CONDOMINIUM AUTHORITY TRIBUNAL

DATE: October 9, 2024
CASE: 2024-00533SA
Citation: Frampton v. Middlesex Condominium Corporation No. 127, 2024 ONCAT 153

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

Member: Dawn Wickett, Member

The Applicant,
Keith Frampton
Self-Represented

The Respondent,
Middlesex Condominium Corporation No. 127
Represented by Christopher Mendes, Counsel

Hearing: Written Online Hearing – August 23, 2024 to September 19, 2024

REASONS FOR DECISION

A. INTRODUCTION

[1] The Applicant is the owner of a unit of Middlesex Condominium Corporation No. 127 (“MCC 127”).

[2] The parties were previously before the Tribunal and the issues in dispute were resolved by way of Settlement Agreement in 2023-00711N (the “SA”) issued on March 25, 2024.

[3] The Applicant brings this application alleging MCC 127 has not complied with terms 4.1 (in part), 4.2, 4.3, 4.4, and 4.5 of the SA, which read:

> 1. The Respondent agrees to send a letter to the above unit owners to explain the issues relating to their behaviours that are causing a noise nuisance to the owner directly below their unit. If the unit owners do not change their behaviours, the Respondent agrees to take the necessary steps to address these issues. Such action includes filing a CAT case against the above unit owners to remedy the situation.
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> 2. The Respondent agrees to follow up with the above unit owners to have

all necessary flooring and underlay changed to reflect all required building code standards or better. In addition, the Respondent will recommend to the unit owners (although the unit owners are not required) that thicker underlay be used in this context in order to remedy the issues once and for all.

3. The Respondent agrees to share with the Applicant relevant communications with the proposed contractor that will perform the installations and confirm the type of material and related details such as brand name and thickness, that is to be installed and on which dates.

4. The Respondent agrees to inspect the apartment during installation to ensure the proposed flooring and underlay is actually being installed.

5. Should the owners of the above unit ignore the instructions of the Respondent and not install the appropriate underlay and flooring, the Respondent agrees to take the necessary steps to escalate the situation and follow through until the flooring has been remediated. Such action includes filing a CAT case against the above unit owners to remedy the situation.

[4] The "above unit owners", subject to the terms of the SA were not parties to the previous Tribunal proceeding, and as a result were also not parties to this hearing.

[5] The Applicant seeks an order requiring MCC 127 to comply with the terms of the SA. In the alternative, the Applicant submits that he would like the terms of the SA amended to instruct MCC 127 to fully investigate his noise complaints, including hiring an expert. The Applicant submits that MCC 127 should bear the costs for hiring the expert. The Applicant further requested an order requiring MCC 127 reimburse him the fee ($125) paid to file this application.

[6] MCC 127 denies it did not comply with the terms of the SA. MCC 127 submits that the application should be dismissed with an order for costs in its favor. Specifically, MCC 127 seeks an order requiring the Applicant to reimburse its legal fees ($8,600), and the fee ($8,180) it paid for retaining an engineer to perform sound transmission testing.

B. PRELIMINARY ISSUE

[7] After the parties submitted their documentary evidence, it was brought to my attention that some of MCC 127's materials contained the Applicant's personal email address and telephone number. To protect the Applicant's privacy, I am ordering, that should a member of the public request copies of the Tribunal's hearing record, the Tribunal shall ensure to redact the Applicant's email address

and telephone from the documents prior to being released.

C. OUTCOME

[8] For the reasons that follow, I find that the terms 4.2, 4.3, 4.4 and 4.5 are not enforceable. Given the terms are not enforceable, I further find that MCC 127 did not fail to comply with these terms of the SA.

[9] Regarding term 4.1, I find MCC 127 has complied with this term.

[10] I will order this application dismissed without costs.

D. ISSUES & ANALYSIS

Issue No. 1: Has MCC 127 failed to comply with term 4.1 of the SA?

[11] The Applicant and MCC 127 agree that MCC 127 fulfilled its obligation of the first part of term 4.1 set out in the SA which reads:

> The Respondent agrees to send a letter to the above unit owners to explain the issues relating to their behaviours that are causing a noise nuisance to the owner directly below their unit.

[12] In compliance with the above, on April 21, 2024, MCC 127's counsel sent the above unit owners a letter outlining the ongoing concerns for unreasonable noise emanating from their unit and directed them to take steps to reduce the unreasonable noise. This letter further advised that the corporation would be hiring an engineer to complete noise transmission testing between the units.

[13] The Applicant submits that MCC 127 did not comply with the remainder of term 4.1 which reads:

> If the unit owners do not change their behaviours, the Respondent agrees to take the necessary steps to address these issues. Such action includes filing a CAT case against the above unit owners to remedy the situation.

[14] The Applicant's position is that MCC 127 did not comply with the second part of term 4.1 by not taking steps to ensure the above unit owners change their behaviours causing noise nuisance and/or did not file a CAT case against them.

[15] MCC 127 submits that filing a CAT case was an option and not a requirement of the SA. Further, it contends that it has taken steps to address the Applicant's ongoing complaints by hiring an engineer to complete noise transmission testing. The engineer testing found that the noise transmission between the units was not

above normal. Further, the above unit owners provided photographs that they have taken additional steps of ensuring that the flooring in their unit is 75% covered by rugs, which is more than the 65% required by the corporation's Rule 20.

[16] Based on the evidence above, I find that MCC 127 has complied with this term of the SA. Further and notably, beyond sending a letter to the above unit owners, the second part of term 4.1 is broadly written and open to interpretation which does not require MCC 127 to take specific action(s) to ensure its compliance with the SA.

<u>Issue No. 2:</u> Has MCC 127 failed to comply with terms 4.2, 4.3, 4.4 and 4.5 of the SA?

[17] In the previous Tribunal proceeding, the Applicant filed the application without making the above unit owners parties to the proceeding, despite his allegations that they were creating unreasonable noise which was a nuisance and that he was seeking remedies which specifically impacted them.

[18] Without the above unit owners' participating in the previous proceeding, the Applicant and MCC 127 engaged in Stage 1—Negotiation and Stage 2—Mediation. The mediation completed with both the Applicant and MCC 127 agreeing to terms as set out above. Terms 4.2, 4.3, 4.4 and 4.5 have a direct impact on the above unit owners, in that MCC 127 agreed to ensure the unit owners change the flooring in their unit and that the new flooring would meet all required Building Code standards or better. If the above unit owners did not change the flooring in their unit as required by MCC 127, then MCC 127 would take necessary steps to ensure the flooring was changed.

[19] The fact that terms impacting someone's rights were agreed upon without affording the affected party (above unit owners) the opportunity to know the issue and be heard on the matters in the proceeding is concerning, and not in keeping with section 1.39 (1) of the *Condominium Act, 1998* (the "Act"), which states:

> Subject to section 1.41, the Tribunal shall adopt the most expeditious method of determining the questions arising in a proceeding before it that affords to all persons directly affected by the proceeding an adequate opportunity to know the issues and to be heard on matters in the proceeding.

[20] Further, section 1.39 (1) of the Act is in keeping with the rules of natural justice and procedural fairness which are fundamental principles in all administrative tribunal and court proceedings. Essentially, every person has the right to know the case against them, the right to an unbiased decision-maker, the opportunity to be

heard and the right to a decision and to know the rationale for that decision. As the above unit owners were not made parties to the first proceeding before the Tribunal which resulted in the SA, they were therefore also unaware of this proceeding about the alleged breach of the SA. Both proceedings have a direct impact on the above unit owners, I find terms 4.2, 4.3, 4.4 and 4.5 are not enforceable. Given this finding, I further find that MCC 127 has not failed to comply with these terms.

Issue No. 3: Should costs be awarded?

[21] The Applicant seeks an order requiring MCC 127 to reimburse him the fee ($125) he paid to file this application.

[22] The Tribunal's Rule 48.1 states:

> 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.

[23] The Applicant was not successful in this matter. As such, I find no basis to make an order for MCC 127 to reimburse him the cost he incurred to file this application.

[24] MCC 127 seeks an order requiring the Applicant to reimburse it for the legal costs ($8,600) it incurred to participate in this proceeding.

[25] The Tribunal's Rule 48.2, provides:

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

[26] The Tribunal's Practice Direction, "CAT Practice Direction: Approach to Ordering Costs" (the "Practice Direction"), states that a determination of costs, including indemnification, shall consider,

> (i) whether a party's conduct was unreasonable, for an improper purpose, or caused a delay or expense;
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> (ii) the conduct of all parties and representatives requesting costs;
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> (iii) the potential impact an order for costs would have on the parties;

(iv) whether the parties attempted to resolve the issues in dispute before the CAT case was filed;

(v) the provisions of the condominium corporation's declaration, by-laws and rules, including whether the parties had a clear understanding of their respective requirements and/or the potential consequences for contravening them; and

(vi) whether the costs are reasonable and were reasonably incurred.

[27] With respect to MCC 127's request for an order requiring the Applicant reimburse it the legal fees incurred for participating in the Tribunal proceeding, I find that both parties are at fault for entering carelessly into an agreement that could not possibly be fulfilled without the participation of a third party who was excluded from the negotiation. Therefore, I make no order for costs.

[28] With respect to MCC 127's request for an order for compensation requiring the Applicant to reimburse it the fee ($8,180) paid for the engineering report, I decline to make such an order. There is no evidence before me indicating that the Applicant requested MCC 127 to secure the engineer testing in response to his complaints of nuisance noise entering his unit. Rather, the evidence indicates that MCC 127, of its own volition, had the testing done for evidentiary purposes should it request the above unit owners change the flooring in their unit.

E. <u>ORDER</u>

[29] The Tribunal Orders that:

1. The application is dismissed without costs.

2. Should a member of the public request a copy of the hearing record, the Tribunal shall ensure to redact from its content, the Applicant's email address and telephone number.

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Dawn Wickett
Member, Condominium Authority Tribunal

Released on: October 9, 2024