CONDOMINIUM AUTHORITY TRIBUNAL

DATE: March 20, 2023
CASE: 2022-00609SA
Citation: Day v. Lambton Condominium Corporation No. 31, 2023 ONCAT 41

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

Member: Stephen Roth, Member

The Applicant,
John Day
Self-Represented

The Respondent,
Lambton Condominium Corporation No. 31
Represented by Inderpreet Suri, Counsel

Hearing: Written Online Hearing – October 10, 2022, to February 22, 2023

REASONS FOR DECISION

A. INTRODUCTION

[1] The Applicant, John Day, alleges that Lambton Condominium Corporation No. 31 ("LCC31") failed to observe the terms of a Settlement Agreement (the "Agreement") between the parties dated June 26, 2020.

[2] The relevant details of the Agreement are as follows:

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> 4. The Respondent appoints Ashley Schmitchen to be the sole representative at Trademark for any future requests for records by the Applicant. Ms. Schmitchen is the sole person at Trademark responsible for handling all records requests for all of its Condominium Corporations and the Applicant shall send any Requests for Records only to her at (email address redacted).
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> Acknowledgment
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> We, the Users, agree that this Settlement Agreement fully resolves the issues in dispute. We understand that the case will be closed, and we also understand that this Settlement Agreement can only be changed if both the Applicant and Respondent agree to the changes in writing.
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Compliance

If any of the parties fails to comply with this Settlement Agreement, then another party can file a case with the CAT requesting an order requiring compliance with this Settlement Agreement. That case must be filed within six months of the failure to comply with this agreement.

B. BACKGROUND

[3] The Applicant is a unit owner who brought a previous CAT case (2020-00173R) alleging the Respondent failed to respond to his records request within the legislated mandated timeframe. In the mediation stage, the parties resolved the dispute by way of the Agreement. Term 4 provided for a designated person at the condominium management firm used by LCC31.

[4] Mr. Day testified that on March 30, 2022, he received written communication by way of an Information Certificate and a Letter to Owners to change the procedure for records requests by owners.

[5] The Applicant argues that this change violated term 4 of the parties' agreement. Additionally, and pursuant to the agreement, Mr. Day argues that the agreement cannot be changed unless the parties agree in writing. Mr. Day alleges that the Respondent unilaterally amended the process without consulting him.

C. EVIDENCE & ANALYSIS

[6] Mr. Day did not commence this application when LCC31 announced the new procedure. Rather he waited until after the Respondent failed to respond within the prescribed time to his August 3, 2022 records request.

[7] Denise McAsey is the Respondent's condominium manager and provided witness evidence in this case. Originally, Ms. McAsey was employed by Trademark Property Management Ltd. ("Trademark"). She testified that as of June 29, 2022, Trademark was acquired by Lionheart Property Management ("Lionheart"). Ms. McAsey advised that she continues in her role with the Respondent as a Lionheart employee.

[8] Ms. McAsey testified that, as of October 19, 2022, Ashley Schmitchen, Mr. Day's designated contact at Trademark according to the agreement, accepted employment elsewhere, although she maintained brief part-time employment with Lionheart to assist in her role's transition to another employee. In her testimony, she stated that it was expected that Ashley Schmitchen would stop working completely "at the end of 2022." However, in cross-examination, she clarified that Ashley Schmitchen resigned completely on November 25, 2022.

[9] Kim Scott, an LCC31 board member, testified that Trademark began charging LCC31 a surcharge for records requests. As a result, the board decided to respond to records requests itself as a cost-saving measure. Furthermore, on March 30, 2022, the board instructed Trademark to send an information certificate

and letter to all owners updating the owners that records requests should be sent to Ms. Scott's email and to her attention.

[10] Ms. Scott acknowledged that through inadvertence, no separate correspondence was sent to Mr. Day advising him that the updated information certificate did not apply to him. Ms. Scott further stated that she has no information that Mr. Day made inquiries or raised the issue with her, or anyone else that the new procedure should not apply to him. "Had he", she testified, "his concerns could have been resolved promptly."

[11] Ms. Scott detailed four separate record requests made by Mr. Day subsequent to the announced new procedure, all which were directed to her by him. The first two, separate—but both dated June 23, 2022—were sent to Ms. Scott by email. Ms. Scott testified that that she delivered March 2022 and April 2022 board minutes in response to the request to Mr. Day on June 27, 2022, and June 28, 2022 respectively. Ms. Scott stated that Mr. Day did not raise any concern or objection to the procedure for obtaining records during these exchanges. Mr. Day has not challenged that these requests were fulfilled as described.

[12] Ms. Scott described a third request dated August 3, 2022, for May 2022 board minutes that led to Mr. Day bringing this CAT application. Ms. Scott testified that she inadvertently did not respond to the request because she was unwell, and because "there was some confusion with respect to this specific records request." She testified that "When Mr. Day started a CAT proceeding, I realized that I had inadvertently (missed) it." Although there was no direct evidence as to whether Mr. Day raised a concern with the procedure when he initially made this particular records request, based on the evidence before me, I find that he did not.

[13] Ms. Scott described a fourth request dated August 7, 2022, sent to her email for "PICS" in the last twelve months. These were delivered to Mr. Day on August 11, 2022 by the condominium's assistant manager. Ms. Scott stated that Mr. Day did not raise any issue with the procedure during these exchanges.

[14] In cross-examination, Ms. Scott testified that when she responded to these four requests, she was not aware of the existence of the Agreement made with Mr. Day or that Ashley Schmitchen was his designated contact. Candidly, she acknowledged that she and other board members should have been aware of it when instituting the new procedure, but the Agreement was not raised by anyone. Ms. Scott suggested that the board allowed Trademark to deal with these issues and that the board's delegation resulted in the board's failure to appreciate the existence of the Agreement.

[15] Mr. Day argued that the Respondent was in breach when the Information Certificate was circulated. He states, "the most significant change to Term 4 of the agreement was the removal of a professional property management company." In submissions, Mr. Day stated that he experienced almost two years of error-free record request responses with Trademark. Implicitly, Ms. Scott's admission that

Mr. Day should have been advised that the new procedure did not apply to him acknowledges a breach. This is confirmed in the Respondent's closing submissions as well.

Impossibility of Performance (Frustration of Contract)

[16] In his submissions, Mr. Day acknowledged that employees come and go from their jobs. Implicitly, he agrees that when the parties negotiated the settlement agreement, it was foreseeable that either the designated condominium management entity or designated contact person may become unavailable. There are numerous reasons why this may occur: bankruptcy, death, retirement, change of jobs or the loss of contract with the condominium. It was foreseeable that Trademark might be purchased or that Ms. Schmitchen might depart. Mr. Day relies on the provision of the Agreement requiring agreement by the parties to make any changes. However, the process for mutually changing a term is distinct from whether term 4, as is, remains capable of being performed.

[17] I have to determine the consequences of the new management company and the designated person's departure. Was term 4 of the Agreement incapable of being performed? Or, is the essence of term 4 capable of being performed?

[18] I have considered whether either of Ms. Schmitchen's departure from Trademark, or Lionheart's takeover of Trademark renders term 4 of the Agreement incapable of being performed. A contract becomes frustrated when, without the fault of any particular party, an event occurs that renders the essential terms incapable of being performed. In these situations, the contract is at end. Taking term 4 as expressly written, given that Trademark does not exist as an entity and the designated contact is no longer employed, the term is not capable of being followed.

[19] The Applicant's description of the dispute in the parties' previous CAT case 2020-00173R, which is contained verbatim in the Agreement, provides evidence as to the Applicant's motivation for entering into this agreement: He alleges that on three occasions in the previous eighteen months, LCC31 failed to respond to his records requests in time. The accuracy of this allegation is immaterial to my analysis.

[20] I have considered whether the essence of term 4 is whether the Applicant is entitled to a designated contact person at whichever property manager the Respondent is using. The Agreement is brief. Only term 4 deals with the agreed to record request process. The Agreement does not include terms dictating the parties' responsibilities when the management company or designated person become unavailable. In terms of what was bargained for, I have insufficient evidence before me as to the specific importance of Trademark or Ms. Schmitchen rather than a designated contact at the board. As such, I cannot conclude what the parties bargained for in this situation. For me to conclude that the essence of the contract is that the Applicant is entitled to a designated person at the condominium management firm requires speculation that is not underpinned by persuasive

evidence. Unfortunately, the agreement does not include a term as to what happens when either the condominium management entity or the designated contact becomes unavailable. It is evident that, eventually, because of reasons such as bankruptcy, death, retirement, change of jobs or the loss of contract with the condominium, these key terms would not be capable of being followed.

[21] As such, I find that term 4 of the Agreement became incapable of being followed and came to an end. It became impossible to perform.

[22] The Respondent initiated a change in the process before Ms. Schmitchen resigned. While the Respondent may have had desirable reasons for doing so, the Respondent was in breach of term 4 while Ms. Schmitchen remained employed. Given my finding that term 4 would soon become impossible to perform anyway, and given my conclusions below that any breach was of a de minimis nature, it is not necessary for me to discuss whether Mr. Day waived his rights to term 4 by following the request for records instructions set out in the Information Certificate, as argued by the Respondent.

Remedy

[23] As a remedy, Mr. Day requests that the Respondent provide him with a proposed contact name at Lionheart to be the new designate. He submits he is agreeable to changing the contact as long as that person is a Lionheart employee.

[24] The Respondent argues that if a breach existed, it was de minimis in nature, and refers me to a similar finding *in Harrison v. Toronto Standard Condominium Corporation No. 2714*, 2022 ONCAT 91 ("Harrison").

[25] In *Harrison*, the Applicant owner entered into a settlement agreement with the respondent condominium to include specific wording in a notice sent to all unit owners. Through inadvertence, the board sent a letter without the specific wording from the settlement agreement, leading the applicant to file a CAT case.

[26] In *Harrison*, the Tribunal found that while the respondent condominium corporation did not meet the terms of the agreement, the breach was minor. The CAT found that the appropriate remedy would be for the respondent condominium corporation to acknowledge their error in writing to the unit owners by posting the CAT decision on a centralized platform. The CAT did not award any fees.

[27] As a remedy, the Respondent argues the CAT should order LCC31 to assign a designated person of its choosing to address Mr. Day's records requests. The Respondent submits that currently, that person would be Ms. Scott. Furthermore, LCC31 submits that it should have the autonomy to change this person.

[28] It may be that LCC31 breached the agreement through inadvertence for a short period of time, before Ms. Schmitchen resigned. However, given that Mr. Day still had a designated person for records requests, I agree that the breach was de minimis.

[29] Only term 4 of the Agreement is at issue before me. The remaining terms in the Agreement relate to what records had been provided to Mr. Day in the previous dispute and the cost of providing those records. They do not relate to term 4. I find that Term 4 is severable from the rest of the Agreement. It is not evident that these remaining terms are substantive; however, the Agreement remains in effect, but with term 4 coming to an end.

[30] Section 1.47(6) of the *Condominium Act, 1988* provides the Tribunal with authority to make an order that it considers appropriate to remedy a contravention of a settlement agreement. Having found that Term 4 came to an end soon after any breach, I decline to direct a new records request process. The parties are free to negotiate new terms.

D. COSTS

[31] The Applicant seeks only his CAT filing fee as costs. I decline to make the award. Mr. Day should have raised the issue of the breach with LCC31. While I understand that Mr. Day believes the new process was unilaterally imposed on him, the Tribunal considers the steps taken by the parties in resolving the issue when deciding costs. He should have raised the issue with the Respondent immediately. LCC31 was deprived of an opportunity to resolve matters with Mr. Day. I also decline to award costs to the Respondent. The Respondent's failure to appreciate that it had entered into an Agreement with Mr. Day, also contributed to Mr. Day bringing his application.

E. ORDER

[32] The Tribunal Orders that:

1. Term 4 of the Settlement Agreement dated June 26, 2020 came to an end because of impossibility of performance.

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Stephen Roth
Member, Condominium Authority Tribunal

Released on: March 20, 2023