

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: May 31, 2023

CASE: 2023-00172SA

Citation: Harder v. Metropolitan Toronto Condominium Corporation No. 905, 2023 ONCAT 73

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

Member: Mary Ann Spencer, Member

The Applicant,

Karen Harder
Self-Represented

The Respondent,

Metropolitan Toronto Condominium Corporation No. 905
Represented by Greg Marley, Counsel

Hearing: Written Online Hearing – April 10, 2023 to May 17, 2023

REASONS FOR DECISION

A. INTRODUCTION

- [1] Karen Harder (the “Applicant”) is the owner of a unit of the Respondent, Metropolitan Toronto Condominium Corporation No. 905 (“MTCC 905”). Ms. Harder and MTCC 905 were parties to case number 2022-00700R at the Tribunal which they resolved by a settlement agreement dated December 19, 2022. Ms. Harder alleges that MTCC 905 has breached certain terms of that agreement.
- [2] Specifically, Ms. Harder alleges that MTCC 905 has breached paragraph 2, the term of the agreement which sets out the requirements for MTCC 905’s response to future requests for records, and paragraph 5, the term which relates to the manner of the parties’ public communication about each other. She asks the Tribunal to order MTCC 905’s board of directors to disband the community Facebook page it sponsors and to apologize publicly to her for what she alleges are libellous statements. She also asks the Tribunal to order MTCC 905 to pay a penalty, to reimburse her filing fees in this matter, and to award her compensation for damages.
- [3] MTCC 905 acknowledges that it has breached the term of the settlement agreement relating to its response to requests for records but submits that the

breaches are not significant and do not warrant any sanction. It denies that it has breached the settlement agreement with respect to its public communication about Ms. Harder. It asks the Tribunal to dismiss her application.

- [4] I find that MTCC 905 has breached Paragraph 2 of the December 19, 2022 settlement agreement. With respect to the record it provided in response to her February 15, 2023 Request for Records, I order it to provide Ms. Harder with a statement of the actual cost it incurred to produce the record and a statement of the reasons for the record's redaction. I order no costs in this matter.

ISSUES & ANALYSIS

- [5] The issues to be decided in this matter are:

1. Has MTCC 905 breached the Settlement Agreement dated December 19, 2022?
2. If MTCC 905 has breached the Settlement Agreement, what remedy should the Tribunal order?

Issue 1. Has MTCC 905 breached the Settlement Agreement dated December 19, 2022?

- [6] Ms. Harder alleges that MTCC 905 has breached paragraphs 2 and 5 of the settlement agreement. I address these separately below. I note that to support her allegations, Ms. Harder uploaded a number of documents to the CAT-ODR system as evidence, many of which pre-dated the settlement agreement. Before the parties made their submissions in this case, I advised them that I would only consider incidents which occurred after the date of the agreement.

Paragraph 2 of the Agreement - The Board Response to Requests for Records

- [7] On February 15, 2023, Ms. Harder submitted a Request for Records form to MTCC 905. She alleges that MTCC 905's response to this request breached paragraph 2 of the December 19, 2022, settlement agreement, which states:

2. The Corporation agrees that if any future requests are made from this Applicant seeking records, they shall provide:
 1. A Board's response-to-records form
 2. A separate statement listing what records they are providing
 3. A separate statement explaining which redactions (if any) have been made and what part of the Act or Regulations the Board is relying on (in compliance with section 13.8 (1) of O. Reg. 48/01)

4. A reasonable estimate of the costs for labour and delivery of the records
5. A subsequent statement of the actual costs incurred to satisfy the request

- [8] Ms. Harder's request was for two records: "investigation reports relating to e-mail breach of security mentioned in the Board's January 31, 2023 letter to owners" and "security audit investigation reports conducted by an outside expert mentioned in the Board's January 31, 2023 letter to owners."
- [9] On March 6, 2023, Jane Finahina, MTCC 905's administrative assistant, e-mailed the Board Response to Records form to Ms. Harder. In her accompanying e-mail, Ms. Finahina explained that the board's January 31, 2023, letter to owners referred to only one report. She advised that this report was not a core record and that Ms. Harder would be charged a fee for its redaction. The Board Response for Records form only includes a response to the request for the "investigation reports relating to e-mail breach of security" and advises the estimated fee for the record will be \$4.98+HST.
- [10] Notwithstanding that Ms. Finahina did provide an explanation in her e-mail, both of the records Ms. Harder requested should have been listed on the response form together with the board's explanation for the record it was not providing. I also note that the estimated fee was incorrectly recorded on the form. It was included as a fee for labour "during the examination"; however, this is the cost a corporation incurs when an owner examines records in the corporation's offices. The fee should have been listed under labour "for providing access to the records."
- [11] Ms. Harder paid the estimated fee and, on March 16, 2023, the corporation e-mailed her a redacted copy of a report prepared by an outside contractor. She submits that MTCC 905 violated the settlement agreement because it did not provide either a statement setting out what redactions were made and the reason for them or a statement of the actual cost of producing the record.
- [12] MTCC 905 does not deny that it failed to provide the two statements Ms. Harder testified she did not receive. Ron Smith, MTCC 905's condominium manager, testified that the omission of a statement of the record's redactions and the reasons for them was an oversight. With respect to the omission of a statement of the actual cost of producing the record, Mr. Smith testified that this was not a case where the actual cost would vary from the estimate; the corporation knew the time which would be required to produce the record. He testified that as a result "it was pointless to perform extra work to produce this statement." Based on this testimony, I find that MTCC 905 did breach paragraph 2 of the December 19, 2022 settlement agreement when it responded to Ms. Harder's February 15, 2023,

Request for Records.

- [13] I note that Ms. Harder disputes that she received all of the records she requested in her Request for Records; she submitted that MTCC 905 has both reports she requested in its possession and therefore should have provided them. She also submitted that the report the corporation did provide should not have been redacted. Finally, she disputes the labour rate which MTCC 905 used to calculate the fee she was charged for the record she did receive. She uploaded a number of documents to support these arguments. However, these issues do not relate to the terms of the settlement agreement and therefore I am not addressing them.

Paragraph 5 of the Agreement – Disparagement in Any Public Forum

- [14] Ms. Harder also alleges that MTCC 905 has breached paragraph 5 of the December 19, 2022, settlement agreement which states:

5. The Parties shall refrain from disparaging, insulting, or demeaning one another in any public forum, online or otherwise.

Counsel for the Respondent denies that the Respondent has contravened this term.

- [15] Ms. Harder uploaded documents to support several incidents which she submitted indicate that MTCC 905 has breached the settlement agreement. The majority of these were examples relating to her allegation that the corporation's board of directors has not enforced its written guidelines about the use of the community Facebook page it sponsors; it has failed to remove postings which include what she alleges are disparaging remarks about her. She noted that one of the postings was made by a board member but also provided examples of postings by non-board members and suggested they contained information about her that they could only have obtained from board members.
- [16] Ms. Harder also submitted that a January 31, 2023, letter sent to owners from MTCC 905's board implied that she was responsible for hacking the corporation's computer system. Ms. Harder alleges that the letter's juxtaposition of a reference to a possible computer security breach with the statement the corporation had not sent her all of the e-mail addresses she had used to send an e-mail to owners implied that she was responsible for that breach.
- [17] Ms. Harder further submitted that the settlement agreement was breached when a board member failed to take any action to intervene when another owner was distributing alleged disparaging material about her in the building's lobby while she was a candidate for a position on the board of directors. Finally, she described an

incident where she allegedly was verbally harassed in the building's lobby by another owner and then followed by an unknown individual. She reported this incident to the corporation but states that the board failed to conduct an adequate investigation of her complaint.

- [18] Ms. Harder is requesting the Tribunal to order MTCC 905 to disband the community Facebook page and to order the board of directors and two former board members responsible for the alleged disparaging Facebook postings to make public apologies. She is also seeking \$25,000 as compensation for damages.
- [19] Paragraph 5 of the settlement agreement addresses the manner of the parties' public communication about each other. This is an issue which the Tribunal does not have jurisdiction to hear. The Tribunal's jurisdiction is established in Ontario Regulation 179/17 and includes disputes under s. 55 of the Condominium Act, 1998 (the "Act") with respect to records, disputes about a corporation's governing documents with respect to parking, vehicles, storage and pets, and disputes related to s. 117 (2) of the Act with respect to nuisance. Section 1.44 (1) of the Act states that the Tribunal may make an order at the end of a proceeding which directs a party "to comply with anything for which a person may make an application to the Tribunal."
- [20] During the Stage 1 – Negotiation and Stage 2 – Mediation processes at the Tribunal, parties may raise issues which were not specifically set out in an Applicant's problem description when their application was reviewed and accepted by the Tribunal. They may agree to include any agreement they reach on those issues as a term in a settlement agreement. However, to be enforceable by the Tribunal, that term must relate to the Tribunal's jurisdiction.
- [21] Section 1.47 (6) of the Act states that if the Tribunal determines that a party has contravened a settlement, it may make an order that it considers appropriate to remedy the contravention. Although this suggests a degree of discretion depending on the facts before the Tribunal, this does not mean that the Tribunal can make findings and orders with respect to a term of a settlement agreement that addresses matters about which it could not accept an application. To do so would in effect create a situation where a settlement agreement could become a means of circumventing the Tribunal's jurisdiction.
- [22] Jurisdiction was not raised as a preliminary issue in this matter. However, both parties addressed it briefly in their submissions. Counsel for the Respondent submitted that the Tribunal does not have jurisdiction to order the corporation to issue apologies but provided no detail to support his submission. Ms. Harder

submitted that the Tribunal has jurisdiction to make the orders she is seeking. She wrote “Recent case law has established a broader interpretation of section 117 of the Act, which now includes a wide range of harassing, rude and disrespectful conduct.” She referred me to a number of cases, including *York Condominium Corporation No. 188 v. Chaudhry, M.*, 2021 ONSC 7027 (CanLII), *York Condominium Corporation No. 794 v. Watson*, 2021 ONSC 6574 (CanLII), and *Niagara South Condominium Corporation No. 12 v. Kore*, ONSC 8475.

[23] I have reviewed the cases Ms. Harder cited and note that while they do not specify a subsection of s. 117 of the Act, they all relate to findings of potential harm or injury under s. 117 (1). The Tribunal does not have jurisdiction over s. 117 (1), which states:

No person shall, through an act or omission, cause a condition to exist or an activity to take place in a unit, the common elements or the assets, if any, of the corporation if the condition or the activity, as the case may be, is likely to damage the property or the assets or to cause an injury or an illness to an individual.

At paragraph 55 in *Kore*, referring to the decision in *Ottawa Carleton Standard v. Friend*, 2019 ONSC 3899, the Court noted that “injury to an individual pursuant to s. 117 of the Act includes psychological harm and verbal and written forms of abuse.”

[24] Ms. Harder submitted “The Board’s treatment of me, and their example that has permitted others to abuse me with impunity, is at the heart of this case.” While she presented evidence of what may be incidents of the corporation publicly disparaging her, I find that the Tribunal does not have jurisdiction to make a finding with respect to these alleged contraventions of the settlement agreement or to order the remedy she requests. And further, pursuant to s. 1.47 (6) of the Act, it would not be appropriate to do so. Ms. Harder may well have a valid case. However, if she wishes to pursue this, she will need to do so in a different venue. I note that while I make no finding, this does not mean that the parties should not adhere to paragraph 5 of the agreement which I assume they negotiated in good faith.

[25] Because I have made no finding with respect to the alleged breach of paragraph 5 of the settlement agreement, I am not considering Ms. Harder’s request for \$25,000 in damages.

[26] Finally, I note that Ms. Harder described the board’s treatment of her as “oppressive.” While she did not specifically raise oppression as an issue, I note that the Tribunal also has no jurisdiction to order an oppression remedy under s.

135 of the Act.

Issue 2: If MTCC 905 has breached the Settlement Agreement, what remedy should the Tribunal order?

- [27] I have found that MTCC 905 has breached paragraph 2 of the settlement agreement. Ms. Harder requested that I order a penalty of \$5,000 under s. 1.44 (1) 6 of the Act for the failure of the corporation to provide both records she requested. Section 1.44 (1) 6 of the Act provides that the Tribunal may issue a penalty if a corporation has refused to provide records without reasonable excuse. As I noted above in paragraph 15, this case is only about compliance with the terms of the December 19, 2022 settlement agreement. Paragraph 2 of the agreement relates only to the statements which accompany a response to a request for records. There is no provision to order a penalty for failing to provide the statements which accompany records.
- [28] Greg Marley, Counsel for the Respondent, submitted that Ms. Harder's application should be dismissed. With respect to the breach of paragraph 2 of the agreement, he noted that the redactions in the report provided to Ms. Harder were self-evident and the corporation's failure to produce a statement setting them out was an administrative oversight. However, he provided no reason for the corporation's failure to inform Ms. Harder of the reasons for the redaction. And, as Mr. Smith testified, Mr. Marley also submitted that the estimated and actual costs of producing the record the corporation provided were the same.
- [29] Given the relatively insignificant amount of the fee in this case, I might agree with Mr. Marley's submission if the only breach of paragraph 2 of the settlement agreement was the failure to provide a statement of the actual cost of production of the records. However, MTCC 905 also failed to provide Ms. Harder with an explanation of the reasons for redaction of the record it provided. Paragraph 2 of the settlement agreement is an extract of the requirements for accompanying statements set out in section 13.8 (1) of Ontario Regulation 48/01. Mr. Smith's apparent dismissal of a term of the agreement as being "pointless" is concerning; compliance with the regulated requirements, and therefore with the terms of paragraph 2 of the agreement, is not optional. Therefore, I am ordering MTCC 905 to comply with the terms of the agreement and to provide Ms. Harder with the two outstanding statements. I also advise MTCC 905 to fully comply with the agreement should Ms. Harder submit further Requests for Records.

B. COSTS

[32] Section 1.44 (2) of the Act states that an order for costs “shall be determined...in accordance with the rules of the Tribunal.” The cost-related rules of the Tribunal’s Rules of Practice relevant to this case are:

48.1 If a Case is not resolved by Settlement Agreement or Consent Order and a CAT Member makes a final Decision, the unsuccessful Party will be required to pay the successful Party’s CAT fees unless the CAT member decides otherwise.

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

[33] Ms. Harder requests reimbursement of the \$125 she paid in Tribunal filing fees. MTCC 905 requests \$2,500 which represents a portion of its legal costs.

[30] Ms. Harder was partially successful in this matter. I have found that MTCC 905 has breached paragraph 2 of the settlement agreement. Rule 48.1 of the Tribunal’s Rules of Practice states that the unsuccessful party will be required to pay the successful party’s Tribunal fees unless the Tribunal member finds otherwise. Ms. Harder raised a number of issues related to her Request for Records which were not properly before the Tribunal in this case. She posted over 65 documents to the CAT-ODR system, many of which were not relevant and predated the settlement agreement. As a result, both the Tribunal and MTCC 905 were required to spend additional time on this matter. For this reason, I am exercising my discretion and am not awarding the Tribunal filing fees that Ms. Harder requested.

[31] Counsel for the Respondent advised that MTCC 905 had incurred \$7,400 in legal fees with respect to this matter. He submitted that the corporation was required to retain counsel given the seriousness of Ms. Harder’s allegations with respect to paragraph 5 of the settlement agreement which he submitted were without merit. He noted that all owners at MTCC 905 will bear the legal costs the corporation incurred and asked that the Tribunal award MTCC 905 \$2,500 of its legal fees to disincentivize Ms. Harder from making unfounded claims. While I have found that the Tribunal does not have jurisdiction to address the alleged breaches of paragraph 5 of the agreement, that does not mean that Ms. Harder’s claims are unfounded. Rule 48.2 is clear that the Tribunal will generally not order a party to

reimburse another party for its legal fees. While Ms. Harder may not have understood the Tribunal's jurisdiction, I do not find that she brought her application to the Tribunal for an improper purpose. For this reason, I award MTCC 905 no costs in this matter.

C. ORDER

[32] The Tribunal Orders that:

1. Within 10 days of the date of this decision, Metropolitan Toronto Condominium Corporation No. 905 shall comply with paragraph 2 of the December 19, 2022 settlement agreement and provide the Applicant with the following statements with respect to her February 15, 2022 Request for Records:
 - a) a separate statement explaining which redactions (if any) have been made and what part of the Act or Regulations the Board is relying on (in compliance with section 13.8 (1) of O. Reg. 48/01); and
 - b) a statement of the actual cost it incurred to fulfill the request.

Mary Ann Spencer
Member, Condominium Authority Tribunal

Released on: May 31, 2023