

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: October 27, 2022

CASE: 2022-00468SA

Citation: Essex Condominium Corporation No. 28 v. Pecarski, 2022 ONCAT 116

Order under section 1.47 of the *Condominium Act, 1998*.

Member: Victoria Romero, Member

The Applicant,

Essex Condominium Corporation No. 28

Represented by Kevin Kok, Counsel

The Respondent,

Alex Pecarski

Self-Represented

Hearing: Written Online Hearing – August 16, 2022, to October 6, 2022

REASONS FOR DECISION

A. INTRODUCTION

- [1] The Applicant, Essex Condominium Corporation No. 28 (ECC 28) filed this case against the Respondent Alex Pecarski, who is the owner of a unit in ECC 28. The Applicant and Respondent were previously involved in another Condominium Authority Tribunal (CAT) case - namely, Case No. 2022-00205N, which the parties agreed to resolve by way of Settlement Agreement.
- [2] This Settlement Agreement was made with respect to a breach of the rules of the condominium relating to smoking.
- [3] The Applicant argues that the Respondent has not complied with the terms of that Settlement Agreement.
- [4] Under section 1.47 (3) of the *Condominium Act, 1998* (the "Act"), a party to a settlement agreement who believes that the other party has contravened the settlement can file an application with the CAT. If the CAT determines that a party has contravened the settlement, then it may make an order to remedy the contravention.

[5] Accordingly, the questions before me in this case are:

1. Has the Respondent breached the Settlement Agreement dated June 23, 2022?
2. If yes, what orders (if any) should the Tribunal make to remedy the breach?

[6] The Respondent, Alex Pecarski, joined at the onset of Stage 3 - Tribunal Decision and posted one single message at the beginning of the hearing, on August 17, 2022, denying the allegations: "I haven't been smoking on balconies, been going downstairs and outside. Thank you take care."

[7] This was the only time Mr. Pecarski participated. He did not participate for the remainder of the hearing. I sent three notices for him to participate confirming that if he did not, I would continue the proceeding without him. I also asked CAT staff to contact him by phone and email. As we did not receive any reply from him, the hearing proceeded without Mr. Pecarski's participation.

[8] My decision is based solely on the evidence and submissions provided by ECC 28.

B. DECISION

[9] For the reasons set out below, I find that the Respondent has not complied with the terms of the Settlement Agreement. Pursuant to paragraph 11 of the Settlement Agreement, I order the Respondent to pay the Applicant pre-litigation costs incurred from September 17, 2020, through August 17, 2021, in the amount of \$3,748.00 plus HST. Within 30 days of this Order, and in accordance with s. 1.44 (1) 4 of the Act and Rule 48 of the Tribunal's Rules of Practice, I also order the Respondent to pay \$2,358 + HST to the Applicant for its CAT costs and \$125 for its Tribunal fees regarding this matter.

C. ANALYSIS

Issue 1: Has the Respondent breached the Settlement Agreement dated June 23, 2022?

[10] On June 23, 2022, the parties settled their case 2022-00205N and the Respondent agreed:

[4] Effective immediately, under no circumstances shall the unit owner, Mr. Alex Pecarski, smoke on the balcony of the Unit.

[8] Effective immediately, Mr. Pecarski shall ensure that his guests and occupants shall comply with the Corporation's Rules and shall not smoke within the boundaries of the Unit and/or the balcony.

[11] Mr. Pecarski acknowledges and agrees that if there is a breach of this agreement, the Corporation shall file a new CAT complaint and, among other things, the Corporation shall seek recovery of its legal costs incurred from September 17, 2020, to August 17, 2021, in the amount of \$3,784.00 plus HST

- [11] The Applicant argues that the Respondent has breached the Settlement Agreement by smoking on his Unit's balcony on at least four occasions, being July 3, July 16, August 17, and September 5 of 2022.
- [12] I have considered all of the evidence and submissions but will only refer to that which is relevant to my decision.
- [13] ECC 28 unit owner, Penny Kelly, testified that she saw an individual smoking on the Respondent's east-facing balcony on July 3, 2022. Upon reporting this event to ECC 28's property manager, Frank DiBiase, she confirmed with Mr. DiBiase, through a physical description of both the Respondent and his unit's location, that the person smoking on the balcony was in fact the Respondent.
- [14] ECC 28 unit owner, Thomas James Baker, lives in the unit immediately adjacent to the Respondent and they both shared a balcony which is divided by a cement wall approximately six inches thick. On July 16, at approximately 8:00 p.m., Mr. Baker testified that while sitting on his balcony, he heard the Respondent's door to the balcony open. "Almost immediately thereafter, I smelled the pungent stench of marijuana." On August 17, at approximately 1:10 p.m., Mr. Baker was sitting inside his unit with both balcony doors open when he "heard extensive coughing coming from the Respondent's unit, and shortly thereafter, the odour of marijuana wafted into my unit." On September 5, 2022, at approximately 4:45 p.m., Mr. Baker entered his unit's kitchen. "A pungent odour of marijuana was immediately discernible."
- [15] The Applicant submits that "the Respondent's Unit and Mr. Baker's Unit abut one another. The dividing wall is the wall in Mr. Baker's kitchen. The odour of marijuana is strongest in Mr. Baker's kitchen. Mr. Baker also hears extensive coughing from the direction of the Respondent's unit, commensurate with the marijuana odour emanating into Mr. Baker's unit. When Mr. Baker is on his balcony and the Respondent (or a guest of the Respondent) is on their balcony, the same phenomenon occurs: the coughing and the odour come exclusively from that direction, often shortly after the sound of the sliding door opening and closing,

indicating that someone is outside on the balcony.”

[16] The witnesses' evidence was not disputed given that Mr. Pecarski chose not to participate in this proceeding. I further note that who may have been smoking in the unit is not relevant given that, as the parties agreed in paragraph 8 of the Settlement Agreement, that the Respondent is responsible to ensure that his guests and occupants shall comply with the Corporation's Rules and shall not smoke within the boundaries of the unit and/or the balcony.

[17] Based on the evidence provided by Ms. Kelly and Mr. Baker, I find, on a balance of probabilities, that Mr. Pecarski has breached the Settlement Agreement by smoking in his unit and/or balcony at least in four occasions. I therefore order the Respondent to comply with the Settlement Agreement.

Issue 2: If yes, what orders (if any) should the Tribunal make to remedy the breach?

[18] According to section 1.47 (6) of the Act, the Tribunal may make any order it considers appropriate if it determines that a party has contravened a settlement agreement.

[19] The Respondent seeks the total amount of \$9,430.50 plus HST for damages and costs, to be collected in the same manner as common expenses. This amount is broken down as follows:

- a) Recovery of the cost of Mr. Baker's air purifier of \$2,485.99.
- b) Pre-litigation costs incurred from September 17, 2020, through August 17, 2021, in the amount of \$3,748.00 plus HST, as per paragraph 11 of the Settlement Agreement
- c) Legal costs for the initial Application, incurred from May 12, 2022, to June 23, 2022, in the amount of \$1,752.50 plus HST
- d) Costs for this Application, incurred from July 4, 2022, to September 14, 2022, in the amount of \$3,930 plus HST
- e) Filing fee for this proceeding in the amount of \$125.00.

[20] The Applicant referred to Section 6 of ECC 28's Smoking Rule which states:

The Owner of a unit and the residents and tenants of the Unit in which tobacco or cannabis products are present shall take all necessary steps to ensure that smoke or odor that is in the unit (from smoking) does not travel or migrate from the Unit or to another Unit or the common elements of the Condominium Property and both shall be responsible and shall install caulking or insulation or what ever barriers necessary to stop the travelling or migration of the

smoke or odor and they shall be responsible for the cost of repairs of any damage to the common elements or other units which damage was caused by or related to smoking in the Unit. Any costs incurred by the Corporation to enforce this Rule, including solicitor and client legal costs shall be paid to the Corporation by the Owner of the Unit in which the problem originated or the person causing the problem resides or resided or was a guest and such costs shall be added to and collected as common expenses for that Unit.

[21] The Applicant submits that the Respondent has repeatedly breached the Settlement Agreement, which he voluntarily signed.

a) Recovery of the cost of Mr. Baker's air purifier of \$2,485.99.

[22] Paragraphs 5 and 6 of the Settlement Agreement state:

[5] On or before June 30, 2022, Mr. Pecarski shall provide the Corporation with adequate medical documentation that Mr. Pecarski is not able to smoke in a designated smoking area outside of the building and that he is required to smoke within the boundaries of his Unit as a result of a disability-related need as defined by the Human Rights Code.

[6] Upon receiving medical documentation, the Corporation shall work with Mr. Pecarski to develop an accommodation plan, which may include obtaining an air purifier and/or engaging an engineer to seal the unit to ensure that the second-hand smoke does not pose a health hazard and/or cause a nuisance to Mr. Pecarski's neighbours. Mr. Pecarski acknowledges that he may be responsible for some or all of the costs to implement the accommodations.

[23] While paragraph 6 of the Settlement Agreement says that the Respondent may be required to contribute some or all of the funds needed to purchase an air purifier should his smoking be accommodated upon the provision of medical evidence, the receipt provided by Mr. Baker shows that the air purifier was purchased on December 23, 2020, approximately 18 months before the Settlement Agreement between the parties.

[24] The Respondent submits that as their attempts to establish compliance with the smoking rule covers the period from September 17, 2020, to August 2021, the December 2020 purchase needs be covered. However, there is no evidence substantiating these attempts such as copies of letters or emails that may have been sent to the Respondent regarding the smoking issue.

[25] Given the timing of the air purifier purchase, I find that the air purifier was not purchased in contemplation of this Settlement Agreement. The fact that the Respondent was allegedly seeking compliance before is minimally relevant on this

issue. Paragraph 6 of the Settlement Agreement speaks to future costs. If this was a cost that was related to the Respondent's smoking that had already been incurred, it ought to have been specifically referenced in the Settlement Agreement. It was not. Lastly, Mr. Baker is not a party to these proceedings. Therefore, I am unable to award the recovery of the cost of Mr. Baker's air purifier.

b) Pre-litigation costs incurred from September 17, 2020, through August 17, 2021, in the amount of \$3,748.00 plus HST, per Section 11 of the Settlement Agreement (Pre-CAT costs)

[26] The Applicant submits that section 119 (1) of the Act states that ECC 28 is obligated to enforce the provisions of the Act. The Applicant indicates they attempted to achieve compliance for over two years by sending letters to the Respondent. Paragraph 11 of the Settlement Agreement also confirms that, in case of breach, the Corporation's intention would be to seek recovery of these costs:

[11] Mr. Pecarski acknowledges and agrees that if there is a breach of this agreement, the Corporation shall file a new CAT complaint and, among other things, the Corporation shall seek recovery of its legal costs incurred from September 17, 2020, to August 17, 2021, in the amount of \$3,784.00 plus HST.

[27] Given the above, the Respondent clearly had prior notice of exactly what would be owed as the specific amount is set out in the Settlement Agreement. The Respondent expressly agreed to it contingent solely on a finding that he breached the agreement. As I have found that the Respondent has breached the Settlement Agreement, these costs are now payable. I therefore order the payment of pre-litigation costs incurred from September 17, 2020, through August 17, 2021, in the amount of \$3,748.00 plus HST, pursuant to paragraph 11 of the Settlement Agreement (Pre-CAT costs).

c) Legal costs for the initial Application, incurred from May 12, 2022, to June 23, 2022, in the amount of \$1,752.50 plus HST;

d) Costs for this Application, incurred from July 4, 2022, to September 14, 2022, in the amount of \$3,930 plus HST (collectively referred to as CAT costs)

[28] Regarding the legal costs related to this proceeding, the Tribunal's authority to make orders is set out in section 1.44 of the Act. Section 1.44 (2) of the Act states that an order for costs "shall be determined ... in accordance with the rules of the Tribunal." The cost related rules of the Tribunal's Rules of Practice relevant to this case 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.

48.2 The CAT generally will not order one Party to reimburse another Party for legal fees or disbursement ("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.

- [29] The Tribunal's Practice Direction: Approach to Ordering Costs, issued January 1, 2022, provides guidance regarding the awarding of costs. Among the factors to be considered are whether a party or representative's conduct was unreasonable, for an improper purpose, or caused a delay or expense; whether the case was filed in bad faith or for an improper purpose; the conduct of all parties and representatives; the potential impact an order for costs would have on the parties; whether the parties attempted to resolve the issue in dispute before the CAT case was filed; and whether a party has failed to follow or comply with a previous order or direction of the CAT. The Tribunal may also consider the provisions of the corporation's governing documents and whether the parties would have had a clear understanding of the potential consequences of a contravention of the declaration and rules.
- [30] An award of costs is discretionary, and the jurisprudence is clear - condominium corporations must act reasonably and judiciously when incurring legal costs.
- [31] Counsel for the Applicants referred me to *Peel Condominium Corporation No. 96 v. Psofimis*, 2021 ONCAT 48, a case in which the Tribunal ordered the removal of an owner's dog and awarded the corporation 100% of the legal costs it requested.
- [32] In the *Psofimis* decision, the Tribunal noted that the corporation was required to submit an application to the Tribunal "only because Mr. Psofimis deliberately and repeatedly ignored the condominium's numerous attempts to request his voluntary compliance. He disregarded notices, emails and letters and blatantly disregarded the agreement entered into by him, evidently not in good faith, promising to comply...".
- [33] This case is different from *Psofimis*, as we have no evidence the Respondent disregarded notices, emails and letters as these documents were not presented.
- [34] I note that the Tribunal Rules regarding Costs only allow me to award costs arising

out of Stage 3 – Tribunal Decision. This case did not have a Stage 2 – Mediation. Furthermore, regarding the Applicants' request to have the award for legal costs for the initial Application, incurred from May 12, 2022, to June 23, 2022, in the amount of \$1,752.50 plus HST, I cannot award costs for a case where I was not the member as I am unable to apply the principles of the CAT practice direction where the costs being requested were incurred in relation to a different case not this one.

- [35] Given that the Respondent chose not to participate in Stage 3 - Tribunal Decision, I also have no evidence the amounts sought would result in hardship to the Respondent.
- [36] What we do know is that the parties entered into this Settlement Agreement which the Respondent subsequently breached. The evidence provided regarding the breaches remains undisputed given that the Respondent chose not to participate. It was the Respondent's actions and/or conduct (breaching this Settlement Agreement) that caused further legal expenses.
- [37] I will award costs to the Applicant; however, this Stage 3 – Tribunal Decision was an uncontested proceeding in which the Applicant presented two witnesses, was required only to make one submission (written case) and answered my questions.
- [38] There is also no evidence provided to substantiate the costs of \$3,930 + HST. I do not have the benefit of legal invoices or details of the work done to determine if the amount incurred is reasonable or proportionate to the issues in dispute other than the Applicant submitting "the costs herein are reasonably incurred."
- [39] Weighing all these elements and the principle of proportionality, an award of costs on a partial indemnity basis is appropriate. Therefore, I award the Applicant \$2,358 + HST, which is 60% of \$3,930 plus HST, legal costs the Respondent advises they incurred with respect to this application.

e) Filing fee for this proceeding in the amount of \$125.00.

- [40] ECC 28 was successful in proving the Respondent had breached the Settlement Agreement and therefore, in accordance with Rule 48.1 of the Rules of Practice, I will order a cost award of \$125 in respect of the Tribunal fees it paid, as requested.

D. ORDER

- [41] The Tribunal Orders that:

1. Pursuant to s. 1.44(1)1 of the Act, the Respondent shall comply with the terms of the Settlement Agreement and the Smoking Rule and in particular, the Respondent shall not smoke on his balcony and shall ensure that no other occupant of the unit or guest smokes on the balcony or in the unit.
2. Pursuant to paragraph 11 of the Settlement Agreement, the Respondent shall pay pre-litigation costs incurred from September 17, 2020, through August 17, 2021, in the amount of \$3,748.00 plus HST to the Applicant.
3. Within 30 days of this Order, in accordance with s. 1.44 (1) 4 of the Act and Rule 48 of the Tribunal's Rules of Practice, the Respondent shall pay \$2,358 + HST to the Applicant for its CAT costs and \$125 for its fees regarding this matter.

Victoria Romero
Member, Condominium Authority Tribunal

Released on: October 27, 2022