CONDOMINIUM AUTHORITY TRIBUNAL

DATE: May 12, 2023
CASE: 2022-00683N
Citation: Sievewright v. Toronto Standard Condominium Corporation No. 1793 et al., 2023 ONCAT 68

Order under Rule 19 of the Condominium Authority Tribunal's Rules of Practice

Member: Mary Ann Spencer, Member

The Applicant,
Karen Sievewright
Self Represented

The Respondents,
Toronto Standard Condominium Corporation No. 1793 and Toronto Standard Condominium Corporation No. 1808
Represented by David Thiel, Counsel

Submission Dates: April 12, 2023 to May 2, 2023

MOTION ORDER

[1] The Applicant, Karen Sievewright, is a unit owner of the Respondent, Toronto Standard Condominium Corporation No. 1793, which shares facilities with the Respondent, Toronto Standard Condominium Corporation No. 1808. Toronto Standard Condominium Corporation No. 1808 was added as a respondent in this matter by order of the Tribunal dated October 27, 2022. Ms. Sievewright brought application to the Tribunal with respect to allegations that she is experiencing unreasonable noise from the grate covering the drain at the Respondents' garage door, and unreasonable noise, odour, smoke and/or vapour from the Respondents' emergency generator's industrial vent.

[2] The Stage 3 – Tribunal Decision proceeding in this matter opened on February 9, 2023. It was immediately adjourned on consent of the parties to permit them to complete professional testing and to receive and review their experts' reports.

[3] The Stage 3 – Tribunal Decision proceeding recommenced on April 10, 2023. As a preliminary matter before the submission of evidence, Counsel for the Respondents submitted that the Tribunal does not have jurisdiction to hear the issues which were set out in the Stage 2 Summary and Order in this matter as

follows:

> 1. Is there an unreasonable noise coming from the garage door and its associated components when operating that is a nuisance, annoyance or disruption in the condominium corporation?
>
> 2. Is there an unreasonable noise, odour, smoke and/or vapour coming from the generator exhaust that is a nuisance, annoyance or disruption in the condominium corporation?

Counsel for the Respondents submits that the issues relate to repair and maintenance of the common elements which are the responsibility of a condominium corporation as set out in sections 89 and 90 of the *Condominium Act, 1998* (the "Act"). The Tribunal's jurisdiction, established in O. Reg. 179/17, does not extend to these sections of the Act. I asked both parties for written submissions on the question of the Tribunal's jurisdiction.

[4] For the reasons set out below, I find that the issue of unreasonable noise from the garage relates to a corporation's obligations under sections 89 and 90 of the Act to repair and maintain the common elements. Because the Tribunal has no jurisdiction over these sections of the Act, I cannot hear this issue and dismiss this part of the Applicant's case. However, I find that it is not clear that the issue relating to alleged unreasonable noise, odour, smoke and/or vapour from the generator exhaust is only an issue of maintenance and repair and therefore I will hear evidence on this issue.

ANALYSIS

[5] Rule 19.1 of the Tribunal's Rules of Practice states that "The CAT can dismiss an Application or Case at any time in certain situations, including: (c) Where a Case is about issues that the CAT has no legal power to hear or decide." The jurisdiction of the Tribunal is set out in O. Reg. 179/17. The sections of the regulation relevant to the issues in this dispute state:

> **1.** (1) The prescribed disputes for the purposes of subsections 1.36 (1) and (2) of the Act are:
>
> (c.1) subject to subsection (3), a dispute with respect to subsection 117 (2) of the Act or section 26 of Ontario Regulation 48/01 (General)
>
> (d) subject to subsection (3), a dispute with respect to any of the following provisions of the declaration, by-laws or rules of a corporation:
>
> (iii.1) Provisions that prohibit, restrict or otherwise govern the activities described in

> subsection 117 (2) of the Act or section 26 of Ontario Regulation 48/01 (General).

Section 26 of O. Reg. 48/01 sets out unreasonable odour, smoke, vapour, light and vibration as prescribed nuisances, annoyances or disruptions.

[6] Ms. Sievewright submits that the issues fall within the Tribunal's jurisdiction because they relate to section 117 (2) of the Act and to Rules 6 and 8 in Schedule A to TSCC 1793's By-law No. 1 and Rules 2. (7), 2. (12) and 2. (24) of its "House Rules" dated August 31, 2018. The cited rules variously prohibit owners and/or residents from creating noise that disturbs the quiet enjoyment of other owners.

[7] Section 117 (2) of the Act states:

> No person shall carry on an activity or permit an activity to be carried on in a unit, the common elements or the assets, if any, of the corporation if the activity results in the creation of or continuation of,
>
> (a) any unreasonable noise that is a nuisance, annoyance or disruption to an individual in a unit, the common elements or the assets, if any, of the corporation; or
>
> (b) any other prescribed nuisance, annoyance or disruption to an individual in a unit, the common elements or the assets, if any, of the corporation.

[8] Ms. Sievewright relies on the legal principle that a corporation is a "person" to establish the Tribunal's jurisdiction with respect to s. 117 (2) of the Act. In this regard, she referred me to the Tribunal's decision in *Nikolov v. Halton Standard Condominium Corporation No. 476,* 2022 ONCAT 65 (CanLII), a case which addressed an alleged nuisance security light, which states, at paragraph 8:

> The Act does not define a "person", the term used in subsection 117(2) of the Act. However, given that a business corporation is a legal person, I conclude that there is no reason why a condominium corporation should not have the same status.

I note that the same principle was also affirmed in the Tribunal's decision in *Lake v. Bruce Vacant Land Condominium Corporation No. 19*, 2023 ONCAT 28 (CanLII), a decision to which Ms. Sievewright also referred me and in which the Tribunal determined it had jurisdiction to address the issue of the alleged nuisance of fountain lights which the condominium corporation had recently installed.

[9] I find that s. 117 (2) of the Act could apply in this case. However, I find that the rules cited by Ms. Sievewright do not. The preamble to the rules set out as Schedule A to By-law No. 1 states, "The following rules shall be observed by owners…" and therefore those rules do not apply to the corporate Respondents.

Similarly, the “House Rules” cited by Ms. Sievewright each specify that they apply to “residents” or “owners”. For example, Rule 2 (12) states:

> Residents shall not engage in any activity in common element areas that is in any way considered to be disruptive or disturbing to Residents' right to quiet enjoyment or prevents contract staff from completing their assigned work.

[10] In submitting that the Tribunal should dismiss Ms. Sievewright’s application, Counsel for the Respondents does not argue that the Tribunal does not have jurisdiction over disputes relating to s. 117 (2) of the Act or s. 26 of O. Reg. 48/01. Rather, he submits that the Tribunal does not have jurisdiction to address issues which relate to the repair and maintenance of the common elements. In this regard, he referred me to the Tribunal’s recent decisions in *Brady v Peel Condominium Corporation No 947*, 2023 ONCAT 8 (CanLII) and *Rahman v. Peel Standard Condominium Corporation No. 779*, 2023 ONCAT 37 (Canlii), both of which are cases which the Tribunal dismissed because it found the issues to be the repair and maintenance of common elements.

[11] In *Brady*, the Tribunal found the alleged nuisance noise coming from the pipes in the building was not being caused by the actions of a specific owner but related to maintenance and repair. Counsel for the Respondents referred me to paragraph 9 of the decision which reads, in part:

> Based on the evidence and submissions before me, it is not disputed that there is a noise resulting from running water through the piping between the units. There is no evidence that it is the result of any activity by another unit owner, for example, from the unit above the Applicant’s, other than the normal activity of turning on a faucet.

The Tribunal’s finding was in reference to the corporation’s declaration which the Tribunal quoted as follows: “…no condition shall be permitted to exist (and no activity shall be carried on) in any unit, or upon the common elements that will unreasonably interfere with the use and enjoyment (by other unit owners) of the common elements and/or other units…” Ms. Sievewright argues that Section 12 (a) of the Respondents’ declaration is broader than the provision quoted in *Brady.* However, I find Section 12 (a) is strikingly similar. It begins by stating that each owner has reasonable use of the common elements and then states “However, no condition shall be permitted to exist and no activity shall be carried out that will reasonably interfere with the use and enjoyment by other owners of the common elements and other units”. I find the reference to “other owners” means that the section applies to owners and not to the corporation.

[12] The Respondents would have an obligation to enforce the above-quoted section of the declaration and the rules cited by the Applicant if the owners or residents were creating the alleged nuisances. Ms. Sievewright submits that owners, by driving over the garage grate, are creating unreasonable noise, and therefore are in violation of the cited rules. However, an owner who is using the common elements properly for their intended purpose (in this case, driving into the garage) is not engaged in a disruptive activity: it is the garage grate, not the drivers' activity which is the source of the alleged disruptive noise. Further, I note that Ms. Sievewright did not suggest that owners or residents are in any way responsible for the alleged unreasonable noise, odour, smoke and/or vapour from the generator vent.

[13] Ms. Sievewright also referred me to a number of cases the Tribunal has heard which she submitted are similar to the case before me. These included *Toronto Standard Condominium Corporation No. 1978 v. Hackman,* 2022 ONCAT 143 (CanLII), in which one of the addressed issues was whether the Respondent was experiencing unreasonable noise from other units. The Tribunal found that the Applicant corporation was obliged by the terms of its declaration to investigate. This case, however, can be distinguished from the case before me because the allegation was not that noise was coming from a common element. Similarly, in *Toronto Standard Condominium Corporation No. 2048 v. Mortazavi,* 2023 ONCAT 17 (CanLII), which Ms. Sievewright suggested was a case which demonstrated the way in which a condominium corporation should investigate allegations of unreasonable noise, the allegations were that an individual owner was the source of that noise.

[14] Ms. Sievewright further submits that the current case can be distinguished from *Brady* because, unlike the pipes which were identified as the probable source of noise in *Brady,* "Both the garage door and the generator exhaust are not original elements in the Condominium and in fact are security and emergency systems which are not covered by the Declaration provided by the Respondent or the Act". However, it is clear that the garage door grate and the emergency generator are common elements of the Respondents. Section 1 (1) of the Act and Section 1 (3) of the submitted declaration both define "common elements" as "means all the property except the units." The question is whether the stated issues in this case relate solely to the repair and/or maintenance of those common elements.

[15] With respect to the issue of the garage grate, Ms. Sievewright described the problem as follows in her application to the Tribunal:

> For the last 15 months the grate which covers the drainage trench, also at the garage door has been broken. It creates a banging sound in our unit when cars

> drive over it.
>
> I have requested that the issue be fixed, but to date TSCC 1793 has put in only temporary measures. Although the manager, superintendent and garage door maintenance firm confirmed the issue. They refuse to put in place a permanent solution or bring in professionals to come up with a plan to assist.

The Stage 2 Summary and Order in this matter sets out the following actions taken by TSCC 1793:

> June 15, 2022 – installed rubber around the garage grate;
>
> July 18, 2022 – had a welder investigated the grate. The welder stated that the grate was not broken. The welder provided a cost to weld and drill the garage grate;
>
> July 20, 2022 - more rubber was installed around the garage grate;
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> August 31, 2022 – individual bars of the garage grate were welded and the garage grate was drilled to the ground; and
>
> November 30, 2022 – the Condominium Manager and the Concierge visited the unit to conduct an investigation.

[16] While I have not heard evidence in this case, Ms. Sievewright's description of the problem as the failure of the Respondents to repair a broken grate and the remedial actions recorded by the mediator in this matter as those taken by the corporation persuade me that the issue of the garage grate is one of repair and maintenance. A garage is a common element with a necessarily fixed location; the corporation is responsible for its repair and maintenance under sections 89 and 90 of the Act. Even if unreasonable noise was proven, the conclusion would be that this was a failure of the corporation to meet those responsibilities, as Ms. Sievewright herself suggests in the final paragraph of her problem statement. Because the Tribunal's jurisdiction does not extend to sections 89 and 90 of the Act, the Tribunal cannot address Issue 1 in the Stage 2 Summary and Order. This finding does not mean that Ms. Sievewright is not experiencing unreasonable noise; it does mean that the issue would have to be pursued in another venue.

[17] It is less clear that the issue relating to the generator vent relates solely to the corporation's obligations to repair and maintain the common elements. Ms. Sievewright described the issue as follows in her application to the Tribunal:

> In March 2021 a large diameter industrial vent was constructed in front of my bedroom window. I was not notified or consulted on this matter. The vent emits high temperature exhaust and noise from the emergency generator. When running

> the noise is loud (over 84 decibel's) and the gasses that are emitted are very hot and, I believe, noxious – similar to those from a car exhaust, except in a much larger quantity.
>
> I have asked that the vent be moved, spoken to the Manager and written to the Board, but they refuse to meet with me to discuss the issue.

The Stage 2 Summary and Order indicates the following:

> November 30, 2022 – the Condominium Manager and the Concierge visited the unit to conduct an investigation.
>
> TSCC 1793 and TSCC 1808 retained J.E. Coulter Associates to conduct acoustic testing regarding industrial vent noise. The testing is scheduled to take place on February 9, 2023. No report has been issued yet.
>
> TSCC 1793 and TSCC 1808 have also been in discussion with an environmental consultant about the industrial vent noise.

[18] The actions set out in the Stage 2 Summary and Order are only investigative in nature and therefore are not sufficient to persuade me that the issue of unreasonable noise, odour, smoke and/or vapour relates to the maintenance and repair of the generator and its components. Further, there are similarities in the circumstances set out in Ms. Sievewright's problem statement to the circumstances of the cases heard by the Tribunal in *Nikolov* and in *Lake v. Bruce Vacant Land Condominium Corporation No. 19,* 2023 ONCAT 28 (CanLII), both of which addressed allegations that a recently installed common element created a nuisance and both of which Ms. Sievewright referred me to.

[19] I note that Counsel for the Respondents also addressed both *Nikolov* and *Lake*:

> To the extent that these cases introduce some uncertainty into the Tribunal's interpretation of section 117(2), it can be reconciled on the basis that what was ordered in this case did not constitute repair or maintenance. The light bulbs in these cases were not damaged, nor had they fallen into a state of disrepair. Replacing or adjusting the brightness of a light bulb is definitively distinguishable from maintenance and repairs of a mechanical system, air duct system, plumbing system, or general building damage, which inherently fall under section 89 of the Act.

I do not disagree with Counsel's submission. However, there is no evidence before me to indicate that the generator vent issue is one of repair and maintenance that falls under sections 89 or 90 of the Act. For example, while Ms. Sievewright's problem description sets out a decibel level, it is unknown whether this is indicative

of a malfunctioning generator. Whether the generator vent is a repair and maintenance issue or whether any noise or exhaust it produces constitutes a nuisance can only be determined by hearing evidence.

[20] Counsel for the Respondents' motion succeeds in part. I have determined that the Tribunal does not have jurisdiction to address the issue related to the garage. However, I will hear evidence on the issue related to the generator vent. I note that the fact I will hear evidence does not preclude a subsequent finding that the issue falls outside of the Tribunal's jurisdiction.

ORDER

[21] The Tribunal dismisses the Applicant's case with respect to the issue of the Respondents' garage and its related components. The Tribunal will hear the Applicant's case with respect to the issue of the Respondents' generator and its related components.

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Mary Ann Spencer
Member, Condominium Authority Tribunal

Released on: May 12, 2023