CONDOMINIUM AUTHORITY TRIBUNAL

DATE: July 12, 2024
CASE: 2024-00184N
Citation: Sievewright v. Toronto Standard Condominium Corporation No. 1793 et al., 2024 ONCAT 104

Order under Rule 19.1 of the Condominium Authority Tribunal's Rules of Practice

Member: Patricia McQuaid, Vice-Chair

The Applicant,
Karen Sievewright
Self-represented

The Respondents,
Toronto Standard Condominium Corporation No. 1793
Represented by Bree Pierce, Counsel

Toronto Standard Condominium Corporation No. 1808
Represented by Bree Pierce, Counsel

MOTION DECISION AND ORDER

[1] The Applicant, Karen Sievewright (the "Applicant"), is a unit owner in the Respondent Toronto Standard Condominium Corporation No. 1793 which shares facilities with the Respondent Toronto Standard Condominium Corporation No. 1808 (collectively, the "Respondents"). The Applicant filed this case with the Tribunal on March 22, 2024, alleging that the noise and vibration from the operation of the garage doors infiltrates her unit "virtually every few minutes of every day, lasting about 15 seconds per occasion". She submits that the noise and vibration is unreasonable and is a nuisance, annoyance, and disruption contrary to section 117 (2) (a) of the *Condominium Act, 1998* (the "Act") and the Respondents' governing documents.

[2] At the outset of this hearing, the Respondents brought a motion to dismiss the case pursuant to Rule 19.1 of the Tribunal's Rules of Practice on two grounds: first, that the exact issue between the parties was already determined by the Tribunal in a previous case between the parties and therefore cannot be re-litigated (the legal principle of res judicata), and second, that the Tribunal has no legal power to hear or decide this case due to issues related to the Tribunal's

jurisdiction.

[3] As explained below, after considering the submissions from the parties, I have decided to grant the Respondents' motion. The application is dismissed. I will address each of the grounds for dismissal raised by the Respondents.

Should this case be dismissed on the basis of res judicata?

[4] In the previous Tribunal case,[1] the Applicant alleged that she was experiencing unreasonable noise from the grate covering the drain at the Respondents' garage door. The Tribunal, in its order dated May 12, 2023, dismissed the case relating to the "garage door and its associated components". Though the Tribunal did, as the Respondents submit, frame the issue as "is there an unreasonable noise coming from the garage door and its associated components when operating", a careful reading of that decision shows that the Tribunal was specifically addressing the noise issue allegedly arising from the broken grate.[2] It was this fact that led the Tribunal to conclude that the issue related to the Respondents' repair and maintenance obligations under sections 89 and 90 of the Act and, therefore, was not within the Tribunal's jurisdiction to decide.

[5] I do not accept the Respondents' submission that the previous Tribunal decision encompassed the entire garage door; that is an overly broad reading of that decision. Though the allegation of unreasonable noise is the same, the alleged cause is not. In December 2023, the Respondents replaced the garage door mechanism. The Applicant's complaint centers on its operation. The Applicant is not asserting the exact same issue and I do not dismiss her case on the basis of res judicata. I do, however, find that the jurisdictional issue, which is the second ground for the Respondents' motion, means that the case cannot be decided by the Tribunal.

Does the Tribunal have jurisdiction to decide the case?

[6] The Applicant alleges that the operation of the garage door causes noise and vibration that infiltrates her unit every few minutes of everyday, presumably as residents regularly come and go from the underground garage that serves the Respondents. The Applicant asserts that the garage door mechanism being relatively new means that this cannot be related to a repair and maintenance issue but rather that the dispute falls within the parameters of section 117 (2) of the Act which states:

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[1] *Sievewright v. Toronto Standard Condominium Corporation No. 1793 et al.*, 2023 ONCAT 68 (CanLII)
[2] See paragraph 16 of the decision.

> (2) 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.

[7] Despite relying on virtually the same facts and allegations about the noise and vibration from the operation of the garage doors which were considered by the Tribunal in *Kimel v. Toronto Standard Condominium Corporation No. 2026* ("Kimel") [3], the Applicant still asserts that this case falls within section 117 (2) of the Act.[4] Yet in Kimel, the Tribunal stated in paragraph 12 as follows:

> In my view, it over-extends the intended scope of the term "activity" in subsection 117 (2) of the Act to refer to any regular use of the common elements by residents, placing emphasis on the word "regular" to indicate just the intended and ordinary use of the common elements in question. Where such regular use of the common elements results in unreasonable noise and vibration, or any other unreasonable effects upon the comfort, use, and enjoyment of the property by others, I conclude that the cause of the unreasonableness should not be attributed to the activity (nor its permission) but relates in some way to its context or the condition of the property in, on, or to which it is done. Conditions (as opposed to activities) that give rise to nuisances, annoyances, or disruptions, are not the subject matter of subsection 117 (2) of the Act.

The reasoning of Kimel is persuasive on this point. The Applicant is not alleging anything other than noise or vibration resulting from the regular use of the garage door nor, as noted above, does she allege that the garage door mechanism is in need of repair or maintenance. As in Kimel, I conclude that the dispute does not fall within the parameters of section 117 (2) of the Act.

[8] More consistent with the reasoning in Kimel, the Applicant also relies on section 12 (a) of the Respondents' declaration in conjunction with section 1 (1) (d) (iii.2) of Ontario Regulation 179/17 ("O. Reg. 179/17") to assert that the matter is within the Tribunal's jurisdiction (as was determined, on its facts, to be the case in Kimel).

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[3] 2023 ONCAT 186 (CanLII),

[4] I note that the Applicant's claims in her case description are exact restatements of the claims made by the applicant in Kimel, without variation, it seems, for the purpose of advancing her case here.

Section 12 (a) in the declaration states:

> Each owner may make reasonable use of and has the right to occupy and enjoy the whole or any part of the common elements, and each Owner has the right to make reasonable use of, and has the right to enjoy any exclusive use common element area which has been designated to his Unit in Schedule "F", subject to any conditions or restrictions set out in the Act, the Declaration, the Corporation's by-laws …, and the Rules ….However, no condition shall be permitted to exist and no activity shall be carried on in the common elements that is likely to damage the property or that will unreasonably interfere with the use or enjoyment by other Owners of the common elements and the other Units, that results in the cancellation or threatened cancellation of any policy of insurance referred to in the Declaration ….

Section 1 (1) (d) (iii.2) of O. Reg. 179/17 gives the Tribunal jurisdiction over provisions in a corporation's governing documents that prohibit, restrict or otherwise govern any other nuisance, annoyance or disruption to an individual in a unit, the common elements or the assets, if any, of the corporation.

[9] The declaration provision referenced in Kimel, as quoted in that decision, contains language that aligns with section 12 (a) of the Respondents' declaration though it is not evident from the quoted portion in Kimel that they are fully identical. In any event, while in Kimel the Tribunal found that the particular wording in the declaration had sufficient breadth to impose upon the respondent condominium a duty to not allow a condition that unreasonably interferes with the use and enjoyment of their units by any owners, I do not conclude the same in this case for the following reasons.

[10] I note that section 12 (a) is a single paragraph that requires reading its statements not as distinct, but closely related provisions. The intention and scope of the paragraph is set out in its first three words: "Each Owner may …",The subsequent statements then serve to define the permissions granted, the conditions or provisions that apply to them, including the provision that "no condition shall be permitted to exist and no activity shall be carried on in the common elements that is likely to damage the property or that will unreasonably interfere with the use or enjoyment by other Owners of the common elements and the other Units …".

[11] I find that the wording of section 12 (a) specifically relates to 'owners' and their obligations to make reasonable use of the common elements and their exclusive use common elements, including that such owners may not allow a condition to exist or carry on an activity that will unreasonably interfere with the use or enjoyment by other owners of the common elements and the other units. I conclude therefore that these obligations apply to owners and not the

corporation.[5] Here, there is no allegation that owners are permitting a condition to exist. As noted above, owners (or residents) are merely making regular and ordinary use of the underground garage. As such, the provision in the Respondents' declaration does not bring the dispute within the Tribunal's jurisdiction.

A. CONCLUSION

[12] Though I am dismissing the case because the issue does not fall within the Tribunal's jurisdiction, I am sympathetic to the Applicant's circumstances. The crux of the matter is that her unit is in close proximity to the entrance to the underground parking garage. The operation of the garage doors is not silent; it creates a noise which is vexing for the Applicant, even within three months of installation of a new garage door mechanism. I urge the parties to work together to determine if there is a viable response to the Applicant's complaints, rather than to turn once more to the Tribunal.

[13] I do wish to address one other point raised by the Respondents in their submission, related to the alleged noise – that the operation of the garage door is compliant with City of Toronto by-laws relating to noise. Whether or not there may be unreasonable noise as per section 117 (2) (a) of the Act is not determined by reference to a by-law enforcement officer's conclusion. I placed no weight on the Respondents' submissions on this point.

[14] The Respondents' motion is successful. They have asked that they be given the opportunity to make submissions on costs. I will allow them to do so, and for the Applicant to respond. The Respondents shall advise within two days (by July 16, 2024) of issuance of this order whether they still wish to pursue their costs. If they do, I will then set a short time frame for those submissions to be made.

B. ORDER

[15] Pursuant to Rule 19 of the Tribunal's Rules of Practice, the Tribunal grants the Respondents' motion and orders that this application be dismissed. The issue of costs remains to be decided, pending submissions from the parties.

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[5] I note that the Applicant did raise a somewhat similar point in her previous case, and at paragraph 11 of that decision, the Tribunal also found that the provision did not apply to the corporation. While this does make the res judicata argument more persuasive, the fact that Kimel was decided subsequently may have caused the Applicant to believe that this issue had not been definitively determined.

Patricia McQuaid
Vice-Chair, Condominium Authority Tribunal

Released on: July 12, 2024