

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: April 6, 2023

CASE: 2022-00085R & 2022-00074SA

Citation: Manaj v. York Condominium Corporation No. 228, 2023 ONCAT 57

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

Member: Noeline Paul, Member

The Applicant,

Luiza Manaj

Self-Represented

The Respondent,

York Condominium Corporation No. 228

Represented by Victor Yee, Counsel

Hearing: Written Online Hearing – February 22, 2022 to March 11, 2023 (2022-00074SA); April 18, 2022 to March 11, 2023 (2022-00085R)

REASONS FOR DECISION

A. INTRODUCTION

- [1] This is a decision for two applications brought to the Condominium Authority Tribunal (“CAT”) under the *Condominium Act, 1998* (“Act”). These two applications were heard together further to an order by the CAT on May 5, 2022. Throughout this decision, these applications will be referred to collectively as the “case”.
- [2] The Applicant is a unit owner of the Respondent, which is a residential condominium. She filed CAT case 2022-00074SA on the grounds that the Respondent had breached a settlement agreement that they entered into on July 8, 2021 (“SA”). She filed CAT case 2022-00085R on the basis that she did not receive all the records that she requested through a Request for Records dated September 17, 2021 (“RFR”). The Applicant asks that the CAT order the Respondent to pay a penalty for refusing to provide all the requested records. Both parties requested an order of costs, with each party claiming that the other unreasonably delayed the hearing process.

B. ISSUES

- [3] The issues to be decided in these applications are as follows:
1. Did the Applicant receive the records to which she is entitled?

2. Did the Respondent refuse to provide records without a reasonable excuse and, if so, should a penalty be ordered against the Respondent?
3. Did the Respondent breach the SA?
4. Should costs be awarded?

C. DECISION

[4] For the reasons below, I find that the Applicant received the records to which she is entitled. I also find that the Respondent did not refuse to provide records and, therefore, a penalty is not warranted. I further find that the Respondent did not breach the SA. Lastly, I find no basis to order costs against either party and, therefore, am not ordering costs in this case.

D. BACKGROUND

[5] The Applicant submitted the RFR to obtain records related to the Respondent's election of directors at their August 16, 2021 AGM election, which was held using the virtual platform of GetQuorum Services ("GQ"). In the prescribed government form, the Applicant indicated that she was seeking access to all records of voting for directors at the AGM and she specifically noted that these include the following:

1. Video of the meeting;
2. Hard copies of the proxies;
3. Ballot data report for the advanced electronic voting, which shows the ballot ID, for whom they voted, but not the unit number and the name of the person who voted;
4. Ballot data report for the live electronic voting, which shows the ballot ID, for whom they voted, but not the unit number and the name of the person who voted ("Ballot Data Report");
5. The list of the units that voted electronically in advance and live at the meeting, but not for whom they voted;
6. Voting results summary report; and
7. Report of the receipts of the ballots, which includes the ballot ID, for whom they voted, the date and time of voting, excluding the name or unit number that submitted the vote ("Receipts Report").

[6] In subsequent communication between the Applicant and the Respondent's staff, the Applicant clarified item #6 of the RFR, indicating that she was requesting a voting results summary report that was signed by the scrutineers. The Respondent

advised her to submit a new request for records and she did so. This voting results summary report pertaining to the directors' election, signed by the scrutineers ("Voting Report Signed by Scrutineers"), formed part of the records requested and considered in this adjudication.

- [7] The Applicant has received several records as a result of her requests. The records that were disputed in this case fall under those described in items #4, 6, and 7 of the above-noted list, with item #6 modified to reflect the Voting Report Signed by Scrutineers. While the Applicant has received several records, she was not satisfied that these documents fulfilled her requests.
- [8] The CAT hearing was conducted using the CAT's online dispute resolution ("ODR") platform with evidence provided through supporting documents and witness sworn statements. CAT case 2022-00085R was the primary case that was used in the hearing for the purposes of uploading documents and communication in the CAT-ODR system but the documents and communication apply to both CAT applications. The Applicant, the Respondent's president, the Respondent's condominium manager, and GQ's co-founder provided testimony through sworn statements. One election scrutineer was expected to be called by the Applicant to provide testimony, with the Respondent having the opportunity for cross-examination. However, this scrutineer ultimately refused to participate in the hearing process. Based on the circumstances, I ruled that I would admit portions of her email communication as documentary evidence and give the evidence appropriate weight in my deliberations. Closing submissions were received from both parties. As a further note, the Applicant was represented by counsel for the majority of the hearing duration but became self-represented just prior to closing submissions.

E. ANALYSIS

Issue 1: Did the Applicant receive the records to which she is entitled?

- [9] The records that were alleged to be outstanding for purposes of deciding this case are the Ballot Data Report, the Receipts Report, and the Voting Report Signed by Scrutineers. For the reasons set out below, I have found that the Respondent has complied with the Applicant's requests with respect to these three records. I have discussed these records and specific findings in the sections that follow.
- [10] During the hearing, the Respondent provided copies of the live e-ballots. In her closing submissions, the Applicant attempted to broaden the scope of the issues in this case to include the e-ballots such that I should consider the Respondent's failure to provide these documents earlier. While I agree that the Respondent could have provided these documents before they did, for the purpose of deciding

the issues in this case, I will limit this analysis to the issues that were previously agreed upon and I will not consider the Respondent's failure to provide these e-ballots earlier as a refusal to provide the records requested in the RFR.

1. Ballot Data Report and Receipts Report

- [11] In her closing submissions, the Applicant stated that she requested records pertaining to the election of the directors held at the August 2021 AGM so that she could have transparency around the voting. She asserted that this transparency would have been met had the Respondent provided either the Ballot Data Report or the Receipts Report containing the information that she wanted. She noted that in their Response to the RFR, the Respondent indicated that they would provide these records and so she expected to receive ones that contained ballot IDs. She argued that the document that she received as the Ballot Data Report was a manually generated Excel file that did not list the ballot IDs, nor the date and time when the owners voted. The Applicant further argued that the document that she received as the Receipts Report was redacted, did not contain the names of voted candidates, and listed information that seems confusing such as votes submitted by paper proxy around the time of a previous AGM. In her closing submissions, the Applicant questioned the credibility of these documents and why the Respondent agreed to provide the requested records in their Response to the RFR if they, in fact, did not possess such records.
- [12] In their closing submissions, the Respondent took the position that they provided the records that were requested in the RFR. Specifically, the Respondent noted that they provided an unredacted record for the Ballot Data Report and redacted record for the Receipts Report, with the redactions to remove identification of the unit owners' names, unit numbers and email addresses. The Respondent also indicated that the Applicant was provided with a report of attendees from GQ showing ballot ID numbers.
- [13] A difficulty noted by the Applicant, and in this case generally, is that the Applicant requested, but did not receive, specific reports containing information that could assist her in identifying the accuracy of the voting for directors at the August 2021 AGM. It seems that the Applicant expected any one of the reports to verify the results of the voting, but these reports lacked the information that the Applicant desired.
- [14] Based on the evidence, the Respondent did not possess the disputed records that contained all the information that the Applicant was seeking. More precisely, the records that the Respondent had did not contain reports with the details that the Applicant requested. The Respondent's condominium manager testified that, even though the Applicant sought documentation that the Respondent did not have, they made reasonable efforts to nevertheless provide her with the requested documents. With respect to the ballot copies that were provided during the hearing, this witness explained that the failure to provide these earlier was inadvertent and he thought that he had provided all the records requested.

- [15] While there has been much confusion around what records the Respondent had in their possession and what should be provided as a result of the RFR, I am satisfied that the Respondent has provided the Applicant with the records that they have for the purposes of fulfilling the Applicant's requests. I note that the records that were provided as the Ballot Data Report and the Receipts Report are not of the quality that one would expect. However, the poor quality of these reports do not discount them from being records that fulfil the Applicant's request. Given the number of records that the Applicant has received through her requests and during the hearing, I find that the Respondent has provided records to satisfy the Applicant's request for the Ballot Data Report and Receipts Report.
- [16] The Applicant requested in her closing submissions that I examine an unredacted copy of the document that she received as the Receipts Report. I find that this is unnecessary and that the Applicant has been provided with records to satisfy the above-noted aspects of the RFR. Further, I do not find sufficient basis to doubt the credibility of the records provided by the Respondent. Therefore, I decline the Applicant's request that I examine the unredacted records.

2. Voting Report Signed by Scrutineers

- [17] In her closing submissions, the Applicant argued that the records that she received did not fulfil her request for the Voting Report Signed by Scrutineers, specifically noting the report was not initially signed by the scrutineers. She acknowledged that she received "a document that appears to be a signed voting summary report on March 18, 2022" but asserted that this should have been provided to her in response to her RFR.¹ She further argued that what she received was a signed list of units that voted live, as opposed to a full ballot report. The Applicant also took issue with the Respondent's demand that she submit a new request after her September 2021 RFR to ask for the signed version of the report.
- [18] In their closing submissions, the Respondent argued that the RFR did not clearly indicate that the Applicant was requesting a report signed by the scrutineers. Their position was that the Respondent provided the records that were available and subsequently provided a report signed by the scrutineers once the Applicant completed a new request for this. The Respondent asserted that there is no legal requirement for them to keep a signed report and the signed version provided to the Applicant is the only document that the Respondent has as a voting report signed by the scrutineers.
- [19] I agree with the Respondent's position that the RFR did not specifically request a Voting Report Signed by Scrutineers and that it is not obvious on the face of it that they should provide such a document to her. I find that the Respondent complied with the Applicant's requests and provided the records that they had in their possession. Given the totality of records that the Applicant has requested and

¹ Applicant's Closing Submissions dated February 27, 2022 at p.3.

received, I am satisfied that the Applicant's request has been fulfilled. While she may not have received one report that conforms to her expectation of what the Voting Report Signed by Scrutineers should contain, I find that she has ultimately received the records that she sought through the RFR and her subsequent request for a signed report.

Issue 2: Did the Respondent refuse to provide records without a reasonable excuse and, if so, should a penalty be ordered against the Respondent?

- [20] Section 1.44 (1) 6 of the Act permits the CAT to impose a penalty, when appropriate, in cases where the condominium corporation has, without reasonable excuse, refused to permit a person to examine or obtain records.
- [21] As indicated above, I have found that the Respondent has complied with the Applicant requests for the Ballot Data Report, Receipts Report, and Voting Report Signed by Scrutineers. Based on my review of the communications between the Applicant and Respondent, I also find that the Respondent did not attempt to frustrate the Applicant's attempts to obtain records. As such, I am not satisfied that there has been a clear refusal to provide records on the part of the Respondent.
- [22] Given my above findings, I conclude that the Respondent has not refused to permit a person to examine or obtain records and, therefore, it is not appropriate for the CAT to order a penalty under the Act.

Issue 3: Did the Respondent breach the SA?

- [23] In her closing submissions, the Applicant argued that the Respondent breached paragraphs 4 and 5 of the July 2021 SA, which read as follows:

[4] At future virtual meetings where directors of the condominium corporation are being elected, York Condominium Corporation No. 228 will allow the owners to see, directly on the screen, the voting results, including the total number of votes cast for each candidate, as and when generated by the system.

[5] At future meetings where directors of the condominium corporation are being elected, York Condominium Corporation No. 228 will strive to ensure that there are least two owners in the condo corporation who are not involved in the election appointed as scrutineers to observe and ensure fairness in the voting process. If no volunteers offer to act as scrutineers, York Condominium Corporation No. 228 will select the scrutineers.

- [24] At the heart of the Applicant's concerns is that she believes the August 2021 live voting was held without transparency. She expected to see the live voting displayed either as the votes came into the GQ system or as a total of votes soon thereafter. The Applicant testified that the voting results were not declared until approximately 30 minutes after the voting occurred and she stated that this approximate 30-minute delay or break was not captured on video. She also has raised concerns around the scrutineering of the live voting.

- [25] In his testimony, the Respondent's president stated that he negotiated the SA for the Respondent and he did not seek legal advice or consult with GQ or any virtual meeting provider prior to entering into the SA. He stated that, as a result, he did not know the practical limitations that the virtual meeting service provider might have.
- [26] I will address the arguments around the on-screen voting results display and the scrutineers as two separate issues below.

1. On-screen Voting Results

- [27] The parties in this case have different views of how paragraph 4 should be understood. In her closing submissions, the Applicant argued that the SA requires that owners should be able to see election results "as and when generated by the system" as soon as the system closes all voting. She asserted that, as soon as the voting closed, the election results should have been broadcasted virtually to owners.
- [28] The Respondent took the position that paragraph 4 is ambiguous and has caused the parties to have vastly different ideas of what was expected of them in displaying the election results. In their closing submissions, they argued that they understood paragraph 4 to require them to display the voting results once the totals had been finalized. From their perspective, the total number of votes could only be generated after the process of tallying and approving all votes.
- [29] In his testimony, the Respondent's president stated that he understood paragraph 4 of the SA to mean that they would allow attendees of virtual meetings to see, directly on screen, the voting results once they had been calculated and tallied. He further stated that the votes needed to be tallied and approved by the meeting chairperson prior to display. This witness testified that he chaired the virtual meeting in his capacity as president. He described the steps that he took during the voting process and, in particular, gave a breakdown of the time period between the close of voting and when the votes were announced. He explained that the finalizing of the votes, including the tallying process, took longer than anticipated.
- [30] GQ's co-founder testified that GQ does not allow their staff to share their screen with the virtual audience when receiving and counting the electronic votes and they will not share draft tallies until the tallies have been approved by the chairperson.
- [31] Having reviewed the testimony of the witnesses related to the voting process, I find that the series of events that occurred during the election are reasonable, despite the Applicant's suspicions. The Applicant has argued that the approximate 30-minute delay in displaying the election results means that the results were not shown to the owners "as and when generated by the system". However, the Respondent's witnesses have detailed the voting process and what could be possible within the criteria that GQ set out. Specifically, votes must be tallied and

approved by the meeting chairperson before the results can be considered official and announced. Therefore, the announcement of the official votes after the approximate 30-minute timeline does not, in and of itself, mean that the results were not shown as and when generated by the system. The process used represents a reasonable interpretation of the phrase by the Respondent.

- [32] The Respondent has noted in their closing submissions that the SA contains terms that are outside of the CAT's jurisdiction and the Respondent agreed to the SA without legal representation. Regardless of whether the Respondent sought legal advice prior to entering into the SA, I am mindful of the CAT's jurisdiction, its limitations in terms of ruling on how a virtual election should be held and, more specifically, ruling on what type of voting information should be displayed on screen to the virtual audience. The question that I must decide here is simply whether or not the Respondent complied with paragraph 4 of the SA.
- [33] For the purposes of deciding whether the Respondent complied with paragraph 4 in this case, I am satisfied that the Respondent did so. I find that the voting results were displayed once verified and official. The total voting results could not be generated until this final tally of votes and approval process occurred. I appreciate that the Applicant had a different idea of what should have been displayed, how this should have been done, and the timing of this. However, in interpreting the terms of an SA, I cannot add more expectations on either party. The parties can only be bound to the terms to which they could have reasonably agreed. As such, I am satisfied that the Respondent complied with the terms in paragraph 4 with respect to displaying the voting results on-screen during the August 2021 election.

2. Scrutineers

- [34] With respect to the Applicant's arguments around the scrutineers, it is not disputed that the Respondent appointed two scrutineers to observe the election at the August 2021 meeting. However, the issue in dispute is whether the Respondent complied with the full terms of the SA under paragraph 5. In her closing submissions, the Applicant took the position that this paragraph should be read broadly such that the SA requires the scrutineers to be able to fulfil their duties of observing and ensuring fairness in the voting process. She argued that the Respondent did not allow the scrutineers to confirm who was eligible to vote and whether any owners submitted both e-Ballots and proxies. The Applicant asserted that this could lead to unfairness in the process. Further, the Applicant took issue with the role of the meeting chairperson who was tasked with reviewing the proxies and ballots since he is also the Respondent's president.
- [35] In their closing submissions, the Respondent took a narrower reading of paragraph 5 of the SA. They argued that the terms require them to strive to ensure that at least two scrutineers are appointed.
- [36] The evidence in this case is that two scrutineers were appointed for the purposes of the August 2021 election. The Respondent's president and condominium

manager testified that the two scrutineers were seated with the Respondent's condominium manager at 7pm, inside the on-site management office. The Applicant and the Respondent's condominium manager testified that one of the two scrutineers left at some point prior to the end of the voting process and the other stayed up until the end of the meeting. In her email communication, the scrutineer who stayed until the end of the meeting stated that she was seated in the management office during the live voting but was unable to see the live voting process. She further stated that, through her conversation with the condominium manager, she understood her role would involve checking the hard copy proxies.

[37] The testimony of the witnesses indicate that the scrutineers at the August 2021 AGM election did not have access to or view the same information that GQ staff had available to them. As indicated above, GQ's co-founder testified that GQ does not allow their staff to share their screen with the virtual audience when receiving and counting the electronic votes and they will not share tallies until the tallies have been approved by the chairperson. GQ's co-founder further testified that they have never allowed any unit owner scrutineers to watch the votes being cast live on their online platform during a virtual AGM and they do not grant any back-end access to unit owner scrutineers, even for a limited duration. Based on this evidence, the chairperson was required to approve the votes before the information could be released to the virtual audience. Due to this format, the scrutineers were not able to observe how the chairperson went about reviewing and approving the votes.

[38] For the purposes of deciding this case, I am not prepared to find a material non-compliance of paragraph 5 of the SA in the August 2021 election. The Respondent appointed two scrutineers, as required by this paragraph. The evidence does not indicate that the Respondent deliberately structured the election process in such a way as to prevent the scrutineers from performing their duties. Further, I am not satisfied that paragraph 5 of the SA should be read as broadly as suggested by the Applicant.

[39] I agree with the Applicant to the extent that the Respondent's election process should be more transparent so that owners have confidence in their election results. To this end, and for the purposes of managing owners' expectations around virtual elections, the Respondent should make efforts to inform all owners of how the virtual voting process will unfold and, equally important, the role of the scrutineers in the process. Specifically, the condominium community should be made aware, prior to the election, of what information the scrutineers will be able to access. This will go a long way to easing concerns and suspicions among owners of impropriety by the Respondent's Board and president in elections.

Issue 4: Should costs be awarded?

[40] Both parties have requested costs in this case. Each party claimed that the other unreasonably delayed the hearing process. The Applicant requested costs in the amount of \$7,522.41. The Respondent requested costs in excess of \$7,500 for

partial indemnity and approximately \$20,000 for full indemnity.

[41] The CAT may grant an award of costs for filing fees under Rule 48.1 or legal fees under Rule 48.2 of the *CAT Rules of Practice*. The awarding of costs is discretionary. In this case, the parties have specifically requested legal costs. I note that the Applicant is not successful in her case and would likely not have been awarded her filing fees. I am not awarding her filing fees here.

[42] With respect to legal fees, the CAT may order one party to pay another party's legal costs in exceptional circumstances, but this is generally not the CAT's practice. The CAT's *Practice Direction: Approach to Ordering Costs*, issued January 1, 2022, provides guidance regarding the circumstances in which such costs may be ordered.

[43] I find that both parties unreasonably delayed the hearing process in this case. There were delays in communication on both sides and I repeatedly requested responses from them. The Applicant had at least one lengthy absence, without previous notice of the anticipated absence or explanation afterwards. During the time period that she was represented by counsel, she did not communicate through counsel promptly. The Respondent also delayed the hearing by submitting various requests. These requests did not improve the efficiency of the hearing process or assist me in deciding the issues to be adjudicated. The actions of both parties ultimately resulted in delaying the hearing and increasing their own costs.

[44] Given the above, I find that an order of costs is not warranted. Each party should bear their own costs.

F. CONCLUSION

[45] Based on the evidence provided in this case, I conclude the Applicant received the records to which she is entitled and the Respondent did not refuse to provide records. Since I have found that the Respondent did not refuse to provide records, a penalty is not warranted. I further conclude that the Respondent did not breach the SA. Lastly, I have found that both parties contributed to delays in this case and, therefore, I conclude that an order of costs against any party is not appropriate.

[46] Given the findings above, these applications are dismissed.

G. ORDER

[47] The Tribunal Orders the applications dismissed.

Noeline Paul
Member, Condominium Authority Tribunal

Released on: April 6, 2023