

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: November 18, 2022

CASE: 2022-00408N

Citation: McEwen v. Carleton Standard Condominium Corporation No. 5, 2022 ONCAT 125

Order under Rule 4.5 of the Condominium Authority Tribunal's Rules of Practice

Member: Marc Bhalla, Member

The Applicant,
Lorrain McEwen
Self-Represented

The Respondent,
Carleton Standard Condominium Corporation No. 5
Represented by Melinda Andrews, Counsel

MOTION ORDER

[1] The Applicant sought a parking space accommodation for a disability. The parties were not able to reach agreement in mediation and the Applicant withdrew their case. Because of the withdrawal and the fact that the Applicant also filed a case at another tribunal, the Respondent brought a motion seeking the recovery of costs. The motion is denied.

Background

[2] On September 30, 2021, the Applicant filed a case with the Human Rights Tribunal of Ontario (the "HRTO") against the Respondent's board members and condominium manager seeking monetary compensation and non-monetary remedies. When the Applicant filed their case, they were told it would take 1-2 years to be reviewed, due to backlog.

[3] On June 27, 2022, the Applicant filed a case against the Respondent at this Tribunal. The Applicant sought a parking space accommodation for a disability. This accommodation request was also within the Applicant's HRTO claim. The case moved to Stage 2 – Mediation.

[4] On August 11, 2022, during mediation, the HRTO completed its review of the Applicant's claim, and such was brought to the Respondent's attention. The parties agreed to pause the HRTO case as they attempted to mediate the parking space issue. The parties were unable to resolve the parking space issue.

- [5] On September 20, 2022, the Applicant withdrew their case at this Tribunal.
- [6] On October 6, 2022, the Respondent requested the re-opening of the case for a hearing on costs.
- [7] On October 27, 2022, I issued a Motion Order. I confirmed I would consider the Respondent's motion. I gave the Applicant a chance to reply.

Jurisdiction & Submissions

- [8] In support of its claim that I have jurisdiction to award costs, the Respondent cited (i) sections 1.44(1)4 and 1.44(2) of the *Condominium Act, 1998*, (ii) Rule 48.2 of this Tribunal's Rules of Practice; and (iii) the January 1, 2022, Practice Direction issued by this Tribunal, which states:

"[T]he CAT may order a party to pay costs where the party has acted in bad faith or the party's conduct was unreasonable, done for an improper purpose, or directly caused an expense for another party"

- [9] I agree with the Respondent that the Tribunal has jurisdiction to award costs based on what it has cited. The test for cost recovery surrounds the conduct of the Applicant. Specifically, if the Applicant acted in bad faith, unreasonably, with improper purpose or directly caused an expense for the Respondent.
- [10] The Respondent's submissions on costs were within the 30-page "Request to Reopen Case" and 59-page accompanying affidavit. In response, the Applicant provided a 17-page document of submissions with a schedule of 10 pages. The volume of submissions was disproportionate to the scope of the issue. While I reviewed all submissions, I only refer to those relevant to my decision.

Analysis

- [11] The Respondent claims the Applicant acted in bad faith. This resulted in it incurring costs for participating in the case which were ultimately "thrown away". The Respondent alleges that the Applicant filed concurrent cases with this Tribunal and HRTO. It suggests the Applicant is "forum shopping".
- [12] The Respondent says that the parties agreed to address their parking spot issue at this Tribunal. The Applicant could then pursue other issues at the HRTO with the parking spot matter addressed here. As the Applicant withdrew their case at the end of mediation, the parking spot issue has not been addressed.
- [13] The Respondent submits it has been prejudiced by revealing its settlement position to the Applicant in Stage 2 - Mediation. I do not agree that the Respondent

has been prejudiced by participating in settlement negotiations. Stage 2 - Mediation takes place on a without prejudice basis. Settlement offers made at this Tribunal do not remain extended to the Applicant. Such are confidential and cannot appropriately be used in submissions to an adjudicator. While the Respondent could make similar settlement offers going forward, it is not required to.

- [14] The Respondent cites *Durham Condominium Corporation No. 80 v Occleston*, 2022 ONCAT 103 as authority for the recovery of costs incurred in Stages 1 and 2. In that case, the parties addressed the substantive issues of their dispute. They agreed to have this Tribunal decide costs in a Stage 3 hearing. A distinction here is there was no agreement between the parties.
- [15] The Respondent cites *York Condominium Corporation No. 435 v Karnis et al*, 2022 ONCAT 86 to suggest this Tribunal has the authority to resolve Human Rights Code issues. It suggests that this Tribunal is positioned to address the Applicant's parking spot issue more efficiently than the HRTO. I have reviewed the Applicant's HRTO claim. It has a much broader scope than the issue brought to this Tribunal. This Tribunal does not have authority to grant all the relief sought by the Applicant in the HRTO case. It is not the case that the Applicant brought duplicate proceedings.
- [16] The Respondent points to public policy considerations. It states the Applicant should not be able to waste time and resources of both the Respondent and this Tribunal. It suggests that "it is an inherently unfair process to allow a party to withdraw a case without any assessment from the CAT to determine if that is appropriate or without an opportunity for the opposing party to make submissions". As the Tribunal member who issued the Notice of Withdrawal, I confirmed that the Applicant satisfied Rule 34.3(c) of this Tribunal's Rules of Practice for ending a case in Stage 2. Submissions from the Respondent were not necessary. There are other ways a case can be closed in Stage 2 - Mediation without the involvement of responding parties. For example, the Applicant could have abandoned the case by not advancing to Stage 3.
- [17] The Respondent states that the Applicant hoped to face no repercussions for withdrawing their case. In turn, the Respondent faced the repercussion of the cost of participating in the case. While the Applicant has not faced a legal cost repercussion, they experienced other repercussions. This includes a mental health cost of stress and anxiety. I reject the Respondent's suggestion that it is the only party to face repercussions related to this case.
- [18] The Respondent chose to have legal representation, as was its right. It can be

helpful to include legal representatives at mediation. Yet, it is not reasonable to expect to recover related costs. Mediation is a process of self-determination for participants. It can avoid further costs or result in cost recovery but there are no guarantees. In choosing to involve legal representation in mediation, good faith participation includes accepting the risk that related costs may not be recoverable. The Respondent acknowledges that cost awards are unusual at this Tribunal. That is particularly so when a case does not include a hearing at which a party has success.

[19] In assessing the Applicant's behaviour, I cannot ignore that they are self-represented. The Applicant is not trained to navigate through the province's administrative tribunals. This case was complicated. There was potential for overlapping jurisdiction between tribunals. The HRTO said it would need 1-2 years to review the Applicant's case. The Applicant states they did not intend to take part in concurrent tribunal proceedings. There is a significant difference between the two cases. I am not convinced the Applicant acted with malice or ill intent. I am not satisfied that the Applicant's conduct was in bad faith, unreasonable, done for an improper purpose or directly caused an expense for the Respondent. The motion is dismissed.

Marc Bhalla
Member, Condominium Authority Tribunal

Released on: November 18, 2022