

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: July 20, 2023

CASE: 2022-00425N

Citation: Rusu v. Metropolitan Toronto Condominium Corporation No. 1002, 2023 ONCAT 98

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

Member: Mary Ann Spencer, Member

The Applicant,

Elena Rusu

Represented by Elaine Jair, Counsel, November 30, 2022 to January 27, 2023;

Shawn Pulver, Counsel, January 30, 2023 to July 11, 2023

The Respondent,

Metropolitan Toronto Condominium Corporation No. 1002

Represented by Julia Sullivan, Agent, November 30, 2022 to May 26, 2023;

Irene Ho, Agent, May 30, 2023 to July 11, 2023

Hearing: Written Online Hearing – November 30, 2022 to July 11, 2023

REASONS FOR DECISION

A. INTRODUCTION

[1] The Applicant, Elena Rusu, is the owner of a unit of the Respondent, Metropolitan Toronto Condominium Corporation No. 1002 (“MTCC 1002”). Ms. Rusu alleges she is experiencing unreasonable odours in her unit because the occupant of an adjacent unit is violating the Respondent’s non-smoking rules. Ms. Rusu further alleges that MTCC 1002 has failed both to adequately investigate her complaints and to enforce its non-smoking rules. She asks the Tribunal to order MTCC 1002 to enforce its non-smoking rules. She also requests her costs in this matter.

[2] MTCC 1002’s position is that there is no evidence to support that the occupant of the unit adjacent to Ms. Rusu’s is smoking or vaping in her unit. It disputes the validity of Ms. Rusu’s evidence of odours in her unit and submits that it has taken and will continue to take reasonable and appropriate action to enforce its non-smoking rules. It asks the Tribunal to dismiss Ms. Rusu’s application. MTCC 1002 also requests its costs.

[3] I find that the evidence does not support a finding that Ms. Rusu is experiencing unreasonable odours in her unit or that the occupant of the adjacent unit is smoking and/or vaping in breach of MTCC 1002's non-smoking rules. Therefore, I dismiss Ms. Rusu's application without costs.

B. BACKGROUND

[4] This has been a lengthy proceeding. Ms. Rusu submitted her application to the Tribunal on July 27, 2022. The application indicated she was experiencing odours in her unit from marijuana smoking and vaping by the tenant living in an adjacent unit and she alleged that MTCC 1002 had failed to take action to enforce its non-smoking rules.

[5] The Stage 2 – Mediation in this matter concluded on November 14, 2022, and the Stage 3 – Decision proceeding began on November 30, 2022. In the Stage 2 Summary and Order, the mediator identified the issue to be addressed in this proceeding as “if the Respondent has reasonably addressed the Applicant's concern about smoke transmission?”

[6] The Stage 2 mediator noted that Ms. Rusu's case was related to case 2022-00424N, *Metropolitan Toronto Condominium Corporation No. 1002 v. Ruiz*, 2022, ONCAT 131 (CanLII). In its decision released on November 23, 2022, the Tribunal found that Nicole Ruiz, the occupant of the unit adjacent to Ms. Rusu's, was smoking cannabis in violation of MTCC 2001's non-smoking rules. It ordered Ms. Ruiz to comply with the corporation's “Rules Regarding Tobacco and Cannabis”, to immediately cease smoking cannabis in the unit, and to provide a copy of its decision to the unit owner who had not been named as a respondent in the matter.

[7] At the outset of this matter, I asked Elaine Jair, then Ms. Rusu's counsel, if the *Ruiz* decision had altered the issues to be addressed. Ms. Jair's response was that while cannabis odours had diminished, Ms. Rusu continued to experience odours from tobacco smoking and vaping, that the corporation had failed to adequately enforce its non-smoking rules with the owner of the adjacent unit, and that it was not enforcing the Tribunal's order in *Ruiz*. She further advised that Ms. Rusu was seeking damages.

[8] Witness testimony was submitted in mid-January 2023 and the parties were asked to post written cross-examination questions. On Friday January 27, 2023, Ms. Jair advised that she had posted her questions and that another counsel would be taking over carriage of the case although she did not provide a date. I advised her that I had concerns that many of her questions related to the issue of cannabis smoking which had been decided in *Ruiz* and I asked her to revise them to focus

on the issues she had identified.

- [9] On Monday January 30, 2023, counsel Shawn Pulver advised that he had taken over carriage of the case. At his request, a case conference was held on February 7, 2023, at the end of which he requested some time to consider options. When he failed to respond to multiple messages I posted over the following two weeks, on February 22, 2023, I issued a Notice of Intent to Dismiss the case on the basis that it had been abandoned. After receiving and reviewing the parties' submissions, on March 10, 2023, I posted my decision that the case should proceed.
- [10] Both parties advised me that they had been holding discussions during this period of inactivity in the proceeding. Therefore, I asked them to re-confirm the issues to be addressed in this matter. Mr. Pulver advised that the Applicant was continuing to experience air quality issues and requested an adjournment in order to work with the Respondent to resolve the matter. With the consent of the parties, the adjournment was granted. It was then extended to permit the Applicant to receive the results of air quality testing and to accommodate representatives' absences.
- [11] The hearing resumed on April 26, 2023. I advised the parties that I would allow them to disclose additional evidence, including the air quality testing results, and given the new evidence, to provide supplemental witness statements. Cross-examination questions were again submitted. However, while questions were added to those Ms. Jair had submitted in January, I noted that the questions that concerned me then had not been revised. Counsel for the Applicant requested a further case conference which, with the Respondent's consent, was held on May 8, 2023.
- [12] During the case conference, when Counsel for the Applicant advised that Ms. Rusu was experiencing health issues related to air quality, I reminded the parties that the Tribunal has no jurisdiction over section 117 (1) of the *Condominium Act, 1998* (the "Act") which addresses conditions or activities that cause an injury or an illness to an individual. I also reminded them that it has no authority to enforce its orders. Both parties again indicated a willingness to settle this matter and requested a further adjournment. I granted the adjournment. However, the parties were unable to resolve the issues, and the hearing re-commenced on May 23, 2023.

C. ISSUES & ANALYSIS

- [13] Counsel for the Applicant submits that Ms. Rusu is experiencing unreasonable odours in her unit because the occupant of the adjacent unit is vaping in that unit, notwithstanding the Tribunal's order in *Ruiz* which states:

Ms. Ruiz comply with all of MTCC 1002 Rules Regarding Tobacco and Cannabis, and that she immediately refrain from smoking cannabis in her unit.

With the exception of legacy smokers who are permitted to continue to smoke tobacco, MTCC 1002's "Rules Regarding Tobacco and Cannabis" dated June 25, 2018, prohibit all forms of smoking on the condominium property with "smoking" defined as follows:

19.2 The term "smoking" shall include, but not be limited to, the inhaling, exhaling, burning or carrying of ignited tobacco, cannabis or any other substance that contains tobacco or cannabis and the inhaling or exhaling of vapour containing tobacco or cannabis.

Counsel for the Applicant submits that MTCC 1002 is not enforcing its non-smoking rules and asks the Tribunal to order it to do so. MTCC 1002 submits that there is no evidence to support that odours are entering Ms. Rusu's unit or that Ms. Ruiz, who is not a legacy smoker, is in breach of the non-smoking rules.

[14] Ontario Regulation 179/17 ("O. Reg. 179/17") establishes the Tribunal's jurisdiction to hear disputes under Section 117 (2) of the Act. The section relevant to this dispute 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, ...

(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.

Section 26 of Ontario Regulation 48/01 ("O. Reg. 48/01") prescribes odour, smoke or vapour as a nuisance, annoyance or disruption "if it is unreasonable." Neither the Act nor O. Reg 48/01 defines "nuisance, annoyance or disruption". In its decision in *Carleton Condominium Corporation No.132 v Evans*, 2022 ONCAT 97 (CanLII), summarizing *Antrim Truck Centre Ltd. V. Ontario (Transportation)* 2013 SSC 13 (CanLII), the Tribunal wrote at paragraph 20:

... it is instructive to consider the well-established jurisprudence on the law of nuisance. To support a claim of nuisance, the interference must be substantial and unreasonable; the requirement for substantial interference can incorporate a component of frequency and duration of the interference. A 'trivial' interference will not suffice to support a claim in nuisance.

Similarly, minor or occasional interference is not sufficient to support a claim of annoyance or disruption. That an individual finds an odour to be annoying or

disruptive does not necessarily mean that the odour is unreasonable. Individuals' perception of odours may be a subjective response. Factors such as the time incidents occur, how often they occur, and how long they last must be considered in determining whether the odours, smoke or vapour an individual experiences are unreasonable.

[15] The underlying issue to be addressed in this matter is whether Ms. Rusu is experiencing unreasonable odours, smoke or vapour in her unit. If it is found that she is, then the issue to be addressed is what order the Tribunal should make. The final issue to be addressed is whether costs should be awarded in this matter.

[16] I note that Counsel for the Applicant submitted that Ms. Rusu was also subject to "other chemical toxins" infiltrating her unit. The incident log submitted as evidence by Ms. Rusu indicates that on a number of occasions she recorded "very toxic" but odourless air and the health symptoms she experienced from that air. However, the Tribunal does not have jurisdiction to address air quality other than unreasonable odours, smoke or vapour. Further, section 1. (3) of Ontario Regulation 179/17 states that the Tribunal's jurisdiction over s. 117 (2) of the Act does not apply if a dispute also relates to s. 117 (1) of the Act. Therefore, I only consider the evidence relating to odours, smoke and vapour in this decision and not any evidence relating to "other chemical toxins" or their potential adverse health effects.

Issue 1: Is Ms. Rusu experiencing unreasonable odours, smoke or vapour in her unit?

[17] Ms. Rusu testified that she has lived in her unit at MTCC 1002 since 1992. She began to experience what she described as "odours, fumes and other chemical toxins" in mid-August, 2018. She testified that she has continued to experience odours after the *Ruiz* decision was issued which she attributes to the unit Ms. Ruiz occupies:

This could be from the vaping or from their use of a copious amount of air freshener. I believe that since the ruling focused solely on marijuana, the tenants are circumventing the order by turning to vaping and by spraying down their unit with a significant amount of air freshener. All of this just perpetuates and worsens the Odours that I am experiencing in my Unit.

She testified that she experiences odours intermittently and frequently at various times of the day, including the middle of the night. She further testified that the odours "persist for hours." To support her testimony, she submitted a handwritten log of odour/smoke incidents she recorded from November 22, 2022 to December

5, 2022. The log reports multiple incidents at various times on each of those days and records, among others, “strong smoking odour”, “marijuana”, and “garlic.” As noted above in paragraph 16, it also records a number of incidents of “toxic air” but notes “no odour.”

- [18] Three witnesses testified on behalf of Ms. Rusu. Her daughter-in-law Ildiko Rusu testified that she smelled cigarette-like smoke while visiting in August, 2018 and has not visited subsequently based on Ms. Rusu’s advice that the odours continue. Lucilia Ventura, a neighbour of Ms. Rusu’s, testified that, beginning in 2020, she could smell a “skunk-like” odour in her front entranceway and in the corridor. Tishawna Simon, also a neighbour of Ms. Rusu’s, testified that she filed complaints with MTCC 1002 about the smell of cannabis in the corridor in March, 2022. Ms. Simon, whose testimony is dated January 17, 2023, further testified that she also periodically detected a sweet smell she believed to be from vaping and that, in early December, 2022, she had entered Ms. Rusu’s unit and the smell was “quite strong.”
- [19] To support her claim, Ms. Rusu submitted a report from Verify Air Quality Testing which conducted a comprehensive air quality assessment in her unit on March 23, 2023. I asked Ms. Rusu to provide me with the credentials of the firm and I accept that Verify is qualified to conduct air quality sampling. Its report states that there was a “noticeable sweet odour” in the corridor when Frank Haverkate, the firm’s principal, arrived, and that there was a “slight sweet odour” in the living room and office but not in the master bedroom of Ms. Rusu’s unit. The unit’s air was tested for the presence of a broad range of Volatile Organic Chemicals (“VOC’s”) and the results were evaluated against what the report indicates are “minimum odour thresholds from references.” The results indicate that the tested ethanol level exceeded its odour threshold. Ms. Rusu’s position is that this result substantiates that Ms. Ruiz is vaping in the adjacent unit.
- [20] I do not doubt that Ms. Rusu experienced odours and/or smoke in her unit in the past. MTCC 1002 submitted a detailed chronological history of its interaction with Ms. Rusu about her complaints. While that history indicates that corporation staff could not verify the presence of odours the majority of times they responded to investigate her complaints, it does indicate that a security guard, hired specifically by the corporation to monitor the area surrounding Ms. Rusu’s unit and to respond if she advised them of odours, did confirm the presence of “medicinal” and “burning” odours in her unit in November, 2018. Further, part of the evidence set out in the *Ruiz* decision is that Ms. Ruiz claimed that she used cannabis in cooking which may well explain the incidents of “marijuana” and “garlic” odours Ms. Rusu recorded in her log. For example, the entry at 9:05 p.m. on November 27, 2022,

reads “VERY VERY STRONG marij. smoking odour and on top of that strong GARLIC! Odour.” However, the evidence before me does not persuade me that Ms. Rusu is currently experiencing odours, smoke or vapour that are unreasonable or, as Ms. Rusu alleges, that Ms. Ruiz is vaping in her unit in breach of MTCC 1002’s non-smoking rules.

[21] Julia Sullivan, MTCC 1002’s condominium manager until May 26, 2023, testified that she sent Ms. Ruiz a letter enclosing the Tribunal’s decision in *Ruiz* on December 1, 2022. While the date Ms. Ruiz received this letter is unknown, the fact that Ms. Rusu’s log does not extend beyond December 5, 2022 significantly reduces its evidentiary value as proof that Ms. Ruiz continues to smoke and/or vape causing odour ingress into Ms. Rusu’s unit. Because the original testimony in this matter was submitted in January, 2023, I gave the parties the opportunity to update their witness testimony when this hearing resumed on April 26, 2023. Ms. Rusu did submit a supplemental witness statement dated May 2, 2023, which indicated she had attached a log of what she “continued to experience on nearly a daily basis.” However, the log she submitted was a second copy of the log ending December 5, 2022. I questioned whether this submission of the same log was intended and Ms. Rusu’s counsel confirmed that it was.

[22] Similarly, other than Ms. Simon, Ms. Rusu’s witnesses address odours detected before the *Ruiz* decision was issued. Ms. Simon’s testimony does indicate she “periodically” detected a sweet smell she believed to be from vaping in the corridor but does not specify when. Her testimony only confirms the odour was detectable in Ms. Rusu’s unit “early in December” but I cannot determine whether this was before or after Ms. Ruiz received the Tribunal’s prior decision.

[23] MTCC 1002’s evidence is that it has not received complaints about odours since the *Ruiz* decision was issued. Although it is somewhat vague, Ms. Sullivan’s written testimony dated January 13, 2023, states that the corporation had not received complaints from Ms. Rusu “for some time.” She also testified that she had confirmed with another complainant that the odours had ceased. While it is understandable that Ms. Rusu may not have complained to the corporation while this hearing was in progress, Ms. Sullivan’s testimony is supported by Stephen Gray, the president of MTCC 1002’s board of directors. Mr. Gray testified that since the release of the *Ruiz* decision, there have been no complaints about odours. He also stated that the corporation has instructed its cleaning and maintenance staff to be alert for suspicious odours on Ms. Rusu’s floor but none have been reported.

[24] The only independent evidence before me of the presence of any odours in Ms.

Rusu's unit since the *Ruiz* decision is the March 23, 2023 Verify report. Verify placed an air testing monitor in Ms. Rusu's unit over a 36-hour period and instructed Ms. Rusu to operate it when she detected odours. Testing was performed for 46 different VOC's and the results were compared to their odour threshold, that is, the level at which their odour can be detected. The only VOC which testing indicated exceeded its odour threshold was ethanol, which, at levels of 204 and 208 micrograms per cubic metre, exceeded the threshold of 170 micrograms per cubic metre. The report does not explain the significance of either an odour threshold or the significance of the finding in relation to the threshold.

- [25] Counsel for the Applicant submits that the Verify report sets out "an unusually high level of ethanol affecting the unit." However, the report does not state that the detected level is unusually high. Rather, its executive summary states "there appeared to be elevated levels of ethanol at 204 to 28 [*sic*] micrograms per cubic meter..." The report then states "Ethanol can be a component of vaping or e-cigarettes. This would be considered a nuisance odour and could affect sensitive individuals." Mr. Haverkate did not testify at this hearing and therefore I have no explanation of this statement.
- [26] Further, while the Verify report includes Mr. Haverkate's observations of a "noticeable sweet smell" in the corridor and a "slight sweet smell" in two rooms in Ms. Rusu's unit, suggesting that the former is responsible for the latter, it does not indicate either a likely or a potential source of that odour. The report does not state that the smell could be ethanol which Mr. Haverkate indicated can be a component of vaping. I note that in the "Sample Analysis Report" prepared by AirZone, the laboratory which performed the air quality sample analysis, the "odour characteristics" of ethanol are described as "vinous/alcohol" not as "sweet", the descriptor for a number of the other tested substances.
- [27] The report does explain that VOCs can be found in a variety of building and other materials including "paints, solvents, dry cleaning, pesticides, glues, mastics, scented candles, air fresheners, and household cleaners." And, while the report states that "numerous government agencies in the U.S. and Canada list ethanol as an additive in e-cigarettes", it provides no specific references. I do note that Verify also conducted a surface wipe test for nicotine in Ms. Rusu's unit. The report states "the result was negative" but does not indicate how or if this result might be relevant to vaping or e-cigarettes.
- [28] Ms. Rusu suggested that the odours she was experiencing could be from Ms. Ruiz' "copious use of air freshener" which the Verify report does note is a potential source of ethanol. As part of his testimony disputing that vaping was occurring, Mr.

Gray stated that he did not see how odours from air freshener “could be a problem.” He is incorrect; an unreasonable odour can be from any source. However, in this case, the Verify report draws no nexus between the ethanol level in Ms. Rusu’s unit and the smell detected in the corridor. Nor does it suggest any likely source for either. It only states that ethanol “can” be a by-product of vaping. Nor is there any indication of what control measures were taken, even if only by observation, to address the possibility that the source of the detected ethanol odour was within Ms. Rusu’s own unit.

- [29] The Applicant submits that MTCC 1002 accepts that the Verify report establishes that the ethanol level in her unit is likely due to vaping because, after receiving a copy of the Verify report, Ms. Sullivan, on April 23, 2023, sent a notice to residents on Ms. Rusu’s floor and those directly above and below it requesting they cease vaping in their units. The notice states that air quality testing detected an elevated level of ethanol in the unit of a resident who was experiencing health issues. It then states, “Ethanol is a by-product of vaping/e-cigarettes, and the company’s report suggested that this is the likely cause of the air quality-related health issues.” MTCC 1002 disputes that this notice indicates its acceptance of Verify’s report. It is Mr. Gray’s testimony that the corporation sent out the notice to provide reassurance to Ms. Rusu that it was responding to her concerns. In fact, Verify’s report only states that ethanol can be a component of vaping or e-cigarettes and it does not state that either ethanol or vaping is the likely cause of Ms. Rusu’s issues. Further, whether MTCC 1002 does or does not accept Verify’s report, which I note Mr. Gray challenges in his testimony, is not relevant to my decision about the presence of odours which I make based on the submitted evidence.
- [30] I find that Verify’s testing results do not establish either that the detected odour level of ethanol was unreasonable or that its source was from vaping or in fact from any source outside the unit itself. I recognize that air quality test results are a snapshot of air quality at a point in time. However, there is no independent evidence dating after December 5, 2022, to corroborate Ms. Rusu’s testimony that odours are infiltrating her unit. Ms. Rusu herself provided no updated evidence in the form of a log of her observations to support her testimony that the odours are frequent. For these reasons, I find the evidence does not support that Ms. Rusu is experiencing unreasonable odours in her unit, whether from vaping or any other source, and therefore I must dismiss her application.
- [31] My conclusion that the evidence does not support a finding of unreasonable odours in Ms. Rusu’s unit does not necessarily mean that there are no odours. Individuals’ perception of odours will vary and it is possible that Ms. Rusu is particularly sensitive, although I note she did not suggest this is the case. As the

Verify report states, ethanol at the detected level “could affect a sensitive individual.” Similarly, while I did not consider it in making my decision about the current situation in Ms. Rusu’s unit, MTCC 1002 submitted a report it received from Clinic Air which conducted air quality testing in Ms. Rusu’s unit in October, 2020. The report states that the results indicated no substantial levels of VOC’s that “correlate at all to her [Ms. Rusu’s] findings.” It then notes that it was possible that Ms. Rusu was sensitive to odours and did notice them. However, in the absence of any submission by an applicant that a medical condition might require some form of accommodation, an individual’s particular sensitivity is not a factor to be considered in determining what constitutes unreasonable odour, smoke, or vapour.

[32] Because I have found that the evidence does not support the existence of unreasonable odours, smoke or vapour in Ms. Rusu’s unit or, as Ms. Rusu alleges, that Ms. Ruiz is vaping in breach of MTCC 1002’s non-smoking rules, there is no need to address the second issue in this matter, that is, what order the Tribunal should make. The order, as noted above, will be to dismiss the application.

Issue 3: Should the Tribunal award costs in this matter?

[33] 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.

[34] Both Ms. Rusu and MTCC 1002 requested their costs in this matter. Ms. Rusu was not successful and therefore is not entitled to reimbursement of her Tribunal fees. Because she was unsuccessful, I am also not considering her request for reimbursement of her legal fees.

[35] MTCC 1002 requested costs of \$12,226.98, comprised of \$10,628.51 in legal fees, \$1,412.60 paid to Clinic Air to balance the air on Ms. Rusu’s floor and \$676.87 paid to perform air quality testing in Ms. Rusu’s unit.

[36] MTCC 1002 was not represented by legal counsel in this matter. The invoices submitted in support of its request for legal fees indicate that counsel did not become involved until June 16, 2023, when it appears that MTCC 1002 sought legal assistance in the preparation of its final submissions in this matter. That is not sufficient reason to make exception to the Tribunal's Rule 48.2.

[37] Clinic Air's air balancing invoice is dated December 12, 2018. The air quality testing invoice is dated October 6, 2020. Both are costs which MTCC 1002 voluntarily incurred to address and/or investigate Ms. Rusu's complaints and are not directly related to the central issue in this proceeding which was the alleged failure of MTCC 1002 to enforce its non-smoking rules after the *Ruiz* decision was issued.

[38] For the reasons set out in the preceding two paragraphs, I award no costs to MTCC 1002.

D. ORDER

[39] The Tribunal Orders that:

1. Elena Rusu's application is dismissed without costs.

Mary Ann Spencer
Member, Condominium Authority Tribunal