CONDOMINIUM AUTHORITY TRIBUNAL

DATE: September 13, 2024
CASE: 2024-00242N
Citation: Toronto Standard Condominium Corporation No. 2174 v. Mirza et al., 2024 ONCAT 142

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

Member: Brian Cook, Member

The Applicant,
Toronto Standard Condominium Corporation No. 2174
Represented by Jake Fine, Counsel

The Respondents
Izhar Mirza
Not participating

Shehla Mirza
Not participating

Maha Mirza
Not participating

Hearing: Written Online Hearing – June 13, 2024 to August 12, 2024

REASONS FOR DECISION

A. INTRODUCTION

[1] In this Application, Toronto Standard Condominium Corporation No. 2174 ("TSCC 2174") seeks an order requiring the Respondents to stop allowing tobacco or cannabis smoke to migrate from their unit to the unit above theirs. TSCC 2174 also seeks an order that the Respondents stop storing items on the exclusive-use common element patio.

[2] The owners of the unit are Izhar Mirza and Shehla Mirza. The occupant of the unit is their daughter, Maha Mirza (the "occupant"). The occupant joined the case but did not participate in the hearing. The owners did not join the case or otherwise communicate with the Tribunal. The case proceeded to the adjudication stage of

the Tribunal's process as a "default" case, meaning that it would be decided on the basis of the evidence and submissions provided by the Applicant.

B. NOTICE

[3] At the start of the hearing, I asked the Applicant to confirm that the Respondents had received notice of the hearing. The Tribunal's process requires the Applicant to serve notice of the case on the Respondents. If the Respondents do not join the case after the first notice, the Applicant is required to serve a second notice and a third notice if there is still no response.

[4] Rule 20 of the Tribunal's Rules of Practice provide that notice can be delivered personally if the owner is also a resident, or by regular mail to the address for service for the unit owner, as shown in the record of owners and mortgagees that the condominium corporation is required to maintain under section 46.1 of the *Condominium Act, 1998* (the "Act"), or the unit's address, if there is no address for service listed in the record of owners and mortgagees. For occupants of the unit, service can be delivered personally or by mail to the unit's mailing address.

[5] Counsel advised that on May 1, 2024, he sent the first notice by regular mail to the address for service provided by the owners and to the occupant by regular mail. The occupant joined the case on May 13, 2024.

[6] Counsel sent the second notice on May 21, 2024 to the owners by regular mail using the address used for the first notice. The second notice was returned as not delivered. On June 5, 2024, the third and final notice was sent to the owners by regular mail to the same address, and also by email using the email addresses on record for the two owners. The letters were not returned as not delivered, and the emails did not bounce back. The occupant responded to the email and indicated: "They [the Owners] are elderly folk who do not reside there. They do not have availability or reason to join in any tribunal; they are not resident; furthermore, they are mostly out of the country." Since the occupant joined the case, I am satisfied that she had notice of the Application. I am also satisfied that notice to the owners was sent to them in accordance with the Tribunal's Rules of Practice.

C. ISSUES

Smoking Issue

Legislation and governing documents

[7] Section 117 (2) of the Act provides as follows:

> 117 (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.

[8] Odour and smoke are prescribed as a nuisance, annoyance or disruption, if they are "unreasonable" (section 26 of Ontario Regulation 48/01).

[9] TSCC 2174's Declaration includes the following provisions:

> Save and except as expressly provided or contemplated in this Declaration to the contrary, no condition shall be permitted to exist, and no activity shall be carried on upon any portion of the units that:
>
> …
>
> will unreasonably interfere with the use and enjoyment by the other Owners of their units or of their exclusive use common element areas;

[10] TSCC 2174 has adopted Rules. They comprise a two-page document, with six rules headings. There is no rule about smoking.

[11] In response to questions from me, counsel for TSCC 2174 confirmed that the Rules provided are the complete Rules and that there is no rule concerning smoking. He advised:

> A smoke free rule was drafted, but it received push back from some residents. The board attempted to set an informal meeting with residents to discuss their concerns but were persuaded from doing so by the then property management company. The board at that time were also informed by the then property management company, as well as the predecessors to the current management company, that all smoking complaints would be captured under the pre-existing "quiet enjoyment" rules. As a result, it was decided on March 31, 2021 that the board would not further pursue the smoke-free rules.

Evidence

[12] TSCC 2174 has provided witness statements from the occupants of the unit directly above the Respondents' unit.

[13] The witness statements indicate that problems with odours from smoking arose as soon as they moved into their unit in January 2022.

[14] The witnesses state that odour from smoke has permeated their unit. They have spent extra money on dry cleaning clothes. Furniture fabric has absorbed the odours. They do not want to replace furniture for fear that it too would absorb odours. They have purchased air cleaning filter systems and improved the seal around their door. They have health and safety concerns about the impact of the odour, especially if they were to have children.

Analysis

[15] The issue with respect to smoke and odour in this case is whether the smoking odours are unreasonable.

[16] I accept the uncontested evidence of the neighbours in the unit above the Respondents' unit. I accept that they are adversely affected by the smoking odours and that the effect is significant. For them, the odour is very objectionable and substantially interferes with their enjoyment of their unit.

[17] However, the legal determination of what unreasonable odour means involves two parts. One is the subjective experience of the individuals affected, and the other is whether the odour is **objectively** unreasonable.

[18] Previous decisions of this tribunal have taken guidance from the Supreme Court of Canada's decision in *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 ("Antrim"), in which the Court discussed the law as it relates to the tort of nuisance and concluded, at paragraph 18, "that a nuisance consists of an interference with the claimant's use or enjoyment of land that is both substantial and unreasonable." The Court went on to discuss what "substantial" means, finding that "a substantial injury to the complainant's property interest is one that amounts to more than a slight annoyance or trifling interference." (paragraph 22)

[19] Antrim refers with approval to the formulation of the test for nuisance in *Tock v. St. John's Metropolitan Area Board*, 1989 CanLII 15 (SCC):

> … The courts attempt to circumscribe the ambit of nuisance by looking to the nature of the locality in question and asking whether the ordinary and reasonable resident of that locality would view the disturbance as a substantial interference with the enjoyment of land. …

[20] In the context of condominium living, the locality test can be expressed as whether a reasonable resident of the same condominium experience would experience the

odour as a substantial interference with the enjoyment of their unit.

[21] The answer to that question with respect to odours from smoking would likely depend on whether the other residents are smokers. If so, they would be less likely to experience the odour as a nuisance than would non-smokers.

[22] Condominium corporations that become smoke-free by adopting a rule typically have a “legacy” provision, recognizing that people who are smokers when the rule is adopted have a continuing right to smoke in their unit. However, such rules typically provide that if there are complaints from other residents, the smokers must take measures at their own expense to reduce the impact of their smoking on others.

[23] In this case, TSCC 2174 appears to have proceeded as if it had adopted such a rule, which it has not done. This may have happened because of questionable advice from the condominium manager. There is no rule about either smoking or odours in general. It appears that the TSCC 2174’s owners discussed but rejected a rule about smoking in 2021. The upstairs neighbours moved into their unit in 2022, after the discussion about whether the building should be non-smoking. This suggests that they knew, or ought to have known, that smoking was permitted in the building, although they may not have known that a rule to make the building smoke-free had been discussed and rejected.

[24] The Application does not say what remedy is being sought, other than an order that the occupant complies with the governing documents. TSCC 2174 and its counsel have communicated with the occupant and asked her to stop negatively affecting the neighbours. The occupant has responded to this by noting that smoking is permitted in the building. There have apparently been no investigations about structural issues, or other measures that might be taken to reduce the smoking odour.

[25] The cases referred to by counsel in submissions involve enforcement of rules regarding smoking and/or odours. Here, there is no rule to enforce. The fact that a no-smoking rule was considered and rejected suggests that the owners as a whole agreed that smoking is allowed. A necessary implication of that is that non-smokers might experience odours from smoking.

[26] I have considerable sympathy for the residents of the upstairs unit. I have accepted that the odours they experience impact their ability to enjoy their unit. I certainly understand why they find the smoking odours to be objectionable. However, given the existing governing documents and the history, including the rejection of a proposed smoking rule, I cannot find that the smoking odours are

objectively unreasonable.

[27] This finding does not mean that nothing can be done. An engineering consultant could be retained to conduct tests and analysis to see if there is a structural problem or some other issue that would explain the transfer of odours, with recommendations of what might be done to ameliorate the problem. TSCC 2174 has not engaged in any investigations.

[28] It would also be possible to revisit the discussion about adoption of a smoking rule.

Storage Issue

[29] Disputes related to provisions in a condominium's governing documents concerning the storage of items, including on a patio, are also prescribed disputes that can be brought to the Tribunal (Ontario Regulation 179/17).

[30] Rule (3) (i) of the TSCC 2174's Rules includes the following provision:

> … Only seasonal furniture is allowed on a patio or exclusive use Common Element and no patio or exclusive use Common Element shall be used for storage ...

[31] TSCC 2174 has provided some evidence about this issue, consisting of a statement from the condominium manager, letters sent to the Respondents, and photographs.

[32] According to a March 13, 2024 letter from counsel for TSCC 2174, the patio "Contains broken items and/or garbage." The items are not specified. A photo (the "first photo") attached to the letter shows a small area that is cluttered with items. It is difficult to tell what all the items are and whether they could be considered to be seasonal furniture, but there appear to be things that match the description of broken items and/or garbage as alleged.

[33] A second photo filed by TSCC 2174 appears to be of the same space captured in the photo above. The items that dominate this photo are a large sun umbrella, lying on its side, and a large number of cushions, possibly from a sofa that might or might not be seasonal furniture. The cushions are strewn over most of the patio area. The view is certainly not very sightly.

[34] The third photo appears to be of a smaller area of the patio. It shows items such as a suitcase, bags and a bin. There are also some chairs that could be seasonal furniture.

[35] The witness statement of the condominium manager indicates only that there are items stored on the patio that are not seasonal furniture.

[36] The Applicant has provided evidence to show that things have been stored on the patio that are not seasonal furniture. This is in contravention of TSCC 2174's Rule 3 (i), noted above. Without further information about what items are currently on the patio that are not seasonal furniture, it is not possible to make a definitive order, other than to order the Respondents to remove anything currently in the patio area that is not seasonal furniture.

[37] Prior to filing this Application, TSCC 2174 wrote to Maha Mirza asking her to comply with the rule regarding patio storage. It appears that these requests were ignored.

[38] Within 14 days of the date of this decision, the Respondents must remove all items from the patio that are not seasonal furniture. They are further ordered to not store items that are not seasonal furniture in the future.

D. COSTS

[39] The Applicant seeks costs for compliance attempts before the Application was filed and legal costs associated with the Application.

[40] Given my findings, I conclude that the Applicant is not entitled to such costs, most of which relate to the smoking issue.

[41] Rule 48.1 of the Tribunal's Rules of Practice provides that "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."

[42] While the Applicant has not been successful on the smoking issue, it has been successful on the patio storage issue. Given the failure of the Respondents to engage in the case, I find that they should pay the filing fees paid by the Applicant. Within 14 days of this decision, the Respondents shall pay TSCC 2174 $150. If this is not paid, TSCC 2174 may add the amount to the Respondents' common expenses.

E. ORDER

[43] The Tribunal orders that:

1. Within 14 days of this decision, the Respondents shall remove all items from the patio that are not seasonal furniture. If the Respondents do not remove the improperly stored items, TSCC 2174 may, with 48 hours notice to the Respondents, have the items removed and the removal costs may be added to the Respondents' common expenses.

2. Within 14 days of this decision, the Respondents shall pay TSCC 2174 $150, representing the Tribunal filing fees.

Brian Cook
Member, Condominium Authority Tribunal

Released on: September 13, 2024