and/or supporting or facilitating against the Corporation, its solicitors and its property manager. The Corporation has received numerous complaints that the requester has been knocking door to door within the Corporation, providing misinformation to unit owners and attempting to organize litigation against the Corporation. The Board has been advised that unit owners have moved out of the building due to the requester’s harassing behavior. Based on this information, the Corporation believes that the current request is not ‘solely related’ to the requester’s interests as an owner but is being requested to facilitate and pursue civil action against the Corporation and/or will be used by the requester to send harassing correspondence and misinformation to unit owners. The Corporation must balance an individual owner’s right to inspect records with the Corporation’s duty to the other unit owners.

[4] The issue to be decided in this hearing is whether the Applicant is disentitled to the record because the request is not solely related to her interest as an owner having regard to the purposes of the Act. Flowing from the refusal to provide the record, the Applicant is also seeking a penalty pursuant to s 1.44(1)6 of the Act, and her costs.

[5] In the course of this hearing, I limited the parties’, and in particular, the Applicant’s access to the CAT-ODR system because of the number of messages posted as well as the very personal and at times very inappropriate tenor of the messages. I also limited the number of witnesses that each party was permitted to have testify because it became very apparent early in this proceeding that the proposed evidence about the request for the record and the refusal to provide it could easily become the forum for the parties to pursue their respective grievances about the other – the Applicant’s about the board and the board’s about the Applicant’s tactics in challenging the board and its governance practices. The CAT is not the appropriate forum for these pursuits and attempts to use it as such will be curtailed.

[6] In this decision, I will not refer to all of the submissions before me. The Applicant, for example, used the “Questions and Requests” feature of the CAT-ODR system to make many submissions and comments. Issues raised there, and in some documents uploaded to the system (and which have not been made exhibits in this hearing), related to the actions of the condominium management provider, previous litigation involving board members, the respondent and a law firm, concerns about the use of proxies in board elections and allegations/rumours about a law firm or lawyer’s ethical conduct, were not relevant to the issue and were not considered by me. I will address the evidence and submissions relevant

to my analysis and the issues to be decided by me.

[7] Finally, before I turn to my analysis, I note that the Respondent did request that the application be dismissed as frivolous and vexatious pursuant to Rule 4.5 of the Tribunal's Rules of Practice. That motion was denied for reasons set out in my ruling of June 2, 2021. In addition, the Respondent requested that the witnesses not be limited to one for each party and that witnesses be required to give their testimony orally. That request was also denied, in large measure because of the concerns set out above and in order to ensure that the hearing be proportional to the issue to be decided.

RESULT

[8] For the reasons set out below, I find that the Applicant is entitled to the record of owners and mortgagees. I find that a penalty under s. 1.44(1)6 of the Act is not warranted. However, I order the Respondent to pay the Applicant $200 in costs.

ISSUES & ANALYSIS

Issue 1: Is the Applicant disentitled to the record of owners and mortgagees because her request is not solely related to her interest as an owner having regard to the purposes of the Act?

[9] The record of owners and mortgagees is a core record. Entitlement to this record is rarely disputed. As noted in the Tribunal's decision in *Shakyaver v. Metropolitan Toronto Condominium Corporation No. 971*[1], there are very few limits on an owner's right to records. The Tribunal's comments on s. 13.3(1) of the Regulation are instructive at paragraphs 16 and 17:

> There are very few limits to an owner's right to records. One, however, is that a request for records must be "solely related to that person's interests as an owner . . . having regard to the purposes of the Act . . ." (ss. 13.3(1)(a), O. Reg. 48/01). The mandated Request for Records form requires the unit owner to certify that their request is solely related to their interests as an owner. Also, a unit owner is not required to state the purpose for which they are requesting the records. Once a unit owner certifies that their request is solely related to their interests as an owner, it is up to the condominium corporation to prove the contrary on a balance of probabilities or possibly face a penalty because it failed to provide the records without reasonable excuse.
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> The Regulation does not define what a person's "interests as an owner" are, nor does it specify what a purpose for a records request "solely related" to

[1] 2020 ONCAT 2 (CanLII)

those interests would be. It simply states that the request must "have regard to the purposes of the Act." To determine what those purposes might be, one must turn to case law, or infer them from other sections of the Act.

[10] In this case, the Applicant has provided the certification on the Request for Records form. She stated in cross examination that she intends to "use the owners' list to send out her curriculum vitae as she wishes to run for the owner occupied position on the board".

[11] The onus is on the Respondent to provide evidence to prove, on a balance of probabilities, disentitlement under the Regulation. The Respondents' witness is a current board member, Paul Graham. In his testimony, he asserts that the Applicant had wrongly obtained a copy of the owners' list in 2014/2015 and used it to send inflammatory statements about the board to owners. He does not believe that her use of the list was for the good of MSCC 823 then, nor will it be, now. He testified that through his involvement on the board since 2015, he has come to the conclusion that the Applicant's prior accusations about board members were false, and has told her so, with the result that she has become "hostile, irrational and defamatory" toward him. He states that she continues to make false accusations about the board and harasses owners to gain support for "her cause". In his view, the decision to refuse her access to the record is the board's best way to protect owners from the Applicant's harassing and irrational behavior.

[12] The Applicant chose not to cross examine Mr. Graham, though she made submissions, at various points during this hearing about his credibility. While I give little weight to her submissions – whether he describes himself as an astronaut has little relevance to this dispute for example – neither did I find his testimony to be persuasive on the issue before me. He makes a bald assertion that the Applicant previously illegally obtained the owners' list, a record to which an owner is generally entitled. He, like the Applicant herself, has focussed evidence on events that allegedly occurred in 2014, which are of little relevance to a request made in 2021.

[13] I do agree with the Respondent's counsel's submissions that it is clear that the Applicant has a "deep personal animosity toward Mr. Graham," animosity which is not likely to diminish given his role on the board and its refusal to provide the record. What Mr. Graham's evidence did highlight is how fraught with conflict this condominium community is, conflict in which the Applicant is unlikely to be the only participant.

[14] The Respondent may well have concerns about the Applicant sending emails to owners about board members. It may well be unpleasant for them, though I cannot

conclude, nor is it my role to determine, if such statements might be defamatory. There is a stated concern for other owners and the Respondent's "duty to prevent harassment of board members and employees under s. 117 of the Act." However, it is not at all clear that refusing the record will assist the Respondent in that regard. As the Applicant candidly noted, if her intention is to harass, then emails can be sent, and doors knocked on, with or without the list.

[15] Evidence of past conduct, accepting Mr. Graham's testimony, even conduct that is distressing or objectionable does not demonstrate that the request is not 'solely related' to the Applicant's interest as an owner. The Applicant has articulated concerns throughout this hearing, whether valid or not, about the activities within the board, how they make decisions, and how the corporation is managed. This is very much related to her interest as an owner and if the owner's list is in furtherance of an attempt to secure a place on the board, that is solely related to that interest and in accordance with the Act.

[16] Board members may feel harassed, but the fact that the Applicant takes issue with their conduct as a board is a consequence of her interest as an owner. Her manner of expressing her discontent, and the personal animus she expresses may well be questioned. But this does not disentitle her from accessing the record.

[17] The circumstances bear some similarity to those in the case of *Mills-Minster v. York Condominium Corporation No.279*.[2] In that decision, the Tribunal stated at paragraph 17:

> I find that the Applicant is not disentitled to the records on the basis of s. 13.3(1)(a) of the Regulation. I make no comment on actions that may have been taken by the Applicant or statements made by her, or any of the witnesses, as she pursued her Request. In the Tribunal decision of *Ram Shakyaver v. Metropolitan Toronto Condominium Corporation No.971*[1] ("Shakyaver"), cited by both parties, the respondent there alleged that the applicant would use the records to secretly publish fake, misleading, defamatory and hostile information about the board in an attempt to undermine it, not dissimilar to this Respondent's assertions. In the Shakyaver decision, the Tribunal noted that the records request arose against a backdrop of longstanding animosity fraught with conflict between the applicant and the respondent. The Tribunal found that the evidence was credible that the applicant's conduct was provocative and antagonistic, but it did not find that the behavior diminished his entitlement, as owner, to the records requested.

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[2] 2020 ONCAT 41(CanLII)

[18] Those comments are equally applicable here. The Applicant's submission in this case were at times quite inappropriate. Whether the Respondent needs to pursue remedies to fulfill its duties to all owners is not for the Tribunal to assess in this case, but the Respondent has not established, on the balance of probabilities, that the Applicant is disentitled to the record.

Issue 2: Should the Applicant be awarded a penalty under s. 1.44(1)6 because the Respondent refused without reasonable excuse to permit her to examine or obtain copies of the records?

[19] The Applicant is seeking a penalty of $5000 because of harassment that she has experienced with the "baseless, and false allegations" against her.

[20] Section 1.44(1)6 of the Act states that the Tribunal may order a penalty to be paid if it finds that the corporation has, without reasonable excuse, refused to permit a person to examine or obtain records. That is the only basis on which the Tribunal can award a penalty. While I have found that the Applicant is entitled to the record, I conclude that a penalty is not appropriate.

[21] The imposition of a penalty is discretionary. The Tribunal is called upon to determine, based on the evidence before it, whether a penalty is appropriate. While I was not persuaded by the Respondent's arguments on which it based its refusal, I am also not persuaded that a penalty is warranted here. If the various submissions and comments made by the Applicant in this case are indicative of the tenor of her communications with the board prior to and following the request, the board's response, though I have found it to be incorrect, was not surprising and not unreasonable. The refusal cannot be condoned, but in the context of what appears to be an escalating acrimonious relationship between the Applicant and the board, it does not justify a penalty.

[22] In prior decisions, the Tribunal has stated that one of the purposes of the Tribunal process is to promote healthy condominium communities. The evidence and submissions made it abundantly clear that this community is far from healthy. A penalty, on these particular facts, will not serve the purposes for which it was intended. The issues giving rise to this community's ill health have little to do with the refusal to provide the record. Rather this refusal is symptomatic of the fractious environment which appears to have been many years in the making. A penalty is likely to exacerbate rather than improve this situation.

Issue 3: Is the Applicant entitled to costs?

[23] Section 1.44(1)4 of the Act gives the Tribunal discretion to order costs. As a

general rule, an unsuccessful party will be required to pay the costs of the other party unless the Tribunal orders otherwise. I have found that the Applicant is entitled to the record of owners and mortgagees, which she was only able to obtain by pursuing her case before the Tribunal. The Applicant shall be awarded her costs of $200 being the fees paid to the Tribunal.

ORDER

[24] For the reasons set out above, the Tribunal orders as follows.

1. The Respondent shall provide the Applicant with the record of owners and mortgagees within 30 days of the date of this decision.

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

Patricia McQuaid
Vice-Chair, Condominium Authority Tribunal

Released on: July 28, 2021