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Enforcement of condo declaration is a board's duty

Peel Condominium Corp. 108 is an attractive townhouse development built in 2002 on Central Park Dr. in Brampton.

Back in April 2009, the board of directors became aware that Donna Young, one of the owners, had installed in her unit a tankless water heater that vents through the outside wall of the townhouse. The exterior walls are common elements and no alterations may be made without board approval.

Eventually, the board began a court application for an order requiring Young to remove the vent and restore the wall to its original condition.

Young objected saying that the board was selectively enforcing the requirements of the project's declaration and it would be unfair to enforce it only against her.

When the case came before Justice Douglas Gray last year, the evidence confirmed that there had been other contraventions of the condominium's declaration which had not resulted in enforcement proceedings.

One unit owner had torn up a common element lawn and converted it to a garden, which was inconsistent with the appearance of other yards. Another owner constructed a furnace vent through the rear wall of the unit, and at least three kitchen exhaust vents were installed through the exterior walls of units.

All of these actions were violations of the condominium declaration, but none had resulted in court proceedings.

At the court hearing last year, Young argued that she was led to believe by the inaction of the board in the other cases that she would be permitted to breach the outside wall of the unit. She also took the position that since the board had selectively enforced the declaration, it would be unfair to enforce it against her in similar circumstances.

The issue that gave Gray the most concern was the one alleging selective enforcement.

That argument, wrote the judge, "raises issues of fairness on both sides. On the one hand, unit owners as a group, and their representatives, the board of directors, have an interest, and indeed a duty, to enforce the declaration. On the other hand, the individual unit holder who violates the declaration has a legitimate cause for complaint where the board of directors has permitted other violations to occur without consequence. The task of the court is to balance these competing interests in a specific case.

"In my view," he concluded, "there has been a degree of selective enforcement by the (board of directors) sufficient to give rise to a concern. However, it does not approach the sort of rampant nonenforcement that has arisen in some cases, particularly those involving the keeping of pets."

The judge referred to a 1970 case involving selective enforcement of a Toronto bylaw prohibiting multi-family dwellings in an area zoned for single family use. The Ontario Court of Appeal, later supported by the Supreme Court of Canada, ruled that the public interest in enforcement of the bylaw should prevail over the private interest of one who has violated the law, even though the city had been discriminatory in enforcement.

In the Brampton case, Gray decided that the condominium declaration has the force of law as far as the unit owners are concerned.

"It is a sort of constitution that binds them all," he wrote, "and which the board of directors is legally obliged to enforce. There is an interest, in the collective, in having the declaration enforced, even if some transgressors have been allowed to violate it. In such a situation, the collective's interest in having the declaration enforced must prevail over the private interest of the respondent. The situation would undoubtedly be different if there was massive non-enforcement as was the case in some of the cases involving pets."

Young was ordered to restore the wall and remove the water heater vent, but the judge hinted that the condo's selective enforcement of the rules would be relevant to the issue of costs it could recover.

Clearly, for the benefit of the community of condo owners, the judge's decision was correct. But that doesn't mean it was fair to Young, who was the target of discriminatory enforcement.

Peel Condominium Corporation No. 108 v. Young, 2011 ONSC 1786 (CanLII)

Date:	2011-03-21
Docket:	CV-10-1305-00; 108
URL:	http://canlii.ca/t/fkml2
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CITATION: Peel Condominium Corporation No. 108 v. Young, 2011 ONSC 1786
COURT FILE NO.: CV-10-1305-00
DATE: 20110321

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
PEEL CONDOMINIUM CORPORATION No. 108	)))	Bora Nam, for the Applicant
	)	
Applicant	)	
	)	
- and -	)	
	)	
	)	
DONNA YOUNG	)))	Evan Moore, for the Respondent
	)	
Respondent	))	
	)	
	)	**HEARD:** March 21, 2011

REASONS FOR JUDGMENT

GRAY J.

[1] In this application, the applicant seeks to enforce its Declaration as against the respondent, one of the unit owners. Specifically, it is alleged that the respondent, in installing a tankless gas water heater in her unit, constructed a vent through the outside wall of the unit. It is not in dispute that the outside wall is a common element. The applicant seeks an order requiring the respondent to remove the vent, and an order requiring her to pay the applicant for the cost of restoring the wall to its original condition.

[2] The primary argument of the respondent is that the applicant has been selectively enforcing the Declaration, and it would be unfair to enforce it against her.

[3] For the brief reasons that follow, the application is granted.

Background

[4] In April, 2009, the applicant became aware that the respondent had installed a tankless water heater, which vents through the exterior wall. The exterior wall is a common element. The respondent did not seek prior approval from the Board of Directors.

[5] Discussions ensued, including demands that the respondent remedy the problem. Ultimately, this application was commenced.

[6] I am satisfied that there have been other contraventions of the Declaration which have not resulted in enforcement proceedings by the applicant. Some of those contraventions are less serious than others. For example, one unit owner has completely torn up his or her lawn and converted it to a garden that is quite inconsistent with the appearance of other yards. The yard is a common element. The applicant appears to have done nothing about this.

[7] Another unit owner has constructed a furnace vent through the rear wall of the unit, below the fence line. The applicant acknowledges the violation of the Declaration, but apparently takes the position that if approval was retroactively requested, it would be granted.

[8] At least three kitchen exhaust vents have been installed through exterior walls of units. One has been removed, although it is unclear as to whether a hole remains in the wall. Two other vents remain, but the applicant's counsel advises me that the applicant intends to take enforcement proceedings depending on the result of this case.

[9] In at least one other instance, the applicant made adjustments to her own yard, and was retroactively granted approval.

Submissions

[10] The applicant submits that it is entitled, indeed required, to enforce the Declaration for the benefit of all unit holders. Any contravention of the Declaration can only be permitted if it is authorized by the Board of Directors, and in this case, the Board of Directors has not done so.

[11] The applicant submits that there has been no selective enforcement of the Declaration. Any contraventions that have not been approved by the Board are minor. The more serious violations are those that either fall within the Board's policy regarding approved venting through exterior walls, or will await enforcement depending on the result of this case.

[12] Counsel for the applicant also relies on a provision in the Declaration that stipulates, in substance, that violations of the Declaration permitted by the Board of Directors shall not prevent the enforcement of similar violations if they occur.

[13] Counsel for the respondent argues that the doctrine of promissory estoppel prohibits the applicant from enforcing the Declaration in these circumstances. The respondent argues that she was led to believe, through the inaction of the Board, that she would be permitted to breach the outside wall as she has done, and it would now be inequitable to allow the applicant to succeed.

[14] In the alternative, the respondent submits that the applicant has selectively enforced the Declaration, and it would be unfair to permit the applicant to enforce the Declaration in these circumstances.

[15] Both parties rely on caselaw to support their respective positions.

Analysis

[16] I did not call on the applicant to respond to the respondent's position regarding promissory estoppel. In my view, the evidence falls far short of demonstrating that the applicant made a representation on which the respondent relied to her detriment.

[17] Of more significant concern, in my view, is the issue of selective enforcement. There have been a number of instances where breaches of the Declaration, including some similar to the one at issue here, have gone unaddressed by the applicant and its Board of Directors.

[18] Certain provisions of the *Condominium Act*, *1998*, are germane:

> **Objects**
> **17.** (1) The objects of the corporation are to manage the property and the assets, if any, of the corporation on behalf of the owners.
>
> **Duties**
> (2) The corporation has a duty to control, manage and administer the common elements and the assets of the corporation.
>
> **Ensuring compliance**
> (3) The corporation has a duty to take all reasonable steps to ensure that the owners, the occupiers of units, the lessees of the common elements and the agents and employees of the corporation comply with this Act, the declaration, the by-laws and the rules.
>
> . . .
>
> **Changes made by owners**
> **98.** (1) An owner may make an addition, alteration or improvement to the common elements that is not contrary to this Act or the declaration if,
> (a) the board, by resolution, has approved the proposed addition, alteration or improvement;
> (b) the owner and the corporation have entered into an agreement that,
> (i) allocates the cost of the proposed addition, alteration or improvement between the corporation and the owner,
> (ii) sets out the respective duties and responsibilities, including the responsibilities for the cost of repair after damage, maintenance and insurance, of the corporation and the owner with respect to the proposed addition, alteration or improvement, and
> (iii) sets out the other matters that the regulations made under this Act require;
> (c) subject to subsection (2), the requirements of section 97 have been met in cases where that section would apply if the proposed addition, alteration or improvement were done by the corporation; and
>
> (d) the corporation has included a copy of the agreement described in clause (b) in the notice that the corporation is required to send to the owners.
>
> . . .
>
> **Compliance with Act**
> **119.** (1) A corporation, the directors, officers and employees of a corporation, a declarant, the lessor of a leasehold condominium corporation, an owner, an occupier of a unit and a person having an encumbrance against a unit and its appurtenant common interest shall comply with this Act, the declaration, the by-laws and the rules.
>
> . . .
>
> **Compliance order**
> **134.** (1) Subject to subsection (2), an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of a leasehold condominium corporation or a mortgagee of a unit may make an application to the Superior Court of Justice for an order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules or an agreement between two or more corporations for the mutual use, provision or maintenance or the cost-sharing of facilities or services of any of the parties to the agreement.
>
> **Pre-condition for application**
> (2) If the mediation and arbitration processes described in section 132 are available, a person is not entitled to apply for an order under subsection (1) until the person has failed to obtain compliance through using those processes.
>
> **Contents of order**
> (3) On an application, the court may, subject to subsection (4),
> (a) grant the order applied for;
> (b) require the persons named in the order to pay,
> (i) the damages incurred by the applicant as a result of the acts of non-compliance, and
> (ii) the costs incurred by the applicant in obtaining the order; or

(c) grant such other relief as is fair and equitable in the circumstances.

Order terminating lease

(4) The court shall not, under subsection (3), grant an order terminating a lease of a unit for residential purposes unless the court is satisfied that,

(a) the lessee is in contravention of an order that has been made under subsection (3); or

(b) the lessee has received a notice described in subsection 87 (1) and has not paid the amount required by that subsection.

Addition to common expenses

(5) If a corporation obtains an award of damages or costs in an order made against an owner or occupier of a unit, the damages or costs, together with any additional actual costs to the corporation in obtaining the order, shall be added to the common expenses for the unit and the corporation may specify a time for payment by the owner of the unit.

[19] Certain provisions of the Declaration are relevant:

(a) Article IV(1)(d):

> No owner shall make any structural change or alteration in or to his unit or make any change to an installation upon the common elements or maintain, decorate, alter or repair any part of the common elements except for maintenance of those parts of the common elements which he has the duty to maintain, without the consent of the board.

(b) Article X:

> Each owner shall indemnify and save harmless the corporation from and against any loss, costs, damage, injury or liability whatsoever which the corporation may suffer or incur resulting from or caused by an act or omission of such owner, his family or any member thereof, any other resident of his unit or any guests, invitees or licensees of such owner or resident to or with respect to the common elements and/or all other units, except for any loss, costs, damages, injury or liability caused by an insured (as defined in any policy or policies of insurance) and insured against by the corporation.

(c) Article XII(2):

> All present and future owners, tenants and residents of units, their families, guests, invitees or licensee, shall be subject to and shall comply with the provisions of this declaration, the by-laws and any other rules and regulations of the corporation.
>
> The acceptance of a deed or transfer, or the entering into a lease, or the entering into occupancy of any unit, shall constitute an agreement that the provisions of this declaration, the by-laws and any other rules and regulations, as they may be amended from time to time, are accepted and ratified by such owner, tenant or resident, and all of such provisions shall be deemed and taken to be covenants running with the unit and shall bind any person having, at any time, any interest or estate in such unit as though such provisions were recited and stipulated in full in each and every such deed or transfer or lease or occupancy agreement.

[20] The argument regarding selective enforcement raises issues of fairness on both sides. On the one hand, unit owners as a group, and their representatives, the Board of Directors, have an interest, and indeed a duty, to enforce the Declaration. On the other hand, the individual unit holder who violates the Declaration has a legitimate cause for complaint where the Board of Directors have permitted other violations to occur without consequence. The task of the Court is to balance these competing interests in a specific case.

[21] In my view, there has been a degree of selective enforcement by the applicant sufficient to give rise to a concern. However, it does not approach the sort of rampant non-enforcement that has arisen in some cases, particularly those involving the keeping of pets.

[22] In some ways, this case is analogous to a situation that arises where a municipality attempts to enforce one of its by-laws, and it is alleged that there has been selective enforcement.

[23] The leading case in this respect is *City of Toronto v. Polai,* [1970] 1 O.R. 483 (C.A.); affirmed 1972 CanLII 22 (SCC), [1973] S.C.R. 38. In that case, the City of Toronto applied for an order under the *Municipal Act* to prohibit the defendant from using her building as a multi-family dwelling house in an area not zoned to permit such use. Since 1949, the City had maintained a "deferred list" of known offenders, against whom no prosecution or other enforcement proceedings would be brought. The judge of first instance refused to grant the requested order, relying on the "clean hands" doctrine applied by courts of equity. The Court of Appeal reversed the court below, holding that the City was entitled to the order sought. The Supreme Court of Canada upheld the Court of Appeal.

[24] All three judges of the panel that heard the case in the Court of Appeal delivered separate reasons. Both Jessup J.A. and Brooke J.A. held that the circumstances disclosed discriminatory enforcement of the by-law on the part of the municipality, but held that the public interest in the enforcement of the by-law should prevail, notwithstanding the discrimination.

[25] At page 497, Jessup J.A. stated as follows:

> I have no doubt, however, that the result is discriminatory and therefore inequitable vis-à-vis the respondent and but for one consideration I would deny the appellant the remedy it seeks on the ground that to obtain equitable relief against the respondent it must have done equity to her. That consideration is that the public has a direct and substantial interest in the enforcement of the by-law and such public interest must prevail over the private interest of an admitted flagrant transgressor.

[26] At page 502, Brooke J.A. stated as follows:

> I therefore agree with the learned trial Judge that the practice, as it is carried out today, is discriminatory as against the respondent. However, in my view, that is not sufficient grounds in this case to deny the relief sought by the appellant. The public has a direct and a substantial interest in the enforcement of this by-law and in the circumstances here public interest must prevail over the private interest of one who has admittedly flouted this law for so long. It is in this respect that I hold that the learned trial Judge erred in denying the appellant the order which it sought.

[27] In my view, similar reasoning applies here. Once registered, the Declaration has the force of law, at least as far as the unit holders are concerned. It is a sort of Constitution that binds them all, and which the Board of Directors is legally obliged to enforce. There is an interest, in the collective, in having the Declaration enforced, even if some transgressors have been allowed to violate it. In such a situation, the collective's interest in having the Declaration enforced must prevail over the private interest of the respondent. The situation would undoubtedly be different if there was massive non-enforcement as was the case in some of the cases involving pets.

[28] For these reasons, the application is granted.

Disposition

[29] For the foregoing reasons, the application will be granted in terms of paragraph 1(b) and (c) of the Notice of Application.

[30] The applicant has sought costs on a substantial indemnity basis. I will entertain the parties' submissions on costs. I incline to the view that while the applicant's selective enforcement of the Declaration does not bar it, in these circumstances, from seeking the order I have granted, I think selective enforcement is relevant to the issue of costs.

[31] I will entertain written submissions with respect to costs, not exceeding 3 pages, together with a costs outline. Counsel for the applicant shall have 10 days to file submissions at my chambers in Milton, and counsel for the respondent shall have 10 days to respond. Counsel for the applicant shall have 5 days to reply.

GRAY J.

Released: March 21, 2011

CITATION: Peel Condominium Corporation No. 108 v. Young, 2011 ONSC 1786
COURT FILE NO.: CV-10-1305-00
DATE: 20110321

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

PEEL CONDOMINIUM CORPORATION No. 108

Applicant

- and -

DONNA YOUNG

Respondent

REASONS FOR JUDGMENT

GRAY J.

Released: March 21, 2011