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Case Law Summaries

Friedrich v. MTCC No. 1018, 2019 ONSC 1153

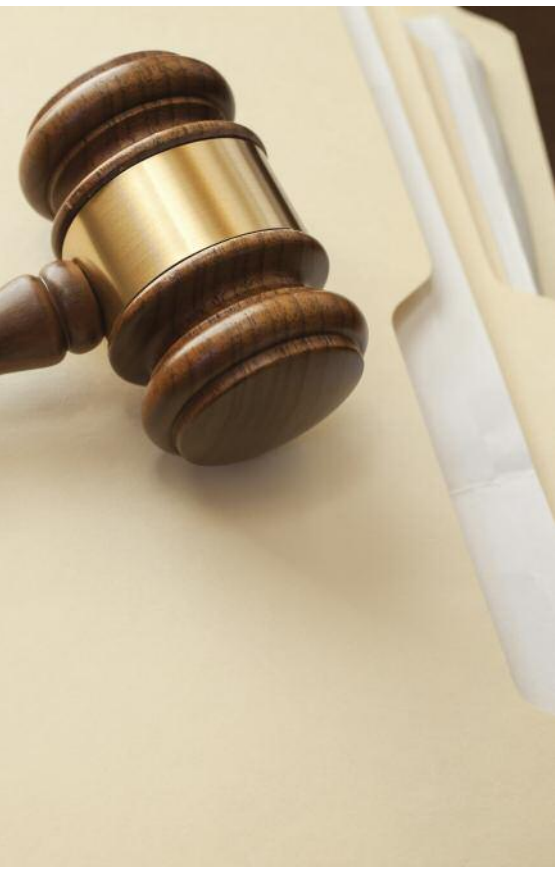
Overview

Fredrich v. MTCC No. 1018, 2019 ONSC 1153 highlights that the Court is reticent to intervene and substitute their own judgment for those made by the board of directors of the condominium corporation without considerable evidence that such measure is necessary.

Mr. Fredrich was a unit owner at MTCC No. 1018 whose vehicle was vandalized in the condominium's underground garage. Prior to this incident, the condominium board decided to change the entry to its parking garage at level 1 from a telephone system to a motion sensor with monitored CCTV, and a security guard visit every two hours. Mr. Fredrich blamed the vandalism on the condominium corporation's negligence in changing the provisions of the security for the garage. The Court held that under the Condominium Act, 1998, the board's business judgment is entitled to deference.

In reviewing decisions rendered by the directors and officers, Canadian Courts have been guided by the *"business judgment rule"*. While the business judgment rule was developed in the context of for-profit businesses, it has been applied when reviewing decisions rendered by condominium boards.[1] As representatives elected by the unit owners, the directors of these corporations are better placed to make judgments about their interests and to balance the competing interests engaged than are the courts. In reviewing a condominium board's decision, the court will determine whether the directors acted honestly and in good faith and exercised the care, diligence and skill of a reasonably prudent person.

Mr. Friedrich's case was dismissed against the condominium corporation as he failed to provide enough evidence to support his position that the condominium corporation's change in the security system was unreasonable and foreseeably caused Mr. Friedrich's loss. There was no breach of applicable standard of care found on the part of the condominium corporation.



Swan v. Durham Condominium Corporation No. 45

Overview

The Superior Court of Justice for Ontario recently rendered a decision in *Swan v. Durham Condominium Corporation 2019 ONSC 1567*, a case that serves as a cautionary tale for directors of condominium corporations who do not take their obligation of good faith in the manner of exercising their duties as seriously as they should.

[1]Yusin v. Saddle Lakes Homeowners Ass'n, 73 A.D.3d 1168 (N.Y. App. Div. 2010); and Black v. Fox Hills N. Cmty. Ass'n, 599 A.2d 1228 (Md. Ct. Spec. App. 1992).

Mr. Leslie Arthur Swan was first elected to the board of the condominium corporation in June 2009, and subsequently elected President of the Board. He was known as a whistleblower and on a crusade to hold the other board members accountable for what he alleged was improper conduct. Mr. Swan believed that the Board lacked authority to contract out the Secretary's record-keeping function to a third-party company known as MCD Enterprises (MCD) and maintained that MCD should not be privy to the affairs of the corporation. The other board members considered Mr. Swan's demeanor to be *"insulting, threatening and confrontational"*.

On August 4, 2009, a member of the board circulated a requisition under section 46 of the Act to convene a meeting of the unit owners to remove Mr. Swan as a director. The reasons cited were that Swan as a director failed to *"act honestly and in good faith"*. On August 11th, 2009, Mr. Swan launched a claim against the corporation for defamation and proceeded to use the corporation to launch actions against two if its own directors. Mr. Swan then accepted service of his own claim against the corporation on behalf of the board which created an obvious conflict of interest. On September 2, 2009, Mr. Swan advised the Board that it had been served with an action, and that the corporation was potentially in default since it had not filed a defence. No earlier defence could have been filed by the condominium corporation since it was Mr. Swan who accepted service on its behalf. On September 17, 2009, at a scheduled meeting, Mr. Swan was removed as director.

In May of 2010, the condominium corporation commenced an application against Mr. Swan under section 134 of the Act, seeking a declaration that he had breached the applicable standard of care as a director contrary to section 37(1) of the Act. Under section 37(1) of the Act, every director and every officer of a corporation in exercising the powers and discharging the duties of office shall act honestly and in good faith, and exercise the care, diligence, and skill a reasonably prudent person would exercise in comparable circumstances. Mr. Swan was declared by the court to have acted in *bad faith* in the exercise of his duties as a director. As a result, the Court found that Mr. Swan was not entitled to be indemnified for his costs under section 38 of the Act. Therefore, under the statute, board members are disentitled to indemnity if their liability or cost-incurring conduct amounts to *bad faith* conduct as this breaches the duty of loyalty to the Corporation.

The condominium Corporation registered a lien for its legal costs against Mr. Swan's unit pursuant to section 85 and 134 of the Act. Section 134(5) of the Act gives a condominium corporation a

broad right of recovery for costs incurred in obtaining compliance orders; it also provides an effective enforcement mechanism for the collection of those costs. This shifts the financial burden from the innocent unit owners to unit owners whose conduct necessitated obtaining the order.

It is important to note that the language of section 134(1) is very broad as it refers to *"any provision"* of the Act. It does not limit its application to compliance with a provision pertaining to a unit owner's use of their unit or the common areas. As such, the condominium corporation's costs of the application related to securing Mr. Swan's compliance with the provisions of the Act or applicable by-laws due to his failure to fulfil his duties as a director would fall under section 134 of the Act.

Condominium corporation directors in Ontario who engage in bad faith behavior will be subject to judicial condemnation should the condominium corporation pursue legal action.

Simcoe Standard Condominium Corporation No. 431 and Simcoe Standard Condominium Corporation No. 434 and Marc Atkins 2018 Carswell ONT 8892 ONSC 3105

Overview

In *Simcoe Standard Condominium Corporation No. 431 and Simcoe Standard Condominium Corporation No. 434 and Marc Atkins, 2018 ONSC 3105*, the Court rejected the condominium corporation's attempt to limit the unit owners' rights to requisition a meeting to remove the board of directors.

Two condominium corporations (SSCC No. 431 and SSCC No. 434), were established by the same developer as vacation residences. Requisitions were delivered to the condominium corporations requiring meetings of owners for the purpose of removing the board of directors. The underlying issue that led to this call for meetings of the owners and vote to remove the two boards of directors related to a special assessment that had the effect of doubling the common expense charges for the owners in the two condominiums and litigation commenced by the two boards on behalf of the condominium corporation against the developer of the two condominium developments.

The condominium corporations brought an application for an order prohibiting the use of proxies at the meetings, regulating the communication with and between owners of units leading up to the meetings and vote, and regulating the conduct of the meeting. The court found that the Corporations had no basis to refuse to call meetings as required by section 46 of the Condominium Act,

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- Write for an audience that includes condominium owners and directors. Avoid technical language.
- If using pictures or graphs within the article, limit to three or fewer.
- No self-promoting content within article.
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1998. If owners of units in the condominium corporations are dissatisfied with the governance provided by the boards, they can require that a meeting of owners be held to consider an issue or issues, including a proposal to remove one or more directors: *Condominium Act, 1998, s. 46*.

The Court found that the statutory criteria for meetings to be requisitioned under section 46 of the Act were met. Even though the boards felt there was misleading information to the owners circulated about issues underlying the call to remove the board of directors, the corporations were free to communicate with the owners and provide the information they felt the owner should have to make an informed decision about the issues.

The Corporations sought to deny the use of proxies at the meetings of the owners primarily on the basis that the proxies would be obtained on the basis of misleading information. Both the *Condominium Act*, 1998, s. 52 and the bylaws of these condominium corporations provide for the use of proxies at meetings if certain requirements are met. The Court did not have authority to deny the owners their statutory right to vote by proxy and in doing so would not have been justified in any event.

The Corporations sought an order limiting communication to an official mail-out containing the positions of each side and banning all other communication with and among unit owners prior to the meetings. The necessary companion to right to vote is the right to discuss important issues that would be subject to vote. The court found that such confined view of communication between owners was not consistent with the democratic model in the Condominium Act, 1998. The Court did not place any restrictions on the communication leading up the meetings. The condominium corporations were unsuccessful in its application and costs were awarded to the Respondent.

Manorama Sennek v. Carleton Condominium Corporation No. 1166, 2018 ONCAT 4

Overview

Sennek v. Carelton Condominium Corporation No. 1166, 2018 ONCAT 4 serves as a reminder that the tribunal will not entertain applications brought by individuals who attempt to re-litigate issues that have already been determined by the courts.

Ms. Sennek sought an order from the Tribunal requiring the condominium corporation to pay a penalty to her for failure to maintain a record over a 91-month period from 2010 to 2018. The Tribunal held that Application was a continuation of a previous dispute brought by Ms. Sennek in Small Claims Court in February 2016.

The dispute between Ms. Sennek and the condominium corporation arose out of a lien that the condominium corporation had registered against Ms. Sennek's property. The condominium was seeking to recover the costs of removing a frame around Ms. Sennek's raised garden bed from her front yard to her backyard. In February 2016, Ms. Sennek commenced an action in Small Claims Court action against the condominium corporation. Within these proceedings, the condominium corporation asserted that the record Ms. Sennek was seeking did not exist. Ms. Sennek alleged that this was false and failed in several attempts to have the courts make a finding that this record existed.

In the application brought before the Tribunal, Ms. Sennek took the alternative approach to claim that the Corporation's assertion that the record does not exist means that the corporation has therefore failed to maintain a record that is required to be maintained under the Act and the Regulations.

The timing of the Application to the Tribunal was two weeks after the Court of Appeal decision of February 8, 2018, *Carleton Condominium Corporation 116 v. Sennek, 2018 ONCA 118*, upholding Justice Sheard's decision declaring Ms. Sennek a *vexatious litigant*. On August 24, 2017, Justice Sheard issued an Order under s. 140 of the *Courts of Justice Act,* prohibiting Ms. Sennek from commencing any action, application, motion or proceeding against the condominium corporation, or its employees, board members, condominium manager and solicitors without obtaining leave of a Judge of the Ontario Superior Court.

The principles of a vexatious litigant are enumerated in *Land Michener Lash Johnston v. Fabian,* 1987 CanLII 172 (ON SC), 1987 CarswellOnt 378 (H. Ct.), which may be summarized as follows:

- Bringing of one or more actions to determine an issue which has already been determined
- Where it is obvious that an action cannot succeed, or if the action

would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief;

- Bringing a proceeding for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
- Rolling forward grounds and issues into subsequent actions; and
- Persistently taking unsuccessful appeals from judicial decisions.

The courts have held that the above principles are not exhaustive and that applicants need not establish all of them.[2] Courts have also rightly concluded that the power to declare someone a vexatious litigant must be *"exercised sparingly and with the greatest care".*[3]

The grounds for the order included Ms. Sennek breaching or failing to comply with orders, initiating complaints to the Law Society, and initiating multiple proceedings since August 19th, 2015 against the condominium corporation, its officers, directors and its solicitors. The various complaints were deemed unfounded and the statement of claim against counsel was dismissed as *"frivolous, vexatious and an abuse of process"*.

The Tribunal evaluated the purpose of Ms. Sennek's application and deemed the application as vexatious on the basis that it was an attempt by Ms. Sennek to continue a dispute already determined by the courts and thus brought for an improper purpose. Ms. Sennek's application was dismissed without holding a hearing according to s. 1.41 of the *Condominium Act*, 1998.

Bianca Stella *is a litigator in the Condominium Law Group at SimpsonWigle Law LLP. She often acts in compliance cases involving mediations, arbitrations, and applications before the Ontario Superior Court of Justice.* CN

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[2] Howie, Sacks, & Henry LLP v. Wei Chen, 2015 ONSC 2501 (CanLII)

[3] Howie, Sacks at para 27, quoting with approval from Dobson v. Green, 2012 ONSC 4432 (CanLII)