CONDOMINIUM AUTHORITY TRIBUNAL

DATE: August 12, 2022
CASE: 2022-00183N
Citation: York Condominium Corporation No. 435 v. Karnis et al., 2022 ONCAT 86

Order under Rule 4 of the Condominium Authority Tribunal's Rules of Practice.

Member: Stephen Roth, Member

The Applicant,
York Condominium Corporation No. 435
Represented by Erik Savas, Counsel

The Respondents,
Monika Karnis and Dana Karnis
Represented by Marc Kemerer, Counsel

MOTION ORDER

[1] As a preliminary matter raised at the commencement of this Stage 3 hearing, the Respondents ask the Tribunal to adjourn the Applicant's Condominium Authority Tribunal ("CAT") application while the Respondent Monika Karis's application to the Human Rights Tribunal of Ontario ("HRTO") proceeds. Respondent Dana Karnis is a unit owner; Monika Karnis is a resident of the unit.

[2] A stay of proceedings halts the further legal process of a judicial or administrative tribunal proceeding. Stays may be subsequently lifted with authorization of the judicial body. In this case, I find that the Respondents' request for an adjournment or deferral, is in substance a request for a stay – a halting of the CAT proceeding.

[3] I have denied the Respondents' motion. My reasons follow.

[4] The Applicant's CAT application asks the Tribunal to decide the following issues:

1. Are the Respondents in breach of York Condominium Corporation No. 435's ("YCC435") governing documents? Have the Respondents established that Monika Karis has a disability related need under the Ontario Human Rights Code (the "Code") that warrants an accommodation?

2. Was the new Rule concerning "dogs for accommodation" purposes properly adopted? If yes, is the Rule that restricts both the breed and weight of Monika Karis's service dog reasonable and does it discriminate against residents with disabilities?

3. Should the Tribunal order Monika Karis's dog be permanently removed from the unit, pursuant to subparagraph 1.44 (1) 2 of the Condominium Act, 1998 (the "Act") and YCC435's governing documents?

4. Is the Applicant entitled to the costs of enforcing compliance with its governing documents against the Respondents?

A. POSITION OF THE PARTIES

The Respondent's Position (moving party)

[5] Monika Karnis resides in the unit and requires the use of a service animal related to a disability.

[6] The Respondents state that the parties agree that Monika Karnis requires a service animal as an accommodation under the Code. The essential dispute between the parties relate to:

1. the size of Monika Karnis's dog that weighs in excess of the weight limitation prescribed by the Rule, and,

2. the German Shephard breed of the service animal, which is prohibited by the Rule.

[7] The Respondents submit that the Rule was not enacted with proper notice (and is therefore unenforceable). Additionally, the breed and weight restrictions have no rational basis, are vague, discriminatory and unreasonable in their reach.

[8] The Respondents submit that Monika Karnis filed a March 18, 2022 HRTO application alleging discrimination due to disability and a denial of reasonable accommodation. The Respondents submit that the Applicant brought its CAT application in response.

[9] The Respondents argue that while the CAT can apply the Code, the HRTO is a body with expertise to determine whether a person's rights have been infringed under the Code. Furthermore, it is argued that the HRTO's range of remedies are broader than the CAT's. These include general, special and aggravated damages, relief that the CAT cannot order.

[10] The Respondents rely on the Superior Court case of *Halton Condominium Corporation No 59, v. Howard* ("Howard") 2009 CanLII 44710 (ON SC) to support its position. The Court found that, where the parties cannot agree on which forum to first adjudicate, the courts will examine the following factors:

1. timing of the commencement of the respective proceedings;

2. subject-matter;

3. jurisdiction of the respective bodies;

4. procedural consequences to the parties of proceeding in one forum or another.

[11] Regarding the first factor, the Respondents submit that the application to the HRTO was filed first, while the Applicant's CAT application was filed in response to the HRTO filing.

[12] Regarding the second factor, subject matter, the Respondents submit that this case requires the special expertise offered by the HRTO.

[13] Regarding the third factor, jurisdiction, the Respondents submit that while both the HRTO and the CAT have the jurisdiction to hear the subject matter of the applications, the Respondents argue that the HRTO is best able to adjudicate the matter as the administrative body with the requisite expertise in this particular set of facts.

[14] Regarding the fourth factor, the Respondents argue that there is no great prejudice to the Applicant in waiting for a decision by the HRTO. YCC435 has demonstrated no urgency to evict the service dog from the building and it is not alleging undue hardship. However, the Respondents argue prejudice to Monika Karnis in proceeding first with the CAT hearing as this could cause her to lose her service dog without a determination first by the HRTO on whether the Applicant has discriminated against her. The loss of this established and very personal form of accommodation would be devastating. It would be very difficult, if almost impossible to get that connection back, particularly if the service dog has been given to another person with a similar disability.

[15] The Respondents further submit that the CAT and HRTO could arrive at differing decisions should they both proceed. To avoid a multiplicity of hearings and expense, the most just and expeditious approach is to have the HRTO make a determination first on the issue of accommodation.

[16] The Respondents submit that an injustice or prejudice would result if the CAT case proceeds because Monika Karnis could be without her service dog (if the CAT ordered its removal) while awaiting a decision of the HRTO.

[17] The Respondents ask the CAT to adjourn the CAT hearing until the HRTO rules on Monica Karnis' application.

The Applicant's Position

[18] The Applicant requests that the CAT dismiss the motion.

[19] The Applicant submits that it has not yet been served an issued copy of Monika Karnis's HRTO application. As such, the Applicant has not responded to that application.

[20] On March 17, 2022, the Applicant commenced its CAT application. The application proceeded through the negotiation and mediation stages, advancing to the Stage 3 Hearing on or about June 1, 2022.

[21] The Applicant submits that the CAT's rules and procedures do not address a request to adjourn or defer directly. However, it submits that section 9.1 (d) of the Statutory Powers Procedure Act, RSO 1990, c. S.22, which applies to proceedings before this Tribunal, provides that "if two or more proceedings before a tribunal involve the same or similar questions of fact, law or policy, the tribunal may stay one or more the proceedings until after the determination of another one of them."

[22] The Applicant refers to the CAT decisions in *Metropolitan Toronto Condominium Corp. No. 1195 v. Solomon*, 2021 ONCAT 20 (CanLII) ("Solomon") and *Rahman v. Peel Standard Condominium Corporation No. 779*, 2021 ONCAT 1 (CanLII) ("Rahman"). The Applicant submits neither case appears to set out specific factors to guide the CAT's exercise of discretion in approaching a request to adjourn.

[23] The Applicant submits that the fact that the Respondent filed an HRTO application prior to the CAT application should not factor into the Tribunal's decision on whether to adjourn because the HRTO application has not been served and there are no assurances that it will. The Applicant argues that the CAT case has already proceeded through the first two stages of the CAT process and is ready at Stage 3. The Applicant argues that it could take months and possibly more than a year for the HRTO application to be determined. It is submitted that these factors weigh against an adjournment in accordance with the Solomon decision.

[24] The Applicant argues that the CAT has the jurisdiction to determine the issues raised in this application and those raised in the HRTO application. The HRTO does not have exclusive jurisdiction over the interpretation of the Code and the Applicant referred to several cases where the CAT has considered the Code.

[25] The Applicant submits that it does not dispute that Monika Karnis has a disability and requires a service dog. However, the breed and weight of the dog are at issue.

[26] The Applicant argues that if the Respondent's HRTO application is unsuccessful,

the matter will have to proceed before the CAT in any event. The HRTO does not have jurisdiction to order the dog removed from the condominium unit. The CAT should favour proceeding with the CAT application as it best avoids the possibility of a multiple proceedings.

B. ANALYSIS

[27] The parties' submissions include some argument on the merits of the CAT application itself. While the background of how the issues between the parties developed provides context for the Tribunal, when deciding this motion, the CAT is not concerned with the merits of the application unless it finds vexatiousness or an abuse of process.

[28] In Howard, the Respondent condominium unit owner requested a stay or dismissal of the application on the ground that another proceeding was pending between the same parties in respect of the same subject matter. The condominium corporation brought an application under the Arbitration Act to appoint an arbitrator to determine whether a restrictive covenant in the corporation's declarations contravened the Code. The Respondent had also brought an application before the HRTO requesting a finding that the restrictive covenant violated the Code. The Court relied on the test for staying an action as summarized in *Varnam v. Canada (Minister of National Health and Welfare)* (1987), 12 F.T.R. 34:

> *A stay of proceedings is never granted as a matter of course. The matter is one calling for the exercise of a judicial discretion in determining whether a stay should be ordered in the particular circumstances of the case. The power to stay should be exercised sparingly, and a stay will only be ordered in the clearest cases. In an order to justify a stay of proceedings two conditions must be met, one positive, and the other negative: (1) the defendant must satisfy the court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant. Expense and inconvenience to a party or the prospect of the proceedings being abortive in the event of a successful appeal are not sufficient special circumstances in themselves for the granting of a stay.*

[29] In Howard, the Court stated that a judicial body is required to balance litigation rights, analyze prejudice and consider differences between courts and administrative tribunals. The Court explained "that there is no single rule that fits all cases" and endorsed the view that "courts have tended to disapprove of a litigant commencing multiple proceedings…and where the parties do not agree on which forum should decide a case, the courts have examined the timing of

commencement of the respective proceedings, the subject-matter, the jurisdiction of the respective bodies and the procedural consequences to the parties of proceeding in one forum or the other."

[30] The Court also considered the following factors in its analysis: Is an application vexatious? Is there a serious issue to be determined? Has either party acted oppressively or abusively?

[31] Importantly, the Court considered that if the condominium corporation was successful before the Human Rights Tribunal, the Human Rights Tribunal would not have the jurisdiction to order the Respondent to comply with the restrictive term in the declarations and stated, "I find that it would be prejudicial for the corporation to require it, before continuing arbitration, to submit to a forum in which the Respondent pays no costs and risks no adverse finding, and then, if they succeed there, to start all over again."

[32] In Solomon, CAT Chair Ian Darling considered a motion to defer an application pending the conclusion of an HRTO proceeding. The condominium corporation had filed the CAT application asking that Solomon comply with its rules. The Respondent brought a motion to defer the CAT application on the basis that they had brought an HRTO application over the same dispute alleging that the condominium rules were being applied in a discriminatory manner.

[33] Chair Darling explained the "intent [is] to ensure that multiple cases do not run concurrently, and if the case is not deferred there is a risk of inconsistent decisions. However, deferral is not automatic." The Tribunal acknowledged that the HRTO application was filed first; however, it had yet to be approved when the corporation filled its case with the CAT. The Tribunal stated that the HRTO case was not so advanced to persuade it that the CAT case should be deferred in favour of the HRTO case.

[34] In addressing the argument that a human rights dispute should be considered by the HRTO, the Tribunal relied on Rahman, a previous Tribunal decision which considered a similar issue and stated at paragraph 20:

> *Regarding the Applicant's HRTO Claim, since the decision of the Supreme Court of Canada in Tranchemontagne v. Ontario (Director, Disability Support Program), [2006] 1 S.C.R. 513, 2006 SCC 14, it is understood that the HRTO does not have exclusive jurisdiction over the interpretation and application of the Ontario Human Rights Code (the "Code"). A tribunal has authority to apply the Code where issues of human rights properly arise within the context of a case before it. Therefore, it is the HRTO, not this Tribunal, that might have reason for dismissing the complaint before it, if it is found that the Applicant's issues under the Code are fully*

addressed here. Further, it is possible that the range of remedies that can be ordered by this Tribunal under the Code are more limited than what is available through the HRTO, and the Applicant may be fully justified in pursuing a claim there while the extent to which his claims under the Code will be addressed in these proceedings remains uncertain.

[35] The law is clear: the possibility of inconsistent results and the inefficient use of parties' resources militates against allowing a multiplicity of proceedings. However, an adjournment or stay is not automatic and requires a balancing of several factors. In reaching my decision, I have considered the following factors:

1. Do the issues to be decided in the multiple proceedings overlap?
2. When were each of the proceedings brought, and what stages are each of the proceedings when the motion for a stay is brought?
3. When will each of the proceedings be complete if allowed to proceed?
4. Is the CAT proceeding vexatious or abusive?
5. Would the success of one party in one forum require the second proceeding to proceed?
6. Would a stay or a denial of a stay unduly prejudice one of the parties?

[36] I find that the issues overlap. The Respondent, Monika Karis, asks the HRTO to find that the weight and breed restrictions of the Applicant's Rule is discriminatory due to disability and a denial of reasonable accommodation. The issue before the CAT is essentially identical – is the Rule that restricts both the breed and weight of Monika Karis's service dog reasonable and does it discriminate against residents?

[37] Both parties agree that the CAT has the jurisdiction to resolve the Code issue. While I have considered the expertise of the HRTO, I am not persuaded that its expertise weighs in favour of staying the CAT application. The CAT has the authority to resolve Code issues and is presumed to have the requisite expertise to resolve such disputes.

[38] I acknowledge that the HRTO application was filed before the CAT application. Which application has been brought first is a consideration; however, it is my view that the stages that each of the proceedings are in at the time the request for the stay is made is equally relevant to the analysis. The CAT application is at Stage 3 – the hearing stage – and ready to proceed. The hearing and release of a decision will take a few months. There is no dispute that the HRTO application has not yet

been served on the Applicant and no responding material has been filed. In short, the pleadings of the HRTO application have not yet been completed. It is speculative as to when and if the HRTO proceeding will commence. The fact that the CAT hearing is ready to begin immediately weighs against a stay. The timeliness of having the issues decided for the parties is a legitimate consideration.

[39] I do not find the behaviour of either party vexatious or abusive. Both parties have raised valid issues to be decided.

[40] It is a persuasive argument that if the HRTO determines that there was no Code violation, YCC435 would have to proceed with its CAT Application to enforce the removal of the service dog. If the CAT application proceeds, the CAT can address both the alleged Code violation and enforcement. I acknowledge that the CAT cannot address the general, special and aggravated damages remedies requested by the Respondent in the HRTO application. It is unclear whether the CAT's denial of a stay ultimately precludes the Respondent from pursuing those damages at the HRTO. That is an issue for the HRTO's determination. Ultimately, one tribunal's decision may impact a party's access to another tribunal and the remedies within that other tribunal's jurisdiction. This is a consequence when tribunals have overlapping jurisdictions.

[41] Both parties have addressed the issue of prejudice. I am not persuaded that the Respondents would suffer any prejudice if the stay is not granted. The Respondents argue that an injustice or prejudice would result if the CAT case proceeds (and ultimately orders the removal of the service dog) because Monika Karnis could be without her service dog while awaiting a decision of the HRTO. If this Tribunal made such a finding, it would be based (in part) on a legal finding that the Applicant did not violate the Code and did not fail to accommodate Monika Karnis. If such a decision was made, it would occur after a fair and full hearing on the merits of the case. While such a finding would undoubtedly be disappointing to the Respondents, the possibility that this Tribunal may render a decision adverse to the Respondents desires, is not in the legal sense, prejudicial. The HRTO could also potentially arrive at the same decision.

[42] When balancing all of the factors, I dismiss the Respondents' request for an adjournment of the CAT proceeding.

C. ORDER

[43] The Motion is dismissed. The Tribunal orders that the case proceed.

Stephen Roth
Member, Condominium Authority Tribunal

Released on: August 12, 2022