CITATION: Metropolitan Toronto Condominium Corporation No. 978 v. McNeil, 2023 ONSC 7522
OSHAWA COURT FILE NO.: CV-23-1592-00
DATE: 20231214

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Metropolitan Toronto Condominium Corporation No. 978, Applicant

AND:

Hugh Brennan McNeil and Susan Laurie Noguchi, Respondents

BEFORE: The Honourable Madam Justice S.E. Healey

COUNSEL: Antoni Casalinuovo, Counsel, for the Applicant

Respondents, Self-Represented

HEARD: December 14, 2023

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ENDORSEMENT

[1] This is an application by Metropolitan Toronto Condominium Corporation No. 978 (MTCC 978) for an order that the respondents immediately cease and desist from preventing the applicant and its contractors or agents from complying with its obligations under the *Condominium Act* ("the *Act*") and its governing documents, being the declaration, bylaws and rules of MTCC 978, allowing for the entry into the respondents' unit to gain access to the adjacent common element riser so that MTCC 978 can make repairs, and related relief.

[2] The respondent Hugh McNeil attended and made submissions on his behalf and that of the co-respondent. Mr. McNeil asks that the Application be dismissed or stayed until a mediation occurs pursuant to s. 132 of the *Act*, or until he is able to obtain a motion date for a cross-motion to dismiss this application as an abuse of process. His position is that the evidence is insufficient to establish that a health and safety issue exists.

[3] The law is clear, as set out in *Metropolitan Toronto Condominium Corporation No. 747 v. Korolekh*, 2010 ONSC 4448, at para. 50, that s. 132 does not require owners and condominium corporations to submit disagreements with respect to the *Act* to mediation and arbitration.

[4] The genesis of this Application is a disagreement over the parties' rights and obligations under sections 19 and 117 of the *Act*.

[5] Section 19 permits for a right of entry to a unit on reasonable notice to the owner by the condominium corporation or its agents. The respondents have refused to comply with that provision.

[6] Section 117(1) provides that no person shall, through an act or omission, cause a condition to exist or an activity to take place in a unit, the common elements or the assets, if any, of the corporation if the condition or the activity as the case may be, is likely to damage the property or the assets or cause an injury or an illness to an individual.

[7] The focus in this hearing on "health and safety" is in my view a red herring. Section 117(1) requires that a condition that is likely to damage the property shall not be permitted to exist. Both parties to this Application share a duty to ensure that, whether by act or omission, the condition that has been identified in the risers not be permitted to continue.

[8] The situation that was identified by Trace Consulting Group, consulting engineers, according to paragraph 6 of the affidavit of George Pace, is that the existing epoxy liner coating had not been successfully applied and was showing signs of failure and *pinhole leaks*. One of the dangers identified was that the risers were therefore prone to water escapes. Needless to say, in a condominium this is a less than ideal situation. And it is not ideal that this situation has never been rectified in the riser adjacent to the respondents' penthouse unit. The risk of damage to other units and/or common elements, I find on the balance of probabilities, is likely.

[9] The other basis for such a conclusion is that MTCC 978 entered into a contract with Xtra Mechanical Ltd. for the repair of the risers, which has now been carried out other than for that portion beside the respondents' unit, for approximately $1.7M. It must be remembered that entering this contract this was a decision made by the Board comprised of unit owners. While I have no evidence of the reserve fund for MTCC 978, this type of expenditure exposes all owners to both depletion of the reserve fund and increased common element fees. I can reasonably infer that the Board would not have made such a decision without there being a critical need to have it addressed.

[10] The respondents' guessing or surmising that the situation is not exigent does not carry any weight by comparison. I do find that the situation is urgent, so as to avoid what I have found to be the likely event of risk of water damage.

[11] It is clear from both the *Act* and the governing documents that MTCC 978 has a legal duty to repair and maintain the common elements, and that the respondents have a corresponding obligation under both the *Act* and the governing documents to permit access as necessary for the repair of common elements.

[12] Accordingly, Mr. McNeil's application for an adjournment to argue a stay or dismissal motion on the basis of abuse of process is denied, as such an application has no prospect of success.

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[13] MTCC 978 will incur a remobilization fee to have the contractor return to address the remaining work. None of the other unit owners should have to bear the cost of this work. These additional costs should be borne solely by the respondents.

[14] For these reasons, the relief requested in the application is granted.

[15] The respondents' have stated in writing that they required a court order before MTCC 978 or its agents could enter their unit. Accordingly, the applicant had no choice but to incur the expense of this Application. Again, the other unit owners should not have to pay for the respondents' decisions. In accordance with other decisions of this court, the applicant shall have its costs on a full indemnity basis. This court orders that the respondents shall pay costs of this application to the applicant fixed in the amount of $29,365.44, to be charged back to the respondents' unit as common expenses.

[16] The draft order supplied by counsel shall issue.

Healey J.

Date: December 14, 2023

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