CONDOMINIUM AUTHORITY TRIBUNAL

DATE: May 16, 2022
CASE: 2022-00089N
Citation: Decoste v. Halton Condominium Corporation No. 134, 2022 ONCAT 51

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

Member: Nicole Aylwin, Member

The Applicant,
Kathy Decoste
Self-Represented

The Respondent,
Halton Condominium Corporation No. 134
Represented by Erik Savas, Counsel

Hearing: Written Online Hearing – April 8, 2022 to May 9, 2022

REASONS FOR DECISION

A. INTRODUCTION

[1] The Applicant, Kathy Decoste, is a unit owner of the Respondent, Halton Condominium Corporation No. 134 ("HCC 134"). Ms. Decoste has requested that the Tribunal order HCC 134 to provide her with an exemption to HCC 134's Rule 7.1, the "no dog rule" and provide legacy status[1] to a dog which she has put a deposit on but is not yet in her possession. It is her position that when she placed the deposit on the dog, she was in full compliance with HCC 134's rules at the time. It was only after she had made a commitment to purchase the dog that HCC 134 instituted the "no dog rule", which, as of February 1, 2022, effectively prohibits owners from having dogs. Thus, she requests an exemption from Rule 7.1.

[2] It is HCC 134's position that Ms. Decoste is not entitled to an exemption. It submits that Rule 7.1 clearly sets out who is entitled to an exemption and Ms. Decoste does not meet these criteria.

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[1] Notwithstanding its long-standing social usage, the Tribunal has identified concerns with the use of the term "grandfathering" generally, as its origins are problematic. The Tribunal believes the term grandfathering is better understood as creating "legacy" provisions. For this reason, throughout this decision the phrase "legacy status" will be used instead of the term "grandfathering."

[3] Both parties agree that the rule itself is not in dispute. They further agree that the only issues to be decided are:

1. Does Rule 7.1 the “no dog rule” apply to Ms. Decoste in this case? Should the dog she has placed a deposit on be provided legacy status?

2. Should any costs be awarded to either party?

[4] For the reasons set out below I find that Rule 7.1 does apply to Ms. Decoste and HCC 134 is not required to provide legacy status to the dog that Ms. Decoste has made a deposit on. I further find that no costs are to be awarded in this case.

B. ISSUES & ANALYSIS

Issue no. 1: Does Rule 7.1, the “no dog rule”, apply to the Applicant in this case? Should the dog she has placed a deposit on be provided legacy status?

[5] According to Ms. Decoste, after attempting for some time to find and purchase a suitable dog, in October of 2021, she agreed to purchase a Dachshund from a breeder in Manitoba. However, due to conditions imposed by the breeder, the dog she agreed to purchase would not be available for her to pick up until Spring 2022. In November 2021, Ms. Decoste put down a deposit of $300 to secure the dog. On December 3 and 4, 2021, Ms. Decoste booked a flight to Winnipeg and rented a car so that she could pick up the dog in June of 2022.

[6] When Ms. Decoste made the deposit and booked her flight and rental car, the pet rule in effect at HCC 134 did not prohibit dogs. At the time, Rule 7.1 read:

> No pet, reptile livestock, fowl, wild creature, other than a domesticated pet of the size not exceeding 20 pounds (9kg) shall be kept in a unit or be allowed upon the common elements. The pets kept in the building before the effective date will be exempted from this Rule

[7] According to board meeting minutes submitted by HCC 134, it was at a board meeting on December 7, 2021, that the board of directors agreed to introduce a new rule prohibiting dogs altogether, regardless of size. The proposed new rule would contain an exemption for dogs already reported and kept in the building. The proposed new Rule 7.1 read:

> Rule 7.1 No dogs of any size resident or visiting are allowed at Lakewinds. The only exception can be the dogs reported and kept in the building before February 1, 2022.

[8] On December 20, 2021, the board sent a notice (the “Notice”) to all owners

proposing the above change to the rules. The Notice, set out the proposed new rule, clearly alerted owners to the date the new rule would become effective (February 1, 2022), and provided owners with the required notice that under the *Condominium Act, 1998* (the "Act") they had the right to requisition a meeting to consider and vote on the proposed rule within 30 days of receiving the Notice. According to the witness statement provided by condominium manager, Shanta Persad, there was no requisition to call and hold a meeting. Consequently, the rule came into effect on February 1, 2022.

[9] After receiving the Notice, Ms. Decoste promptly sent an email to the condominium manager expressing her dismay at the rule change, explaining her situation and requesting exemption from the rule. She asked that legacy status be provided to the dog she had put a deposit on. This email led to a series of email exchanges between Ms. Decoste and the board wherein Ms. Decoste makes her case for an exemption and the board details their reasons for the rule change, citing a variety of ongoing problems and compliance issues with dogs on the property.

[10] On January 31, 2022, the board and Ms. Decoste met to discuss the issue. On February 1, 2022, the board sent a follow-up letter to Ms. Decoste confirming that her request for legacy status for the dog was denied. The letter noted that this was done out of "consideration for other owners who were considering purchasing dogs." Ms. Decoste, argues that this reasoning is unfair as it "lumps" her in with other owners whose circumstances may be different. She submits that she was not simply considering purchasing a dog but had effectively done so by placing a deposit on it.

[11] It is Ms. Decoste's position that when she put down the deposit on the dog and booked the flight and car rental to retrieve the dog, she did so in full compliance with the pet rules of the condominium at that time. She argues that when she put the deposit on the dog, it was sold to her, effectively making the dog hers regardless of whether the dog was in her possession. She also submits that the delay in taking possession of the dog was out of her control. The breeder dictated when the dog could be picked up and brought "home" to Ms. Decoste's residence. In any event, Ms. Decoste notes that the pick-up date originally did not pose a problem since when she entered into the agreement to purchase the dog, the rules at the time allowed dogs and she had received no communication or indication from the board that the rules would be changing. Based on these facts, she argues that she should be provided an exemption and the dog she is to pick up in June should be provided legacy status.

[12] It is HCC 134's position that the rule is clear: to qualify for an exemption under the

new Rule 7.1, a dog must be reported and kept in the building by February 1, 2022. HCC 134 argues that Ms. Decoste's situation does not meet these criteria. It argues that owners, including Ms. Decoste, were provided with ample notice of the rule change and that the deadline set for the rule change was a reasonable one. Finally, HCC 134 notes that the board has an obligation under the Act to enforce its rules and that the board has reasonably interpreted the rule and is acting in good faith in its application. On this last point, HCC 134 pointed me to *London Condominium Corporation No. 13 v. Awaraji,* 2007 ONCA 154, to argue that as long as the board's interpretation of its rule(s) is not unreasonable, a court (or by extension this Tribunal) should not interfere with the board's decision on how to interpret and apply the rules. This is sometimes known as the "business judgment rule". The Tribunal has accepted that the business judgment rule applies such that deference should be given to the decisions of a condominium corporation's board, provided the decision is neither unfair or unreasonable and the directors have met the standards set out in section 37 of the Act, which requires the directors and officers of a corporation to "act honestly and in good faith" and to "exercise the care diligence and skill that a reasonably prudent person would exercise in comparable circumstances" (see *Tamo v. Metropolitan Toronto Condominium Corporation No. 744 et al.,* 2022 ONCAT 40 at para 30, 31 and 41; *Boodram v. Peel Standard Condominium Corporation No. 843,* 2021 ONCAT 31 at paragraphs 17 and 18; and *Davy v. Toronto Standard Condominium Corporation No. 2121,* 2021 ONCAT 114 at paragraph 21).

[13] While I am sympathetic to Ms. Decoste's situation and acknowledge that the timing of the rule change is unfortunate, there is no evidence before me to suggest that HCC 134's decision to deny Ms. Decoste an exemption is unreasonable. HCC 134 properly notified owners of the proposed rule change, it advised owners of their right to requisition a meeting should they wish to hold a vote on the rule, and it provided ample notice of the rule change. No meeting was requisitioned, the new rule is now in effect and the board is applying it based on its interpretation of the rule, which is a reasonable one. HCC 134's current Rule 7.1 is clear in setting out what criteria must be met for an exemption to be made. Namely, the dog must be reported and reside in the building prior to February 1, 2022. Ms. Decoste's situation does not meet these criteria. The fact that Ms. Decoste considers that the deposit made her an owner of the dog does not change the fact that the dog was not kept in the building prior to February 1, 2022. I also accept that the board took the time to hear and discuss Ms. Decoste's situation, concerns, and request for an exemption with her, and although they ultimately decided that an exemption could not be granted, I find that the board made its decision on how to apply the rule in good faith and with due diligence.

[14] I note that as part of her evidence, Ms. Decoste submitted an email from a realtor who expressed the view that the board should grant Ms. Decoste an exemption. While that may be this person's opinion, it is not evidence that the board is incorrect or unreasonable in its decision or its application of the rule, and I give no weight to it.

[15] Given the facts before me, I find there is no basis for me to interfere with the board's interpretation or enforcement of the rule. HCC 134 does not have to provide Ms. Decoste with an exemption to Rule 7.1 and does not have to provide the dog in question with legacy status.

Issue no. 2: Should any costs be awarded to either party?

[16] Each party seeks its costs in this case.

[17] Ms. Decoste has requested that the Tribunal award her costs in the amount of $200 to recover her Tribunal filing fees.

[18] HCC 134 has requested an award for costs in the amount of $13,190.14, which is made up of legal fees, disbursements, and taxes, all related to participating in the Tribunal process.

[19] The relevant sections of the Tribunal's Rules of Practice are:

> 48.1 If a Case is not resolved by Settlement Agreement or Consent Order and a CAT Member makes a final Decision, the unsuccessful Party will be required to pay the successful Party's CAT fees unless the CAT member decides otherwise.
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> 48.2 The CAT generally will not order one Party to reimburse another Party for legal fees or disbursements ("costs") incurred in the course of the proceeding. However, where appropriate, the CAT may order a Party to pay to another Party all or part of their costs, including costs that were directly related to a Party's behaviour that was unreasonable, undertaken for an improper purpose, or that cause a delay or additional expense.

[20] Ms. Decoste was not successful in her case and thus I find she is not entitled to a reimbursement of her Tribunal fees.

[21] With respect to HCC 134's request for costs in accordance with Rule 48.2, HCC 134 submits that there are exceptional circumstances that that should compel the order of a costs award. HCC 134 argues that Ms. Decoste brought this claim to the Tribunal even though the claim was "hopelessly without merit"; that the board attempted to resolve this dispute prior to the filing of a CAT application and even

offered to pay the costs Ms. Decoste had incurred in her attempt to secure the dog (i.e. the deposit to the breeder and her travel costs), if these costs were non-refundable; and, that other owners should not bear the cost of this application.

[22] Given these arguments, in deciding whether to order costs, I have looked to the following guidelines from the CAT Practice Direction: Approach to Ordering Costs:

1. whether the case was filed in bad faith or for an improper purpose;

2. whether the parties attempted to resolve the issues in dispute before the CAT case was filed;

3. the potential impact an order for costs would have on the parties.

[23] I do not agree that this application was "hopelessly without merit" or that Ms. Decoste pursued a "clearly baseless claim". The facts of this case were not so straightforward as to suggest to Ms. Decoste had no chance of being successful. Based on Ms. Decoste's submissions, I accept that she honestly believed that she was entitled to an exemption based on the facts of the case. Given the timing of the rule change and the timing of the deposit she had placed on the dog, it was not unreasonable for Ms. Decoste to seek clarification on whether the new rule applied to her.

[24] Regarding attempts to resolve the issue prior to the CAT process, I commend the parties for trying to resolve this case prior to coming to the Tribunal; however, the fact that they were unsuccessful and that Ms. Decoste did not accept HCC's offer is not, in itself a compelling reason for awarding costs. It is clear from Ms. Decoste's submissions that owning a dog – this specific dog, that she had put significant time into researching, purchasing, and arranging to pick up in Manitoba, a dog that she ultimately believed would be her pet – was very important to Ms. Decoste. Owning this dog was something she was deeply looking forward to and something she had planned in accordance with the rules at the time. Not accepting the board's offer of monetary reimbursement for the costs associated with the dog, does not mean that Ms. Decoste "wouldn't take no for an answer", it simply means the financial loss of the deposit and other costs occurred was not the primary issue for Ms. Decoste, rather the primary issue of import – namely could Ms. Decoste proceed with getting her dog - was not resolved. In this case, the board and Ms. Decoste simply could not come to an agreement on how the rule should be interpreted and applied in this case. Proceeding to the Tribunal was not unreasonable in this case.

[25] Finally, HCC 134 submits that other owners should not have to bear the costs

associated with this case. As noted above, this case was not without merit and there is no evidence of improper purpose. While it is the case that legal costs, if not awarded, will be shared amongst owners, I also note that if legal costs are awarded in this case, it may have a disproportionate impact on the parties. Ms. Decoste, who is self-represented, brought a claim to the Tribunal in good faith. Having to pay the legal costs associated with being unsuccessful, when there is no evidence that either party conducted themselves unreasonably, either in the filing of the application or during the proceedings, could discourage other individuals who believe they have a legitimate case from pursing an application when they ought to. The enforcement of the rules of the condominium – which includes their defence when challenged – is a statutory duty of the board and condominium, and legitimately and appropriately forms a common expense. It will not be in every case of enforcement, or challenge, that is necessarily appropriate to have all costs paid by the individual against whom the rule is enforced or by whom it is being challenged. For these reasons, I find an award of costs for either party is not appropriate.

C. CONCLUSION

[26] I conclude that Ms. Decoste is not entitled to an exemption to Rule 7.1, the “no dog rule,” and I dismiss this application without costs.

Nicole Aylwin
Member, Condominium Authority Tribunal

Released on: May 16, 2022