

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: February 1, 2023

CASE: 2022-00377N

Citation: York Condominium Corporation No. 288 v. Tamhane, 2023 ONCAT 16

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

Member: Dawn Wickett, Member

The Applicant,

York Condominium Corporation No. 288

Represented by Christian Breukelman, Counsel

The Respondent,

Rohit Tamhane

Represented by Natalia Polis, Counsel

The Intervenor,

Ingrid Mayer

Hearing: Written Online Hearing - November 21, 2022 to January 20, 2023

REASONS FOR DECISION

A. INTRODUCTION

- [1] York Condominium Corporation No. 288 ('YCC 288') has a 'no pets' provision in its declaration and rules.
- [2] The Respondent, Rohit Tamhane, is a tenant of a unit in YCC 288 and owns a dog, "Sumo", a large American Bully.
- [3] The unit is owned by Ingrid Mayer who is an Intervenor in this case. Ingrid Mayer did not join the case.
- [4] Peter Mahut is the condominium manager for the Applicant YCC 288. He provided witness testimony on their behalf at the live hearing.
- [5] Jerry Aznavourian is the president of the condominium board and provided testimony at the live hearing.
- [6] At the time the Respondent, became a tenant of a unit of YCC 288, the condominium corporation had no formal process for dealing with a request for accommodation of an emotional support animal ('ESA').

- [7] On October 3, 2020, the Respondent made an accommodation request under the *Human Rights Code* (the 'Code') to YCC 288 to have an ESA. In support of his request, the Respondent provided YCC 288 with two medical letters.
- [8] The request was approved by YCC 288 on November 27, 2020, and Sumo moved into the building on December 5, 2020. Although the approval letter indicates that conditions relating to Sumo would be given within one week, none were provided until March 2022 (1.5 years after the approval). Additionally, in September 2022, YCC 288 updated their pet rule (Rule No.8). While the condominium building remained a no-pets building, a provision was added to include a process for managing requests for accommodation, specifically for an ESA. Part of the approved process includes completing an application form which sets out restrictions against pit bulls and dogs weighing more than 25 pounds.
- [9] It is YCC 288's position that Sumo poses "significant safety risks" within the condominium building because of three alleged incidents of lunging and several noise complaints (barking). YCC 288 seeks an order from the Tribunal to remove Sumo from the condominium building, alleging that the accommodation cannot be continued due to undue hardship relating to allegations about Sumo's behaviour. In the alternative, the Applicant seeks to enforce, retroactively, the March 2022 conditions with respect to Sumo's behaviour on the common elements of the building.
- [10] The Respondent's position is that YCC 288 has not experienced undue hardship, and that the imposing of the conditions introduced in March 2022, is unfair and contrary to the Applicant's duty to accommodate.
- [11] Based on my analysis of the evidence, I am not satisfied that YCC 288 experiences undue hardship by continuing to provide the Respondent with the accommodation of having Sumo live with him in the condominium building. Further, I am not satisfied based on the evidence and submissions of both parties, that an order enforcing YCC 288's restrictions as outlined in the May 22, 2022, email is appropriate. As such, I am dismissing YCC 288's application. The Respondent is entitled to continue living with Sumo in the condominium building.
- [12] I also make an award for costs in favour of the Respondent.

B. ISSUES & ANALYSIS

Issue No. 1 - Has the accommodation resulted in undue hardship which warrants Sumo's removal?

- [13] The Applicant did not dispute that the Respondent is entitled to his accommodation under the Code, by having an ESA. However, YCC 288 argued that the behaviour of Sumo poses significant safety risk to others in

the condominium building. YCC 288 presented evidence that on at least three separate occasions, Sumo allegedly “lunged” at others in the common elements. The incidents occurred on February 23, 2022, May 17, 2022, and August 17, 2022. The February and August incidents were captured on video, which were entered into evidence. The May incident was not captured on video as no cameras are in the area where the incident is alleged to have occurred.

- [14] Mr. Mahut, the condominium manager and Mr. Aznavourian, the president of the condominium board gave evidence. Neither witnessed the incidents. Their evidence regarding the incidents is based on viewing the videos and speaking to the residents who complained, as well as having read one security report dated February 23, 2022.

Lunging Incident #1

- [15] In the video of February 23, 2022, Sumo was with his dog walker in the elevator. Another resident and her child (strapped to the front of the resident) entered the elevator. Sumo sat quietly in the corner of the elevator. Once they reached their destination, Sumo and the dog walker started to exit the elevator when Sumo got up on his back legs and leaned towards the resident and her child. The video clearly shows no contact between Sumo and the resident. The dog walker successfully restrained Sumo and lead him out of the elevator between her legs. While it is YCC 288’s position that this demonstrated Sumo being aggressive and posing a safety risk, the Respondent’s evidence is that Sumo was not being aggressive.
- [16] The Respondent testified that the video shows Sumo’s tail was wagging during the incident, signifying he was not in an aggressive state. In February 2022, Sumo had not had much exposure to others, particularly in elevators given the impact of the COVID-19 pandemic. As such, Sumo was not accustomed to properly greeting people.
- [17] Although the Respondent did not believe that Sumo acted aggressively, to be responsive to YCC 288’s concerns about the incident, he enrolled Sumo in training classes to minimize the potential for future similar incidents. The Respondent provided confirmation of the training classes (Reactive Dog Group Class and individual training sessions) which Sumo successfully completed.
- [18] In further support to his position that Sumo was not displaying aggressive behaviour while exiting the elevator, the Respondent provided an email from the dog walker which recounted the incident and her impression of Sumo. The dog walker’s opinion was that Sumo did not seem to want to harm the resident as he did not growl, his tail was wagging, and he seemed to be curious.

[19] In response to this incident, the board of directors discussed their concerns at a board meeting and had the condominium manager send the Respondent a list of conditions for Sumo while living in the building. The parties did not dispute that the board drafted the list, with no consultation or discussion with the Respondent. At the direction of the board, Mr. Mahut emailed the conditions to the Respondent on March 22, 2022. The email set out the following conditions:

- While on the common elements, Sumo must be muzzled
- By the end of April 2022, Sumo must successfully complete the training RH (Respondent) already initiated
- Entering and exiting the building with Sumo must be done via the north service corridor and north bank of elevators
- Sumo is not to be taken anywhere else on the common elements

Lunging Incident #2

[20] This incident allegedly occurred on May 17, 2022. There was no video evidence and no security/incident report. There was conflicting evidence from the parties about the details of this incident, including the location.

[21] Mr. Mahut testified that a resident complained to him that the week before, May 17, 2022, a dog lunged at him in the hallway on the fifth floor of the building. However, Mr. Aznavourian testified that the incident occurred on May 17, 2022 on the second floor doorway to the parking garage.

[22] The Respondent stated that an incident occurred on the second floor of the building at the doorway to the parking garage. He stated that he did not recall the date. However, during this incident, Sumo got his paw pinched under the door causing him to react, but not in an aggressive manner.

[23] It is possible that the May 17, 2022, incident was, in fact, the situation described by the Respondent in which Sumo's foot was pinched under the door of the second-floor doorway to the parking garage, causing a reaction that he says was not aggressive. I say this because the inconsistencies of YCC 288's evidence makes it uncertain whether this was the event they were relying on as being an incident of aggression.

[24] Since the YCC 288 never formally communicated their concerns and details of the incident with the Respondent about the alleged incident, it is now not certain exactly what, if anything, might have happened on May 17, 2022.

Lunging Incident #3

[25] YCC 288 entered in evidence a video of an incident which occurred on August 17, 2022. The incident occurred in the lobby of the north bank elevators. In the video, the Respondent and Sumo can be seen walking towards the elevator when another resident and their dog entered the area

from another direction. The other resident's dog who was on a long leash, is seen charging towards the Respondent and Sumo, while barking. Sumo appears to have tried to jump toward the other dog; however, the Respondent had control of Sumo and prevented him from moving forward. The other resident regained control of his dog and left the area.

- [26] The Applicant's witnesses confirmed in their testimony that both dogs were in the wrong. Mr. Aznavourian stated that the other resident was also spoken to about the incident.
- [27] The Respondent testified that the other dog in the video was barking and moving towards he and Sumo. He stated that he had control of Sumo by holding his harness, and that Sumo never actually lunged forward towards the other dog. Rather, he was lifting Sumo by the harness to control the situation.
- [28] Mr. Aznavourian testified that the board did not formally communicate their concerns about this incident to the Respondent.

Barking Complaints

- [29] Mr. Mahut testified that in 2022, he received eight complaints of Sumo barking inside the unit. He said that each incident was investigated and brought to the attention of the Respondent. However, despite the complaints, no compliance letters or cease-and-desist letters were sent to the Respondent.
- [30] The Respondent testified that YCC 288 only brought two incidents of barking to his attention. The first one occurred when Sumo was nine weeks old and that the barking lasted less than 15 seconds. The second incident occurred when Sumo was 4.5 months old and lasted for only a few seconds. It was his position that the complaints were unfounded as Sumo's barking was not excessive.
- [31] The Respondent testified that he has a "Furbo" at home which records Sumo. If Sumo barks for more than one minute, he gets notified by the Furbo App on his mobile device. The Respondent has not received barking notifications from the Furbo App, which supports his position that Sumo does not bark, or at least not barking to a point of bothering others in the building. In support of his position, the Respondent entered in evidence letters of support from two units located on the same floor. The first letter of support states that they never hear Sumo bark, and that he appears very well trained. The letter goes on to say that their floor "wouldn't be the same without his loving presence". The second letter is from the residents in the unit next door to the Respondent which states that they are not bothered by "occasionally" hearing Sumo bark.

Conclusion

- [32] Having considered all the evidence and submission, I am not convinced that YCC 288 experienced undue hardship because of the above noted incidents. The incidents captured on video (February 23, 2022, and August 17, 2022) were minor in nature. The videos clearly demonstrate that the Respondent and the dog walker successfully mitigated any potential for escalation of the interactions with other residents and/or dogs. Further, having viewed the videos during the hearing, I agree with the Respondent that Sumo did not appear aggressive. In the February 2022 video, I find Sumo may have improperly greeted or showed curiosity towards the other resident in the elevator, but he was not aggressive given Sumo was not seen barking, lunging uncontrollably, or showing his teeth. Rather, he was on his hind legs, leaning toward the other resident and their child with his tail wagging. He was easily redirected and guided out of the elevator by the dog walker. In the August 2022 video, the other resident's dog appeared to be the aggressor of the incident as it could be seen charging at the Respondent and Sumo. In response to the situation, the Respondent was seen maintaining control of Sumo, preventing any escalation of the incident.
- [33] With respect to the incident of May 17, 2022, in the absence of any clear evidence about the incident, I am not prepared to find that the incident was an act of aggression by Sumo within the condominium building.
- [34] Regarding the barking complaints, I prefer the evidence of the Respondent as it was supported by letters from neighbours, who likely would be the most affected by Sumo's barking. YCC 288 did not provide any supporting documentation about barking complaints.
- [35] I further note that YCC 288 has a process for addressing serious incidents. Mr. Aznavourian testified that the process involves sending formal compliance letters and/or cease and desist letters. However, such a process was never done regarding Sumo. In fact, YCC 288 never discussed with the Respondent any of the concerns they now allege as grounds for seeking Sumo's removal. There is an obvious inconsistency in YCC 288 now suggesting that such alleged incidents were serious enough to provide a basis for claiming undue hardship if Sumo remains on the property, but they were evidently never serious enough to prompt any kind of demand or compliance letter before this case was commenced.
- [36] For the reasons set out above, I deny the Applicant's request for an order removing Sumo from the condominium property. I am ordering that the Respondent can continue living with Sumo in the condominium building.

Issue No. 2 - Are the March 22, 2022, conditions enforceable?

- [37] YCC 288 asked that, should they not be successful in having Sumo removed from the building, in the alternative, they would like an order enforcing compliance with the restrictions set out by the Board of Directors in the

March 22, 2022, email (as outlined above in paragraph 20).

- [38] It is YCC 288's position that their decision to impose conditions on Sumo should be given deference. YCC 288 maintains that their decision was made in good faith, with due diligence and that the decision lies within a range of reasonable outcomes.
- [39] The Respondent's position is that at no time did YCC 288 engage in good faith discussions with respect to the restrictions imposed on March 22, 2022. YCC 288's restrictions were imposed without his input which is a breach of YCC 288's procedural duty under the Code, and as such, the conditions should not be enforced. Further, the Respondent claims that some of the conditions, specifically those regarding how he enters and exits the building with Sumo, are not feasible and pose possible safety concerns for he and Sumo.
- [40] As previously stated, at the time YCC 288 granted the Respondent's accommodation request to have an ESA live with him in the building, they did not have a formal process for such an accommodation. The only mention of animals in their governing documents was that YCC 288 was a no pet building. YCC 288's governing documents, namely Rule No.8, was updated to reflect their process in addressing ESA accommodation requests on September 12, 2022, nearly two years after approving the Respondent's accommodation request, and six months after seeking to impose conditions on the accommodation they originally granted in November 2020.
- [41] The evidence before me clearly demonstrates that YCC 288 did not engage in discussions with the Respondent about their concerns for Sumo's behaviour on the common elements of the building. Rather, YCC 288 unilaterally imposed conditions on Sumo in response to a complaint they received. As the complaints continued, YCC 288 failed to address their concerns directly with the Respondent and made the decision to seek Sumo's removal from the building and/or enforcement of their conditions, by filing this application with the Tribunal.
- [42] While I agree with YCC 288 that deference should be to the decisions of a condominium board, such deference shall not be given when a decision is either unfair or unreasonable. This is in keeping with guidance of the Court in *Muskoka Condominium Corporation No.39 v. Drew Kreutzweiser* [2010 ONSC 2463 \(CanLII\)](#).
- [43] Given YCC 288 never engaged the Respondent in discussions regarding their concerns for Sumo's behaviour, I find their decision to unilaterally impose conditions on Sumo was unreasonable, not in good faith and lacked the exercise of due diligence. In contrast, a reasonable decision, made in good faith and with due diligence is one made after gathering all the relevant information, including that from all affected parties, which in this matter

should have included the Respondent.

[44] Further, in keeping with the provisions of the Ontario Human Rights Commission's Policy on ableism and discrimination based on disability, section 8.6, states that the accommodation process is a shared responsibility; everyone involved should co-operatively engage in the process, share information, and consider potential accommodation solutions. In my view, this obligation extends to problem solving when issues arise that are related to an approved accommodation. As previously noted in this decision, YCC 288's witnesses confirmed that YCC 288 did not engage in conversations with the Respondent about conditions for Sumo's behaviour in the condominium building. In this regard, I agree with the Respondent that YCC 288 breached their procedural duty under the Code by failing to engage the Respondent in discussions about their concerns with respect to his accommodation of Sumo living in the building.

[45] For the reasons set out above, I deny the Applicant's request for an order enforcing their conditions on Sumo as set out in their March 22, 2022 email.

Issue No. 3 - Costs

[46] Both parties have sought their costs in this case. YCC 288 is seeking the cost of the filing fee in the amount of \$200, and the Respondent seeks to recover his legal costs in the amount of \$15,668.74.

[47] Since YCC 288 was unsuccessful, under the Tribunal's Rules 48.1, they are not entitled to reimbursement of their filing fee.

[48] The Respondent has requested reimbursement of his legal fees. The Respondent's Counsel submitted the basis of their requests is that the evidentiary record demonstrates YCC 288 did not have a principled basis to file their application, and they did not engage in good faith discussions with the Respondent to try and resolve the issues in dispute prior to filing their application with the Tribunal.

[49] Rule 48.2, provides:

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 behavior that was unreasonable, undertaken for an improper purpose, or that caused a delay or additional expense.

[50] The Tribunal's Practice Direction, "CAT Practice Direction: Approach to Ordering Costs" (the "Practice Direction"), states that a determination of costs, including indemnification, shall consider,

- (i) whether a party's conduct was unreasonable, for an improper purpose, or caused a delay or expense;
- (ii) the conduct of all parties and representatives requesting costs;
- (iii) the potential impact an order for costs would have on the parties;
- (iv) whether the parties attempted to resolve the issues in dispute before the CAT case was filed;
- (v) the provisions of the condominium corporation's declaration, by-laws and rules, including whether the parties had a clear understanding of their respective requirements and/or the potential consequences for contravening them; and
- (vi) whether the costs are reasonable and were reasonably incurred.

[51] There is no evidence that either party displayed unreasonable conduct during this proceeding. However, in saying that, I cannot disregard the evidence of both parties which indicates that YCC 288 did not try to resolve the issues with the Respondent prior to filing their application with the Tribunal. In this matter, this is particularly concerning given the nature of the issue in dispute, being a request to remove an ESA which is a right protected by the Code. It stands to reason, that YCC 288 should have taken all steps necessary to address their concerns with the Respondent, and work towards a resolution prior to filing their application and requesting an order for Sumo to be removed.

[52] Further, I have considered the impact of a 'no-cost' order on the Respondent and find that it would be significantly greater than it would be upon YCC 288. I say this because YCC 288 is not an individual, but rather a corporation who relies upon the collective spending power of all its unit owners, whereas the Respondent is relying on his individual spending power.

[53] Considering the above factors, I order YCC 288 pay the Respondent \$9,401.24 which represents 60% of his legal costs.

C. ORDER

[54] The Tribunal Orders that:

1. The application is dismissed.
2. Under 1.44 (1) 1 of the *Condominium Act, 1998*, Sumo is permitted to reside with the Respondent in the condominium unit as a matter of accommodation under the Code.
3. Under 1.44 (1) 4 of the *Condominium Act, 1998*, and the Rules of this Tribunal, the Applicant shall pay the Respondent costs in the amount of \$9,401.24, within thirty (30) days of the date of this order.

Dawn Wickett
Member, Condominium Authority Tribunal

Released on: February 1, 2023