COURT OF APPEAL FOR ONTARIO

CITATION: World Medpharm Inc. v. York Region Standard Condominium Corporation No. 1279, 2024 ONCA 417
DATE: 20240522
DOCKET: M55094 (COA-24-CV-0282)

Zarnett J.A. (Motions Judge)

BETWEEN:

World Medpharm Inc. and World Medpharm (2014) Inc., cob as World Pharmacy

Applicants
(Respondents/Responding Parties)

and

York Region Standard Condominium Corporation No. 1279,
York Region Standard Condominium Corporation No. 1247,
2352711 Ontario Inc., cob as Enhanced Care Pharmacy Thornhill*
and 2819826 Ontario Inc.*

Respondents
(Appellants/Moving Parties*)

Benjamin Rutherford, for the moving parties 2352711 Ontario Inc., cob as Enhanced Care Pharmacy Thornhill and 2819826 Ontario Inc.

David Golden and Michael Hochberg, for the responding parties World Medpharm Inc. and World Medpharm (2014) Inc., cob as World Pharmacy

Chris Dunn, for York Region Standard Condominium Corporation No. 1247[1]

Heard: May 14, 2024

ENDORSEMENT

[1] Mr. Dunn advised his client took no position on this motion.

INTRODUCTION

[1] The appellants 2352711 Ontario Inc., cob as Enhanced Care Pharmacy Thornhill and 2819826 Ontario Inc. move, under r. 63.02(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, for a stay of an order of the application judge dated February 27, 2024 until their appeal of that order is heard. The order is a compliance order made under the *Condominium Act 1998*, S.O. 1998, c. 19. It prevents the appellants from operating a pharmacy at York Region Standard Condominium Corporation No. 1247 ("YRSCC 1247"), located on Yonge Street in Markham.

[2] For the reasons that follow, the motion is dismissed.

BACKGROUND AND CONTEXT

[3] YRSCC 1247 is located at 7163 Yonge Street, Markham. York Region Standard Condominium Corporation No. 1279 ("YRSCC 1279") is located nearby, at 7181 Yonge Street. They were developed in common, as "World on Yonge" by the same developer, who was the Declarant for both.

[4] The Declarations for both condominiums provide that a commercial unit may not be used to operate a pharmacy without the consent of the Declarant.

[5] The Declarant entered into an Exclusive Use Agreement dated June 27, 2018 with the responding parties ("Medpharm") which allowed them to be the

exclusive operator of a pharmacy within World on Yonge.[2] That same agreement also appointed Medpharm the Declarant's agent to enforce the Declarations of both condominiums on behalf of the Declarant "as those rights relate to any use of units … as a pharmacy or drug store".

[6] From about 2013, 2337636 Ontario Inc. ("233") operated a medical clinic on Yonge Street close to, but not in, either of the condominium buildings. To support the work of the physicians in, and patients of, the medical clinic, a dispensary pharmacy service was operated on the site by the appellant 2352711 Ontario Inc., operating as Enhanced Care Pharmacy Thornhill ("Enhanced Care").

[7] In March 2022, the appellant 2819826 Ontario Inc. ("281") purchased units in YRSCC 1247 and subsequently leased them to 233 so that it could move the medical clinic into YRSCC 1247. 233 then sublet approximately 10 percent of the area of the units to Enhanced Care so that it could continue the pharmacy and dispensary service from the medical clinic's new location.

[8] In July 2023, Enhanced Care began operating a pharmacy from the area they had sublet within the medical clinic in YRSCC 1247. The appellants describe this as a "pharmacy/dispensary adjunct" to the medical clinic. The appellants do not assert that they received the consent of the Declarant to operate this

[2] The responding party World Medpharm (2014) Inc., cob as World Pharmacy operates a pharmacy in YRSCC 1279 and has done so since 2015.

pharmacy. They submit that both 281 and Enhanced Care were not actually aware of the provisions of the Declaration restricting pharmacy uses when the units were acquired and leased. There appears to be no dispute, however, that: (i) the Declaration of YRSCC 1247 was registered on title; (ii) 281 received, prior to closing its purchase of units in YRSCC 1247, a Status Certificate which attached a copy of the Declaration; and (iii) 281 was represented by counsel on the purchase.

[9] The lease from 281 to 233 permits the premises to be used as a medical clinic, but prohibits a pharmacy or pharmaceutical dispensary. The sublease from 233 to Enhanced Care provides that 233 will indemnify Enhanced Care if the latter cannot use the premises for their intended use.

[10] Medpharm applied to stop the appellants from operating or permitting the operation of a pharmacy. Asserting a right to enforce the Declaration of YRSCC 1247 on behalf of the Declarant, they relied on s. 134 of the *Condominium Act,* which permits, among others, a declarant to bring an application in the Superior Court for an order for compliance with any provision of the Act or declaration. Section 119 of the Act also requires any owner or occupier of a unit to comply with the condominium's Declaration.

[11] The application judge granted the application under s. 134. On February 27, 2024, the appellants were ordered to immediately cease operating a pharmacy in

YRSCC 1247 and/or the building at 7163 Yonge Street, where YRSCC 1247 is located. They were also ordered to immediately come into compliance with the Declaration for YRSCC 1247 including its provisions preventing pharmacy uses without the Declarant's consent.

[12] The moving parties filed a notice of appeal from that order dated March 19, 2024. They now move to stay the order, under r. 63.02(b), pending the hearing of the appeal.

ANALYSIS

(1) The Test for a Stay

[13] The test for staying an order pending appeal requires the court to consider the following three factors: (1) the merits of the appeal to ensure, on a preliminary assessment, that there is a serious question to be tried; (2) whether the moving party would suffer irreparable harm if the stay were refused; and (3) the balance of inconvenience, that is, which of the parties would suffer greater harm from the granting or refusal of the stay pending a decision on the appeal: *Circuit World Corp. v. Lesperance* (1997), 33 O.R. (3d) 674 (C.A.), at pp. 676-77, citing *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at p. 334.

[14] The three factors are not watertight compartments, but rather interrelated considerations such that the strength of one may compensate for the weakness of another: *Circuit World Corp.*, at p. 677. The overarching test is whether granting

the stay is in the interests of justice: *Dhatt v. Beer*, 2020 ONCA 545, 449 D.L.R. (4th) 263, at para.15.

(2) Application of the Test

a. The Merits

[15] The application judge made the order in the exercise of her discretion, and substantial deference will be owed on appeal: *Toronto Standard Condominium Corporation No. 1908 v. Stefco Plumbing & Mechanical Contracting Inc.*, 2014 ONCA 696, 377 D.L.R. (4th) 369, at paras. 31-32. The appellants' grounds of appeal must be considered in that light.

[16] The appellants argue that the application judge failed to take into account or accord sufficient weight to the impact on physicians and patients in 233's clinic caused by the closing of Enhanced Care's on-site pharmacy located within and operating collaboratively with the clinic.

[17] The application judge adverted to this argument but considered the terms of the Declaration to clearly prohibit a pharmacy use in the premises. Section 134 of the *Condominium Act* provides for compliance orders respecting a declaration, and the Act requires owners and users of units to comply with a declaration. For this argument to succeed the appellants will have to show that it was an error in principle to exercise the discretion to require compliance rather than to essentially approve non-compliance because the offending use can be perceived as

beneficial. I was not referred to any authority that requires, as a matter of principle, that the discretion be exercised in that fashion.

[18] The appellants also argue that the application judge erred in granting standing to Medpharm. Section 134 of the *Condominium Act* gives a declarant the right to apply for a compliance order. Although by the Exclusive Use Agreement Medpharm was given the right to enforce the Declarant's rights, the appellants submit that this constitutes contracting out of the Act, which s. 176 of the Act forbids.

[19] It is not clear to me that s. 176, which provides that the Act applies "despite any agreement to the contrary", forbids the Exclusive Use Agreement's conferral, by the Declarant on Medpharm, of the ability to enforce the Declarant's rights, since it was still the Declarant's rights under s. 134 that were being enforced.[3]

[20] The appellants argue that the application judge placed too much weight on the lease given by 281 which prohibited pharmacy uses, because the lease was a "*pro forma*" document. The weight to be assigned to any evidence is quintessentially a matter for the application judge to decide. In any event the foundation of the application judge's order was the Declaration – the lease was referred to as a counterweight to the appellants' contention that they had not

[3] The application judge also noted that the appellants conceded that Medpharm had standing, although counsel on the hearing before me disagreed as to whether that concession was given.

known of the Declaration's terms. But even if they did not actually advert to those terms, nothing suggests they were therefore free to ignore them. The Declaration was registered and was provided to 281 with the Status Certificate when it purchased units.

[21] The appellants argue that the application judge erred in considering that Enhanced Care operated a pharmacy within the meaning of the Declaration. On its face this is a difficult argument since the Declaration prohibits a unit being used for "pharmacy purposes or a drug store" and the appellants' own description of the Enhanced Care operation is that of a "pharmacy/dispensary". The argument is also undercut by the appellants own assertion that if they had actually been aware of the terms of the Declaration they would not have proceeded to set up their operation.

[22] Finally, the appellants argue that the application judge disregarded certain factors in determining to enforce the Declaration, such as the consequences to the Clinic and the lack of evidence of damage to Medpharm. They submit that the application judge erred in failing to analogize the Declaration to a contract in restraint of trade and to take into account the public interest. As with the appellants' first argument, this argument assumes that, in exercising the discretion to make a compliance order, a court must consider factors aimed at approving non-compliance because that non-compliance will benefit third parties.

[23] Although the grounds of appeal meet the relatively low bar of raising a serious issue for appeal, in my view, they are not sufficiently strong to overcome the weakness of the appellants' request relating to the other factors relevant to a stay.

b. Irreparable Harm

[24] There is no evidence of irreparable harm suffered by the moving parties. The appellant 281 owns the units but does not operate the pharmacy or the clinic. There is no evidence of harm, beyond remediable financial harm (such as loss of dispensing fees), suffered by Enhanced Care, which operated the pharmacy until the application judge's order. Enhanced Care's sublease from 233 entitles it to indemnity from 233, should Enhanced Care not be able to use the premises as a pharmacy.

[25] The appellants argue that irreparable harm is being suffered because: (i) the medical clinic operated by 233 has had to restrict its hours and may have to close; (ii) disruptions in the collaborative work between Enhanced Care pharmacists and 233 clinic physicians will have adverse effects on patient health; and (iii) "[p]rimary [c]are access in the community" will be impaired by the absence of a pharmacy/dispensary adjunct to the 233 clinic.

[26] Medpharm strongly contests whether the evidence supports any of these assertions. But there is a more fundamental issue. The irreparable harm

requirement asks “whether the litigant who seeks the [stay]” will suffer irreparable harm: *RJR-MacDonald*, at pp. 340-41. 233 (the operator of the clinic), its patients and the public are not parties to the litigation – they are not litigants seeking a stay.

[27] The appellants have not established that they will suffer irreparable harm from the refusal of a stay.

c. The Balance of Convenience

[28] While the appellants point to the absence of evidence that Medpharm suffered financial harm due to the operation of the Enhanced Care pharmacy, I am not satisfied that the balance of convenience favours a stay. As noted above, there is also no evidence that Enhanced Care is suffering any loss not covered by 233’s indemnity.

[29] In addition, the application judge’s order was made on February 27, 2024. Nearly two months passed before the appellants brought a motion for a stay. The *status quo ante* is not, at this point, a controlling consideration.

CONCLUSION

[30] The interests of justice do not favour a stay. The motion is dismissed. The appellants are at liberty to apply for an expedited hearing of their appeal.

[31] Medpharm is entitled to costs of this motion from the appellants fixed in the amount of $7,500 inclusive of disbursements and applicable taxes. No costs are awarded for or against YRSCC 1247.

"B. Zarnett J.A."