CONDOMINIUM AUTHORITY TRIBUNAL

DATE: October 24, 2023
CASE: 2023-00429SA
Citation: Petersen v. Durham Condominium Corporation No. 139, 2023 ONCAT 154

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

Member: Michael Clifton, Vice-Chair

The Applicant,
Darla Petersen
Self-Represented

The Respondent,
Durham Condominium Corporation No. 139
Wendy Wright, Agent

Hearing: Written Online Hearing – August 16, 2023, to September 26, 2023

REASONS FOR DECISION

[1] The Applicant filed this case with the Tribunal under subsection 1.47 (3) of the *Condominium Act, 1998* (the "Act") for enforcement of provisions of a settlement agreement entered into between the Applicant and the Respondent in a prior Tribunal case on June 12, 2023 (the "Settlement Agreement"). The proceedings in this current case commenced on August 16, 2023.

[2] Although I have determined that the Respondent did fail to comply with the Settlement Agreement, for the reasons set out in this decision I find that the Tribunal is without authority to make the order for compliance that the Applicant requests. As a result, I close this case without making any order for compliance; however, I do order that the Applicant receive reimbursement from the Respondent of her costs of filing this case.

BACKGROUND

[3] The original case between the parties was CAT case number 2023-00186R. This case was closed in Stage 2 – Mediation when the parties entered into the Settlement Agreement.

[4] The dispute between the parties arose when the Applicant, a former board member of the Respondent, noted that various substantial expenses of the condominium over the course of about a year were not shown in board meeting minutes as having been approved by board resolutions as required by the Act.

[5] As the Applicant explained during these proceedings, the usual practice of the Respondent has been that decisions relating to expenditures would be shown in board meeting minutes, other than those which the Respondent's condominium management provider was entitled under their contract to make without board approval. She stated that this practice appears not to have been followed at least between October 2021 and November 2022, stating,

> I am guessing there were probably a couple dozen financial decisions made and not recorded during the months in question. Those missing resolutions are what [need] to be recorded in the minutes.

[6] The Applicant asked the Respondent's board about these apparent omissions on November 13, 2022, providing nine examples of the kind of expenses in question. She received no response until February 2023, when the Respondent provided her with evidence of a board resolution passed in December 2022 ratifying just the nine prior expenses that had been set out as examples in her inquiry.

[7] The Applicant replied to the Respondent, stating that the resolution did not provide her with the information she desired, including "how, when, and by whom the spending decisions were made." She received no reply, and therefore brought her original Tribunal application. (I make note here of the fact that unit owners do not have an entitlement to information under section 55 of the Act, but only to examine records. Therefore, the Applicant's complaint that the Respondent's original resolution did not provide the information she wanted is not relevant to my analysis in this case.)

[8] As noted, that case settled by the parties entering into the Settlement Agreement. In it, the parties agreed that,

> 2. At the next monthly Board meeting in July of 2023, the Respondent agrees to declare and ratify the approval of all missing financial decisions/transactions over $2,000.00 that were not adequately documented in the Board meeting minutes between September 2021 and December 2022. The Respondents will extract these missing transactions/decisions from the email exchanges used to make these decisions and the following information will be minuted at the meeting, as part of the declaration and ratification:

a. The date of the motion

b. Who made the motion

c. The seconder's name

d. Who approved the decision

e. The contractor chosen and amount of the contract

The case was thus closed.

[9] It is critical to note what the parties did and did not agree to. Their agreement was that the decisions relating to financial expenditures needed to be "declared and ratified" at a future meeting of the board, and not that the former minutes needed to be corrected to show which decisions were made in which meetings. The reason for this, as the evidence presented in this case makes clear, is that it was not that such decisions had been made in board meetings and not recorded in the minutes of those meetings, but that such decisions had only been made by email correspondence between board members and the condominium manager outside of any board meeting at all.

[10] It is also evident that the Applicant was likely aware of these facts prior to commencing case number 2023-00186R, in so far, at least, that they were evident from the Respondent's December 2022 resolution. In any event, it is certain that she knew the facts of the matter when the parties entered into the Settlement Agreement.

[11] On July 18, 2023, after the original case was closed, the Respondent's condominium manager sent an email to the Applicant with an attachment listing the following information relating to several transactions:

a. The subject matter of the transaction
b. The contractor who performed the work
c. The cost of the work
d. The dates on which individual board members (named) had provided their approval by email.

For some additional transactions, each relating to window and carpet cleaning, the manager admitted they could find no information in emails or minutes relating to them. No amounts or contractors are identified in her email in relation to these transactions.

[12] Notably, the Respondent provided no resolution of the board declaring and

ratifying such expenditures, as required by the Settlement Agreement. Further, the Applicant advises that the expenditures covered by the information given to her by the condominium manager did not cover all the transactions of concern from the period in question.

[13] The Applicant replied to the manager on July 19, 2023, that, “In my opinion, the attachment to your email … does not meet the terms of the settlement agreement for CAT case 2023-00186R... Please advise how you wish that I should proceed.”

[14] Receiving no reply, the Applicant emailed again on August 1. On August 2, the manager responded that, “due to the absence of board members, a response to your email is not feasible at this time.” The Applicant then filed this case under subsection 1.47 (3) of the Act alleging that the Respondent had contravened the Settlement Agreement by failing to satisfy the terms of section 2, quoted above.

ANALYSIS

[15] Upon review of the facts in this case, I find that the Respondent has not complied with the requirements of section 2 of the Settlement Agreement, as the Applicant asserted. I am surprised that the Respondent seems – based on its limited statements in this case – not to have recognized this for itself.

[16] The requirements of section 2 of the Settlement Agreement are straightforward and clear, as is the Respondent’s failure to fulfill them. Simply put, the Respondent did not pass the required resolution to declare and ratify the previously unrecorded decisions of the board relating to financial transactions made between September 2021 and December 2022.

[17] However, despite this determination, I also find that,

1. The requested rectification (i.e., an order that the Respondent comply with section 2 of the Settlement Agreement),

2. the subject matter of that provision of the Settlement Agreement, and

3. the underlying issue that the Applicant brought before the Tribunal both in the original case and this one,

are not within the Tribunal’s jurisdiction and therefore are not capable of being ordered or enforced by it.

[18] I have no doubt that this decision will disappoint and frustrate the Applicant, as well as probably provide some confusion for the Respondent. After all, it appears

that the parties participated in the original case and entered into the Settlement Agreement, which ended it, in good faith, only now to be told that that agreement is not enforceable by this Tribunal. It is appropriate, therefore, and necessary that I clearly explain my reasons.

Not a Records Case

[19] When the Applicant submitted her original case to the Tribunal, it was submitted as a case relating to condominium records falling within the Tribunal's jurisdiction under paragraph 1 (1) (a) of Ontario Regulation 179/17. On the surface, it does appear that way, with the Applicant's primary concern being the Respondent's apparent failure to keep adequate records as required under subsection 55 (1) of the Act.

[20] I do not speculate about what sort of dialogue might have occurred during Stages 1 and 2 of that earlier case. I am confident that the focus then was on seeking a positive resolution of the parties' dispute (which they did find, and which would have been entirely successful if the Respondent had complied with its obligations under the Settlement Agreement), and that they likely had simply not yet consciously considered possible jurisdictional concerns.

[21] Nevertheless, while it appears on its face that the case could be about adequacy of records, the evidence and submissions of the parties clearly demonstrate that, in fact, this case is about the adequacy, or inadequacy as it were, of the Respondent's corporate governance practices during the period in question.

[22] As noted above, the issue of concern to the Applicant was not ultimately that there were deficiencies in the minutes of the Respondent's board meetings that could be corrected by revisions being made to them, but that there were decisions acted upon by the corporation that had not been made in any meeting at all, contrary to the Act (i.e., the requirement set out plainly in subsection 32 (1) of the Act, that "the board of a corporation shall not transact any business of the corporation except at a meeting of directors at which a quorum of the board is present"). It was a correction to this procedural deficiency that the Applicant wanted, and that the Settlement Agreement sought to provide.

[23] Section 2 of the Settlement Agreement required the board to pass a resolution that would declare and ratify the unrecorded financial transactions of the Respondent made between September 2021 and December 2022. Ratification is the act of granting formal approval to an earlier decision that had only been informally made. The Applicant explained that in times past when she had been a director of the condominium and any financial decisions had been approved by the directors via

email rather than at a meeting of the board, they would then diligently ensure they were "recorded and ratified at the very next board meeting." It is this process – the act of later ratifying in a board meeting the decisions that were made outside of any board meeting – that she desired, and that the Settlement Agreement required, in relation to the transactions in question.

[24] Therefore, in this case, it was not ever (or at least, clearly, by the time that the Settlement Agreement was entered into) the records themselves that were considered deficient, nor was their adequacy substantively in question. In fact, it can be stated that it was the accuracy of the Respondent's board meeting minutes that principally brought to light, and to the Applicant's attention, the deficiency in the Respondent's corporate procedures.

[25] However, such procedures – such as the manner in which decisions are voted upon and meetings are held – are not presently within the Tribunal's jurisdiction and therefore cannot be the subject matter of its orders.

No Authority Despite Agreement

[26] It might seem that the fact that the Settlement Agreement was made should in and of itself grant authority to the Tribunal to enforce it. I do not conclude that this is so.

[27] Subsection 1.47 (6) of the Act provides that, "If, on an application under subsection (3), the Tribunal determines that a party has contravened the settlement, the Tribunal may make an order that it considers appropriate to remedy the contravention." With this broad language and given that I have found that the Respondent's contravention of the Settlement Agreement is obvious on its face, it is not unreasonable to infer that the Tribunal ought to be able to order the Respondent's corrective compliance as requested by the Applicant. Nowhere in section 1.47 of the Act does it expressly state that the authority to make an order rectifying a contravention of a settlement agreement is dependent on the terms or subject matter of the agreement in question being within the Tribunal's jurisdiction. However, what is not expressly stated can still be implicitly required.

[28] It should not be the case that parties to a Tribunal proceeding can simply make any agreement they wish as part of their settlement of that case and expect that the Tribunal can enforce it later on. The Tribunal has a limited jurisdiction established by statute. It cannot exceed that jurisdiction. If, for example, parties were to agree to the registration of a lien, or eviction of an individual from their home, how could the Tribunal be entitled to order compliance with such provisions, when it could not address or order either of them if they had been requested in a new application? (See section 1.36 of the Act for the Tribunal's clear restriction

against dealing with those particular issues.) An interpretation of subsection 1.47 (6) of the Act that allows the Tribunal to enforce provisions of a settlement agreement regardless of whether they would otherwise fall within the Tribunal's jurisdiction seems to result in a likely unintended (by the legislature) potential override of the legislated limitations placed on that jurisdiction.

[29] Therefore, I conclude that, despite the Respondent's contravention of section 2 of the Settlement Agreement, I cannot make an order requiring compliance since its subject matter and requirements in question are presently outside of the jurisdiction of this Tribunal.

[30] I make note that in the interim, while this case was proceeding, the Applicant was re-elected to the Respondent's board. Thus, the Applicant may now be in a position to better help the Respondent rectify its non-compliance with the Settlement Agreement and her underlying concerns relating to appropriate governance practices.

COSTS

[31] The Applicant in this case has obtained a mixed result. First, there is a finding that the Respondent has contravened the Settlement Agreement, such that the Applicant justifiably sought a remedy under section 1.47 of the Act. Second, however, is my finding that the remedy sought is unavailable due to the limitations of the Tribunal's jurisdiction.

[32] I do not think the second finding would have been of such an obvious nature to the parties that the Applicant should have anticipated it or that it overrides the Applicant's justification for bringing the case. However, I do find that the Respondent ought to have been able to independently recognize and take steps to correct its contravention of the Settlement Agreement without the necessity of this case being brought by the Applicant. Therefore, pursuant to Rule 48.1 of the Tribunal's Rules of Practice, I will order that the Applicant be reimbursed her Tribunal filing fee by the Respondent.

ORDER

[33] The Tribunal orders that:

1. The Respondent shall reimburse the Applicant her Tribunal filing fee for this case in the amount of $125 within 30 days of the date on which this order is issued.

Michael Clifton
Vice-Chair, Condominium Authority Tribunal

Released on: October 24, 2023