

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: May 17, 2022

CASE: 2021-00328R

Citation: Sava v. York Condominium Corporation No. 386, 2022 ONCAT 52

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

Member: Laurie Sanford, Member

The Applicant,

Lucian Sava

Self-Represented

The Respondent,

York Condominium Corporation No. 386

Represented by Michael Pascu, Counsel

Hearing: Written Online Hearing – February 4, 2022 to April 25, 2022

REASONS FOR DECISION

A. INTRODUCTION

- [1] Mr. Lucian Sava is a unit owner in York Condominium Corporation No. 386 (“YCC386”) and he brings this application for records of YCC386 that he has requested under section 55 of the *Condominium Act, 1998* (the “Act”). Mr. Sava’s records request was originally for 17 records or sets of records. Fourteen of those requests were resolved by the parties and this decision deals with the remaining three.
- [2] Mr. Sava’s principal request is for records related to the refund of a special assessment by YCC386. In 2016, YCC386 implemented a special assessment on its unit owners in order to raise supplemental funds. In 2017, YCC386 rebalanced its budget and decided to cancel the special assessment. It reimbursed the unit owners who had paid it.
- [3] This is Mr. Sava’s second application to the Tribunal for records related to the special assessment. His earlier application resulted in a decision and order reported as *Lucian Sava v York Condominium Corporation No. 386, 2019 ONCAT 8* (the “2019 Order”). While the records Mr. Sava is currently requesting overlap in

part with those he sought in the earlier application, on a review of the testimony and submissions I am satisfied that Mr. Sava is not seeking to enforce the 2019 Order in this application. This is a fresh request for records.

- [4] The 2019 Order required YCC386 to produce specific records regarding the special assessment and its refund. YCC386 provided some of these records. It now says that it does not have any further records; they were never created. YCC386 relies on the Tribunal decision in *Zhou v. Metropolitan Toronto Condominium Corporation No. 1107*, 2021 ONCAT 126, which supports the proposition that a condominium corporation can only provide the documents that it has and that the Tribunal cannot order production of records that do not exist. As these records do not exist, Mr. Sava is not entitled to an order for their production.
- [5] Mr. Sava also seeks copies of written responses to a request for repair of his unit and to a request to investigate property damage related to a theft of his property. YCC386 submits that it has no records of written responses to Mr. Sava's requests. There is evidence that no records of a response to Mr. Sava's request for the repair were created. Mr. Sava is not entitled to an order for the production of these non-existent records.
- [6] Both parties claimed costs. Mr. Sava also claimed his filing fees. For the reasons set out below, I will order filing fees in the amount of \$200 be paid to Mr. Sava. I will also order costs paid to Mr. Sava in the amount of \$871.50. Mr. Sava claimed a penalty in the amount of \$1,500 for the failure of YCC386 to keep adequate records. However, the Act does not expressly provide for a penalty for keeping inadequate records.

B. ISSUES & ANALYSIS

- [7] The issues in this case may be summarised as follows:
1. Is Mr. Sava entitled to records of responses to his repair and investigation requests?
 - i. Copy of records of a response from YCC386 to a request for repair by Mr. Sava of his property from June 14, 2021; and
 - ii. Copy of records of a response from YCC386 to a request to investigate property damage related to a theft of his property on September 30, 2019.
 2. Is Mr. Sava entitled to records of the 2016 special assessment and the 2017 special assessment refund beyond those he has received?

3. What costs or penalties, if any, should be awarded?

Issue 1. Is Mr. Sava entitled to receive the records of the responses to his repair and investigation requests?

- [8] The legislative process by which unit owners can obtain access to records of a condominium corporation is set out in section 55 of the Act and Ontario Regulation 48/01. Subsection 55(3) of the Act sets out the general entitlement of an owner to examine or obtain copies of records of a condominium corporation, in accordance with the procedures set out in Ontario Regulation 48/01.
- [9] In June 2021, Mr. Sava made a service request for a repair to his unit. In September 2021, Mr. Sava requested that property damage related to a theft of his bicycle be investigated. He seeks records of YCC386's responses to each issue reported.
- [10] Mr. Srjan Besir is the condominium manager of YCC386. His testimony was that he instructed a staff member to search for the records Mr. Sava seeks but none were found. He concludes that they do not exist. Another witness for YCC386, who is responsible for responding to service requests, testified that he never created a record of YCC386's response to Mr. Sava's request for the repair to his unit.
- [11] YCC386 relies on the case of *Zhou v. Metropolitan Toronto Condominium Corporation No. 1107*, 2021 ONCAT 126. In that case, the condominium corporation submitted that some of the records that were requested did not exist. The Tribunal stated, at paragraph 16, "The Tribunal cannot order production of a record that does not exist or order the condominium to create a record solely to satisfy the Applicant's belief or demand that such a record must exist."
- [12] Subparagraph 13.1(1)7 of Ontario Regulation 48/01, when read together with subparagraph 55(1) 11 of the Act, obliges YCC386 to maintain records "that relate to specific units or owners and that the corporation creates or receives". However, I find nothing in the Act or in Ontario Regulation 48/01 that would have obliged YCC386 to create records of its responses to Mr. Sava's requests. YCC386 was not obliged to create these records, they do not exist and accordingly, Mr. Sava is not entitled to them.

Issue 2. Is Mr. Sava entitled to receive records of the 2016 special assessment and the 2017 special assessment refund beyond those he has received?

- [13] Mr. Christopher Creamer, president of the board of YCC386, and Mr. Besir gave testimony about the special assessment and its refund. According to their

testimony, in November 2016, YCC386 implemented a special assessment in the amount of \$59,987.88 payable by all 193 unit owners. However, in 2017, YCC386 determined that it had sufficient funds to meet its objectives without the special assessment and it refunded the amounts that had been paid.

- [14] The combined effect of Mr. Creamer and Mr. Besir's testimony about the records of the special assessment is as follows. YCC386 cannot provide Mr. Sava with a record of the special assessment that shows that YCC386 collected \$59,987.88 because YCC386 never collected that amount. Only some of the unit owners paid the special assessment before it was cancelled. The amount collected was refunded. Beyond the records it has already provided Mr. Sava pursuant to the 2019 Order, YCC386 cannot provide any other financial records of the refund of the special assessment because there are no other records. YCC386 cannot provide proof of payment from any units because it did not keep copies of the cheques paid. YCC386 cannot provide proof of the refund because the refund was given by way of a credit against common expenses without receipts being issued.
- [15] As a result of the 2019 Order, in May 2019, YCC386 provided Mr. Sava with two records. One is an extract from the General Ledger (the "General Ledger"). According to the YCC386 testimony, this shows a debit for the amount collected for the special assessment and a credit for the refund. The second document is a payment summary (the "Payment Summary") which shows a cheque number and an amount of the cheque. A third document, the Special Assessment Refund List (the "Refund List") was provided to Mr. Sava in March 2018. YCC386 submits that this record shows the amount of the refund and which units received it. The parties disagreed on the order in which the documents were provided to Mr. Sava. Mr. Sava provided covering letters for these records and I accept the above chronology.
- [16] YCC386 provided testimony that the three records referred to above are the only records that it has about the special assessment and its refund. It is unfortunate that YCC386 did not either explain the limited collection of the special assessment or raise the issue of which records existed in the earlier proceeding. Now that YCC386 has testified that the records do not exist, the principle in the *Zhou* case applies. YCC386 cannot be compelled to create or produce records which never existed.

Issue 3. What costs, fees or penalties, if any, should be awarded?

- [17] Mr. Sava submits that the records provided to him concerning the special assessment are inconsistent and inadequate. He says they are confusing and he is unable to understand them. He retained a lawyer who reviewed the General

Ledger and who said that he could not understand it either. YCC386 itself was obliged to correct the testimony of its two witnesses. Mr. Besir attempted to reconcile the General Ledger and the Refund List in his testimony but YCC386 conceded that there was an error in the Refund List which made his attempt inaccurate. YCC386 also conceded that its General Ledger, is “not easy to understand”. YCC386 did eventually clarify the three records and explain the discrepancies between them.

- [18] Subsection 55(1) of the Act obliges YCC386 to maintain adequate records, including financial records. The problem posed by the issue of the records’ adequacy in this case is that these records were provided to Mr. Sava in relation to the 2019 Order. In this proceeding, Mr. Sava is not seeking to enforce the 2019 Order. If he were, the Tribunal would not have the jurisdiction to entertain such an application. Mr. Sava is seeking supplemental records concerning the special assessment and, as found above, YCC386 cannot be compelled to create or produce records which never existed.
- [19] Mr. Sava requested a penalty of \$1,500 be awarded against YCC386 for maintaining inadequate records. There is no express provision for a penalty for the failure to keep adequate records. Mr. Sava is not entitled to the penalty he requests. Both because the records were provided under the 2019 Order and because Mr. Sava is not entitled to the relief he seeks, I make no finding on the issue of the adequacy or otherwise of the records.
- [20] YCC386 submitted that if Mr. Sava were concerned about the discrepancies in the records, all he needed to do was to request an explanation of YCC386, which would, in its submission, have been forthcoming. However, a condominium corporation, while required to provide access to certain corporate records, is not obliged under the Act to explain them. Given the acrimonious relations that have arisen between the parties, it strains credulity to think that YCC386 would have explained the discrepancies to Mr. Sava. In fact, Mr. Sava produced an email which he sent to YCC386 dated August 16, 2021 in which he requested a meeting with YCC386 to, among other things, discuss “the Order from the Condominium Authority Tribunal, April 10, 2019”. It was his submission that he did not receive a reply to this request.
- [21] YCC386 submits it should receive its costs in this matter and Mr. Sava should be denied costs. YCC386 takes the position that Mr. Sava commenced this application for an “improper purpose”. They argue that the motivation for Mr. Sava to bring this application was to obtain a refund of the special assessment to which he was not entitled and to harass the condominium corporation. YCC386 also

submits that until Mr. Sava had their evidence and submissions, he continued to insist that the full amount of the special assessment was collected. It appears that Mr. Sava continued to believe that the full special assessment had been levied and he sought records relating to the balance of it. He was also concerned that neither he nor some of his neighbours had received notice of the special assessment. There is nothing improper in requesting records that might address those interests and concerns. I find no evidence of an improper purpose in Mr. Sava's records request or in his testimony.

[22] Rule 48.1 of the CAT Rules of Practice, January 1, 2022 provides:

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.

[23] I find that despite the fact that Mr. Sava did not obtain any new records as a result of this application, he did obtain a significant clarification and explanation of the records he had previously received. He only received that clarification and explanation during the closing stages of this hearing. The clarification that Mr. Sava received and when he received it, taken together, are sufficient to entitle Mr. Sava to an award of his filing fees of \$200 payable by YCC386.

[24] Mr. Sava attempted to represent himself. However, when YCC386 first began to explain the mistake in the Refund List, Mr. Sava became confused by the explanation. I also found YCC386's first attempts to explain the mistake in the Refund List and the discrepancy this created between the records confusing. Mr. Sava felt he had to consult a lawyer who gave an opinion in this matter. He paid \$871.50 for the consultation and for this advice.

[25] Rule 48.2 of the CAT Rules of Practice, January 1, 2022 states:

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 caused a delay or additional expense.

[26] YCC386's initial attempt to explain the error in the testimony of its witnesses and the explanation it offered to properly read the records was itself confusing. It was this initial confusing explanation that led directly to Mr. Sava incurring the legal expense. In the circumstances of this case, I find that these additional expenses

were “directly related to a Party’s behaviour”. I will direct YCC386 to reimburse Mr. Sava for these expenses.

C. CONCLUSION

[27] Mr. Sava is not entitled to an order for the production of records which do not exist. However, he is entitled to his filing fees and to the legal costs he incurred.

D. ORDER

[28] The Tribunal orders that within 30 days of the date of this Order, YCC386 will pay to Mr. Sava:

1. \$200 for the filing fees paid by Mr. Sava to this Tribunal, and
2. \$871.50 under Rule 48.2 of the CAT’s Rules of Practice.

Laurie Sanford
Member, Condominium Authority Tribunal

Released on: May 17, 2022