# COURT OF APPEAL FOR ONTARIO

CITATION: Halton Condominium Corporation No. 61 v. Kolarovaliev, 2024 ONCA 848
DATE: 20241121
DOCKET: COA-23-CV-1021

Zarnett, Coroza and Favreau JJ.A.

BETWEEN

Halton Condominium Corporation No. 61

Applicant (Respondent)

and

Nikolay Kolarovaliev and Borislava Borissova

Respondents (Appellants)

Nikolay Kolarovaliev and Borislava Borissova, acting in person

Antoni Casalinuovo, for the respondent

Heard: April 24, 2024

On appeal from the order of Justice Marvin Kurz of the Superior Court of Justice dated August 29, 2023, with reasons reported at 2023 ONSC 4921.

REASONS FOR DECISION

**OVERVIEW**

[1] The appellants, Nikolay Kolarovaliev and Borislava Borissova, reside in a condominium unit in Oakville, Ontario. They are involved in a dispute with the respondent, the condominium corporation for the building in which their unit is

located. The respondent alleged the appellants smoked or permitted smoking in their condominium unit and brought an application pursuant to s. 134 of the *Condominium Act*, 1998, S.O. 1998, c. 19 (the "Act") to enforce its Non-Smoking Rule against the appellants.

[2] The application judge confirmed the prohibition on smoking in the condominium building and terminated an existing "Grandfather Agreement" that had previously enabled the appellants to smoke in their unit under certain circumstances. He ordered that the appellants and any other individuals in the unit were prohibited from smoking anywhere in the unit itself and could only smoke on the condominium property if they did so outside of the condominium building and at least nine meters away from all doorways, operable windows, and air intakes of the building. If the appellants violated the terms of the order, the respondent was at liberty to apply for further relief under s. 134 of the Act. The appellants were ordered to pay $70,476.66 in costs to the respondent.

[3] The appellants appeal the decision of the application judge and seek leave to appeal the costs order made against them. For the reasons that follow, the appeal is dismissed and leave to appeal costs is refused.

**BACKGROUND FACTS**

[4] The respondent corporation was created for the purpose of controlling, managing, and administering the assets and property of the condominium which

consists of 205 residential units and their common elements in a high-rise building in Oakville, Ontario. The respondent's President, Mr. Jurgen Behn, owns the unit adjacent to the unit owned by the appellants.

[5] The appellants have been registered owners of their unit (Unit 801) since July 14, 2006.

[6] Smoking was permitted in the units and common areas of the building until 2018, when the respondent passed a Non-Smoking Rule. This rule prohibited smoking in the units, on the balconies, and within 9 meters of the building's doorways. Existing owners of units were provided the opportunity to notify the corporation if they wished to enter into a "Grandfather Agreement". The appellants did so. Under this agreement, existing owners could continue to smoke under certain conditions including that they had to keep windows and doors closed, use their exhaust fan, and otherwise ensure that their smoking would not unreasonably interfere with the rights of another person's use and enjoyment of their unit or the common elements. Breach of the agreement would lead to its revocation.

[7] In the months after the appellants entered into the Grandfather Agreement, residents of units neighbouring Unit 801 complained about the odour of smoke migrating onto their balconies, into the corridor, and at times into their units. They identified Unit 801 as the source of the smoke. It is not disputed that Mr. Behn was the source of many of the complaints.

[8] On June 14, 2021, the respondent sent a letter to the appellants demanding they cease the conduct complained of and notifying them that continued violation would lead to revocation of the Grandfather Agreement and a court application.

[9] The parties eventually reached a settlement through mediation whereby the appellants could continue smoking subject to conditions designed to mitigate the impact on other residents. One condition was that the appellants would pay for certain modifications to their unit. If they refused to pay for these modifications and further complaints ensued, the Grandfather Agreement would be revoked.

[10] The appellants ultimately refused to fund the proposed modifications. Further complaints followed. The respondent then brought an application to enforce its rules under s. 134 of the Act. The application judge granted the application.

[11] In his reasons, the application judge found that the appellants repeatedly violated the Grandfather Agreement. He rejected the appellants' argument that they were the victims of a vendetta by Mr. Behn and the respondent against them. Instead, the application judge found the corporation "seemed to be willing to bend over backwards to resolve the smoking issue without having to bring an application such as this."

## ISSUES ON APPEAL

[12] The appellants submit that the application judge's decision should be set aside. In their oral and written submissions, they raise three issues:

a) the application judge failed to consider and misapprehended relevant evidence that supported the appellants' position;
b) fresh evidence calls into question some of the application judge's findings; and
c) the application judge's treatment of the appellants was unfair.

## ANALYSIS

### MERITS APPEAL

### A. ISSUE 1: THE APPLICATION JUDGE DID NOT FAIL TO DEAL WITH AND DID NOT MISAPPREHEND RELEVANT EVIDENCE

[13] The appellants claim that the application judge failed to deal with or misapprehended important evidence in reaching his decision. They point to two specific pieces of evidence: first, their evidence that the entire dispute was a fabrication by the respondent in retaliation for an incident that arose shortly before the start of the dispute at issue, and second, the evidence of their financial planner, Beata Kobelak, that the appellants were on a video call with her at a time when the respondent alleged they were smoking on their balcony.

[14] In 2019, the appellants confronted the respondent and Mr. Behn about how the respondent handled insurance claims in connection with a flood in their bathroom that had caused extensive damage to their unit and units underneath it. They alleged that the respondent was committing insurance fraud. The appellants claim that shortly after they made their complaints to Mr. Behn, the respondent began to contact them about complaints of smoke emanating from their unit.

[15] The appellants assert that this is important context that the application judge ignored.

[16] We see no merit to this argument. Upon our review of the application judge's reasons, we do not agree that he ignored or misapprehended relevant evidence. The application judge noted the conflict between the appellants and Mr. Behn in his reasons. He specifically reviewed their claim that the respondent was "retaliating against them for having raised complaints about Mr. Behn's abuse of his power and harassment of them in his role as President of [the respondent]". We note that it is not surprising that Mr. Behn would be responsible for many of the complaints as his unit is adjacent to the appellants' unit. In any event, the application judge specifically found that the appellants could point to no evidence that suggested Mr. Behn was using his power as President to influence the respondent's response to the complaints. He pointed to the fact that Mr. Behn recused himself from any meetings of the respondent pertaining to the dispute and that the respondent attempted to independently verify Mr. Behn's complainants

about smoking through third parties such as the property manager and security personnel. In sum, the application judge dealt squarely with the appellants' submission that the respondent and Mr. Behn were carrying on a vendetta against them. He concluded:

> [The respondent] seemed to be willing to bend over backwards to resolve the smoking issue without having to bring an application such as this. That began when [the respondent] paid for repairs for the space between the units owned by Mr. Behn and the [appellants] in the hopes of avoiding any direct leakage of smoke from [the appellants' unit] to that of Mr. Behn.

[17] With respect to the application judge's failure to mention the evidence of the appellants' financial planner, Beata Kobelak, we do not accept that this is a basis to overturn the decision. The application judge was not required to mention every piece of evidence that was before the court on the application. Ms. Kobelak's evidence was in reference to only one of the complainants, and while the application judge did not specifically mention it, he expressly stated that he considered the "evidence as a whole" and found "on a balance of probabilities that the smoke from [the appellants' unit] escaped to the hallway, perhaps under the doorway, and through the balcony to adjoining areas." He was entitled to reach this conclusion based on the "numerous and continuing" complaints from a "variety of complainants" as opposed to simply examining the strength of one complaint.

## B. ISSUE 2: LEAVE TO ADDUCE FRESH EVIDENCE IS DENIED

[18] The appellants seek to introduce fresh evidence. The proposed fresh evidence consists of an affidavit of the appellants' son, Erik Kolarovaliev, and a further affidavit of the appellant Nikolay Kolarovaliev. The appellants claim that the fresh evidence contradicts the application judge's findings.

[19] First, the appellants say the fresh evidence undermines the application judge's finding at paragraph 53 of his reasons that while the appellants may have been away on the dates pertinent to some of the complaints, it was conceivable that their son, Erik, caused the smoke that formed the basis of the complaints. The appellants assert that the fresh evidence confirms that on July 4, 2022 and July 9, 2022 (the dates when, according to two complaints, smoke was allegedly emanating from the appellants' unit), Erik was living in Europe and was not in Canada.

[20] Second, the appellants say that the fresh evidence undermines the respondent's position at the hearing that the appellants' unit was the only one about which it received complaints of cigarette odour emanating from the unit. They seek to introduce a notice sent in 2020 by the respondent to the tenants of the condominium stating that it was aware of smoking occurring in "non-Grandfathered" units. The appellants submit that this evidence proves that they

are being unfairly targeted by the respondent, since others have broken the respondent's Non-Smoking Rule as well.

[21] Finally, the appellants say the fresh evidence undermines the application judge's finding at paragraph 46 of his reasons wherein he concluded that one of the tenants that complained about the appellants' unit, Richard Hadfield, is not a member of the respondent's board of directors. The appellants seek to tender a newsletter from Mr. Behn that they received in 2023 (after the hearing) which they claim shows that Mr. Hadfield plays an integral role with the board. They argue that the respondent specifically withheld this information from the application judge. The appellants argue that this evidence is relevant to the application judge's finding that Mr. Hadfield was a neutral third party, which supported his finding that the allegations against the appellants were not the result of a vendetta by the respondent against the appellants.

[22] It is not disputed that the appellants must meet the following the test to persuade us that the fresh evidence should be admitted: i) the evidence could not, by the exercise of due diligence, have been obtained for the hearing; ii) the evidence is relevant in that it bears upon a decisive or potentially decisive issue; iii) the evidence is credible in the sense that it is reasonably capable of belief; and iv) the evidence is such that, if believed, could have affected the result. The overarching consideration is whether the evidence should be admitted in the interests of justice. See: *Palmer v. The Queen*, [1980] 1 S.C.R. 759.

[23] In our view, there is no explanation as to why the first two pieces of fresh evidence could not, with the exercise of due diligence, have been introduced during the hearing in the court below. The position of the appellants that Erik had not lived in the condominium since 2021 was made in the original affidavit of the appellant Nikolay Kolarovaliev tendered at that hearing. There is no explanation as to why evidence confirming Erik's absence from Canada in July of 2022 was not also led during the hearing, even though the appellants were clearly aware of the date of the alleged complaints. Similarly, the notice sent by the respondent that the appellants rely on to prove the existence of complaints about smoking in other units was sent to the tenants of the condominium in 2020, three years before the hearing. We do accept that the third piece of evidence was received after the hearing and could not have been tendered by the appellants.

[24] That said, we dismiss the application to introduce fresh evidence because there is no basis for concluding that the proposed fresh evidence could have affected the result of the hearing.

[25] Even if Erik's evidence was accepted, the complaints about smoking in July of 2022 were only two of several complaints and, as noted above, the application judge accepted the evidence that smoke was emanating from the appellants' unit based on several complaints. He clearly rejected the appellants' position that these complaints were fabricated. There is no basis on which to disturb that finding. Once the application judge accepted that cigarette smoke was emanating from the

appellants' unit in violation of the prohibition, the source of that smoke is beside the point.

[26] Nor does the fact that the respondent sent a notice to the tenants about smoking occurring in "non-Grandfathered" units support overturning the application judge's decision. Again, as noted above, the application judge provided cogent and thorough reasons explaining why he did not accept that the appellants were being targeted unfairly by the respondent.

[27] Finally, the newsletter sent by Mr. Behn does not disclose that Mr. Hadfield is or was a board member. The document states that he was one of several volunteers who worked with the respondent. This evidence supports the application judge's finding that he was a not a board member. Accordingly, the appellants' motion to introduce fresh evidence is denied.

## C. ISSUE 3: THE APPLICATION JUDGE DID NOT TREAT THE APPELLANTS UNFAIRLY

[28] The appellants make the overarching submission that because the application judge never addressed the evidence supporting their position in any meaningful way, they were treated unfairly. We disagree. There is no basis for finding that the appellants were not treated fairly by the application judge or that he did not take into account all of the evidence tendered by the parties. It was his job to determine which evidence he would rely on.

## COSTS APPEAL

[29] The appellants did not refer to an appeal of the costs award in their notice of appeal but asserted during oral argument that the application judge erred in awarding the respondent $70,476.66 in costs. The appellants also claimed that they have received correspondence from the respondent's lawyers that in addition to costs of the hearing, the appellants are also responsible for an additional $19,000 in costs. During the oral hearing of the appeal, counsel for the respondent explained that those additional costs likely relate to a lien the respondent has registered against the appellants' unit, and that under the Act costs are recoverable for the expenses of obtaining that lien.

[30] We deny leave to appeal the costs award. Even assuming that there is a proper costs appeal before this court, we are not persuaded that the appellants have demonstrated any error in principle or unreasonableness in the application judge's costs award. Additionally, there is no basis for this court to entertain argument about any additional expenses allegedly incurred by the appellants in relation to this dispute. We accept the submission of respondent's counsel that no steps have been taken to enforce the lien or recover the expense of obtaining it while the appeal has been pending.

## DISPOSITION

[31] The appeal is dismissed. Leave to appeal costs is denied.

[32] At the conclusion of the oral hearing, we received bills of costs from both parties. Having reviewed the bills of costs, we fix costs of the appeal in the amount of $10,000 all inclusive, payable by the appellants to the respondent.

“B. Zarnett J.A.”
“S. Coroza J.A.”
“L. Favreau J.A.”