CITATION: Ottawa-Carleton Standard Condominium Corporation No. 961 v. Menzies, 2016 ONSC 7699
COURT FILE NO.: 16-69311, 16-68337
DATE: 2016/12/08

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Ottawa-Carleton Standard Condominium Corporation No. 961 Applicant	Rodrigue Escayola, for the Applicant
– and –	Stephen Cavanagh, for the Respondents
Douglas Menzies, Norma White and DGM Management Corp. Respondents	
	HEARD: October 27, 2016

REASONS FOR DECISION

BEAUDOIN J.

[1] This is an application by a residential condominium corporation seeking to enforce its regulations against the short-term tenancies. The corporation relies on its declaration which restricts the use of units to that of "single-family dwellings" and its rules which prevent leases of less than four months in duration.

Summary of the facts

[2] These facts are supported by the affidavits filed before me. The Applicant, Ottawa Carleton Standard Condominium Corporation Number 961 ("OCSCC 961") is a residential condominium corporation located at 170 Metcalfe, in Ottawa. It is comprised of 244 residential units.

[3] The Respondents, Douglas Menzies, an Ottawa lawyer, and his wife Norma White are the registered owners of unit 2601 ("the unit") at OCSCC 961. DGM management is a private corporation solely controlled and directed by Douglas Menzies and/or Norma White. According to the affidavit of Norma White dated, April 19, 2016, DGM leases the unit and DGM's lease runs until March 1, 2018.

[4] Article 3.1 of OCSCC 961's declaration provides that its residential units are to be occupied "only for the purpose of a single family dwelling which includes a home office […] and for no other purpose". The declaration further provides that all occupants of the units, including, tenants, residents and visitors, are to comply with the *Condominium Act*, 1998. S.O. 1998, c. 19. Amended by: 2000, c. 26, Sched. B, s. 7, the declaration, the bylaws and the rules.

[5] OCSCC 961 became aware that an increasing number of its units had been offered for rent on a very short term basis on numerous websites such as *Airbnb*. Units were rented for periods as short as a single night, on a repeated basis within any given month. Through such short-term leases, owners were offering the units to complete strangers, in addition to allowing them access to all of OCSCC 961's common elements and amenities such as parking, the exercise room, the pool, meeting rooms and the elevators. Without the consent of the other owners, some owners were basically operating a hotel out of a residential complex.

[6] OCSCC 961 became aware the unit was listed for rent and was made available on the following websites;

Airbnb;
Expedia.ca;
Kayak.com;
ca.hotels.com;
hotels.com;
Orbitz.com;
reservation desk.com;
easy to book.com
hoteis.com.

[7] The unit was made available for stays as short as a single night. Just as with any hotel, the listings for the unit provided for a "check in" and check out" times, had deposits and cancellation policies, and provided for a cleaning fee and credit card payments. The listings specifically

granted access to the condominium's amenities, gym, meeting areas and unit 2601 had no less than 13 reviews of guests who leased it in recent months.

[8] The Airbnb listing specifically requested that guests "be discreet about mentioning Airbnb to anyone in the building and under no circumstances should [guests] ever leave the keys with the concierge." This use of the unit resulted in at least one complaint.

[9] In a letter dated May 6, 2016, Menzies confirmed that he used the unit to lodge out-of-town witnesses and experts for trial preparation and for the office's annual Christmas party. In an affidavit dated June 24, 2016, White stated that they also offered the unit on silent auctions to non-profit organizations and to accommodate "office functions and other office needs from time to time."

[10] The Board of Directors of OCSCC 961 viewed these and other short-term leases as not constituting a *bona fide* single-family dwelling use and that these leases were similar to the commercial operation of a hotel. The Board of Directors and other owners viewed these leases as constituting a nuisance and a disruption to other owners and occupants. The Board was also concerned with the liability of these occupants imposed upon the corporation. OCSCC 961 is considered to be the "occupant" under the *Occupiers Liability Act*, RSO 1990 c. O.2.

[11] On April 11, 2016, the Board of Directors decided to adopt a rule further defining a length of tenancies which would be acceptable. The Board opted to fix such minimal tenancies to four months. As provided by the *Act*, the proposed rule was circulated to all registered owners, including Menzies and White, at their registered address of service on April 11, 2016.

[12] As required under the *Act*, the notice to owner specifically advised them that the rule would come into effect 30 days after the date of the notice, unless the board received from the owners, prior to that date, a requisition for an owners meeting to submit the rule to a vote.

[13] By way of a letter dated April 15, 2016, Menzies indicated that he represented "owners" affected by the proposed rule. He argued that the Board's actions were "illegal", "ultra vires", "unwarranted" and that he would seek a permanent injunction and damages.

[14] By way of a letter dated April 21, 2016, OCSCC 961 confirmed the identity of its solicitor of record and indicated that the proper way to oppose the proposed rule was for the owners wishing to oppose it to requisition of a meeting of the owners. This would lead to a vote on rule.

[15] On April 22, 2016, after having received a letter from OCSCC 961, DGM issued its application (Court File No. 16-68337) and brought an *ex parte* motion and obtained an interim injunction restraining the corporation from interfering with his short-term rental activities with regard to unit 2601.

[16] Despite the OCSCC 961's letter of April 21, 2016, Menzies provided no notice of this motion and made no effort to contact the Corporation's lawyer to alert them to the motion. Menzies did not advise the court that he and his wife owned the unit in question and that they controlled DGM management.

[17] On May 13, 2016, Justice Scott set aside the *ex parte* order obtained by DGM and concluded that there was a failure to serve the defendants and there was no full and fair disclosure to the original Justice. Justice Scott also concluded that the injunction test was not met and awarded costs of $5,500 against the Applicant.

[18] The deadline for owners to requisition a meeting of the owners to vote on the proposed rule was May 11, 2016. OCSCC 961 did not receive any requisition from any owners. As such, the rule became effective and enforceable on May 11, 2016.

[19] On May 16, 2016, following the setting aside of the *ex parte* injunction: the formal adoption of the proposed rule, OCSCC 961 wrote to Menzies, reiterating that the owners of the unit were to cease and desist from entering into short-term leases or from allowing any form of "hoteling" or short-term occupancy of the unit.

[20] Menzies continued to file additional materials in support of DGM's application and proceeded to schedule a hearing date of October 27, 2016. A total of 8 affidavits were filed on DGM' behalf, the last one was served on September 8, 2016

[21] On July 14, 2016, OCSCC 961 issued this counter-application to obtain compliance.

[22] On October 13, 2016, DMG Management formally abandoned its Application, but retained the right to argue costs. On October 17, 2016 Mr. Menzies advised that it would not oppose nor consent to the Corporation's Application. A week before the hearing, the Respondents changed counsel and advised that they objected to the Court's jurisdiction in this Application.

[23] The Respondents raise these preliminary issues

a) Is DGM a proper party?

b) Is this application stayed by virtue of Section 132(4) of the Act, since no mediation or arbitration has been sought of the disagreement between the parties?

c) Should notice be given to all of the other 243 unit owners, so that they could make submissions, if they chose?

d) Do the Declaration, and the Rules prohibit the form of short term rental or other uses engaged in by the Respondents?

e) Has the application become moot since Menzies has undertaken not to lease the unit?

a) Is DGM a proper party?

[24] Although DGM commenced its own application against OCSCC 961 wherein it describes itself as the lessee of the unit and therefore entitled to seek injunctive relief against OCSCC 961; it now claims that it is not a proper party to OCSCC 961's application. The reasons for this will become more obvious later.

[25] OCSCC 961 claims that DGM is an "occupier" within the meaning of the *Act.* Although "occupier" is not a defined term, it makes a distinction between "owners" and "occupiers". Sections 17(3) and 119(1) of the *Act* provide:

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. 1998, c. 19, s. 17 (3).
>
> …

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. 1998, c. 19, s. 119 (1).

[26] Occupier is a defined term under the section 1 of *Occupiers' Liability Act* R.S.O. 1990, CHAPTER O.2

Definitions

> 1. In this Act, "occupier" includes,
>
> > (a) a person who is in physical possession of premises, or
> >
> > (b) a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises, despite the fact that there is more than one occupier of the same premises; ("occupant")

[27] The Oxford Dictionary defines an occupier as "A person or company residing in or using a property as its owner or tenant, or (illegally) as a squatter."

[28] In this case, I have no difficulty concluding the DGM is an occupier, As Norma White deposes in her own affidavit dated April 19, 2016:

> DGM Corp leases the condo unit 2601 at 179 Metcalfe in the condo building known as Tribeca West – OCSCCC 961. DGM pays the condo expenses – mortgage, taxes, condo fees, hydro and internet costs averaging $3,750.00 per month. DGM Corp in turn rents out the unit on a short term basis through its agent Lisa Miall for periods of time that I and my family do not require it.

[29] These activities would meet the dictionary definition of an "Occupier" and would expose DGM to the duties and responsibilities of an "occupier" under the *Occupiers Liability Act*

[30] I conclude that DGM, as well as Menzies and White, as unit owners, are proper and necessary parties to this application and are therefore obligated to comply with the *Act*, the declaration, the by-laws and the rules of OCSCC 961.

a) Is this application stayed by virtue of Section 132(4) of the *Act*, since no mediation or arbitration has been sought of the disagreement between the parties?

[31] In this case OCSCC 961 has brought its application pursuant to Section 134 of the *Act*, which provides:

> **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. 1998, c. 19, s. 134 (1); 2000, c. 26, Sched. B, s. 7 (7).
>
> **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. 1998, c. 19, s. 134 (2).

[32] Section 132(4) provides as follows:

> (4) Every declaration shall be deemed to contain a provision that the corporation and the owners agree to submit a disagreement between the parties with respect to the declaration, by-laws or rules to mediation and arbitration in accordance with clauses (1) (a) and (b) respectively. (Emphasis mine)

[33] Where a party fails to request arbitration at the first opportunity or has engaged in steps specific to the civil litigation process over and above the delivery of pleadings, that party may be found to have waived its right to arbitration.[1] Similarly where a defendant takes significant steps in response to litigation and does not advance an objection to the Court's jurisdiction at the earliest opportunity may be deemed to have waived their right to arbitration.[2] In the context of

[1] *Hargraft Schofield LP v. Fluke*, 2014 ONSC 5866 at paras 39-41
[2] *Bouchan et al. v. Slipicoff* et al., 2009 ONSC CanLII 728 at para 30

condominium matters, Justice Juriansz (as he then was) conclude that delays by party to request arbitration constitute a waiver of the application of 132(4) of the *Act.*[3]

[34] I find that the Respondents waived the provisions of section 134(2) of the *Act* by commencing their own application against OCSCC 961 and then persisting with that application over a period of 7 months before suddenly arguing that this court lacked jurisdiction to hear OCSCC 961's application.

[35] Respondents' counsel acknowledges that their actions may have constituted a waiver of the arbitration provisions of section 134(2) but not of the mediation provisions; and as such, OCSCC 961's application must still be stayed. A similar argument was raised in *Nipissing Condominium Corporation No. 4 v. Simard*, 2009 ONCA 743 (CanLII). In that case, the Respondent Simard was the owner of the condominium unit and the dispute centered on his rental of the unit to students. The Condominium Corporation sought an order terminating the students' tenancies claiming that they were in breach of the occupancy restriction in the condominium's declaration.

[36] The Court of Appeal upheld the motion judge's decision to refuse a motion to stay the application because of non-compliance with section 134(2) of the *Act*. The motions judge had concluded:

> "this case involves intertwined issues under the Condominium Act and the Condominium Declaration that go beyond the owners of the units and the Corporation, who are the only parties referred to in the requirement of mediation-arbitration in s.132(4) and (1)"

[37] I have already concluded that DGM is a tenant and an occupier and a necessary party to this application. Section 134(2) has no application where the dispute is with a tenant. As in the case of *Nipissing*, staying the proceeding against the owners but not against the tenant would be contrary to Section 138 of the *Courts of Justice Act*, R.S.O. 1990, c. C.34 which seeks to avoid the multiplicity of proceedings. I accordingly dismiss the Respondents' request for a stay of proceedings

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[3] *McKinstry v. YCC No .472*, [2003] O.J. No. 5606 at paras 24 and 26

b) Should notice be given to all of the other 243 unit owners, so that they could make submissions, if they chose?

[38] In its initial application, OCSCC 961 sought declaratory relief against the Respondents as follows:

1. A declaration that article 3.1(a) of OCSCC No. 961's declaration prohibits short-term rentals and transient occupancy for financial, consideration of condominium units at OCSCC 961;
2. A declaration that any lease or occupancy for financial consideration of the unit for a period of less than four months constitute a prohibited use under OCSCC 961's Declaration and Rules;
3. A declaration that any lease or occupancy of units at OCSCC 961 shall be a minimum four month;
4. An order preventing the Respondents from entering into short-term leases or from allowing short-term occupancy or short-term use of unit 2601 at OCSCC 961;
5. The costs of this application, on the full indemnity scale is provided by the Corporation's governing documents and by the Condominium Act, 1998, S.O. 1998, c. 19;
6. Such further and other relief as this Court deems just.

[39] On the return of the application, counsel for the Applicant advised the court that he would not be seeking the first three declarations listed above. It was clear that OCSCC 961 was relying on section 134 of the *Act* in seeking "an order enforcing compliance with any provision of this *Act*, the declaration, the by-laws, the rules".

[40] In light of this, the Respondents principal objection that notice be given where declaratory relief is being sought is no longer an issue. Nevertheless, the Respondents rely on Rule 5.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 that requires that "every person whose presence is necessary to enable the court to adjudicate effectively and completely on the issues in a proceeding shall be joined as a party to the proceeding". The Respondents were the only unit owners served with this application.

[41] The Respondents also rely on Rule 38.06(2) that provides that a judge may dismiss or adjourn an application and direct that notice of the application be served on other persons.

[42] I acknowledge that the distinction between an order seeking compliance and a request for declaratory relief may be a fine one. In a number of decisions[4], Ontario Courts have granted declaratory relief in response to an application seeking declarations and compliance with provisions of the *Act.* In those cases, there does not appear to have been any objection raised with the form of the relief sought or with regard to the lack of service on other unit owners. To avoid the argument that has been raised here, it may be that the better practice is to seek an order directing compliance and avoid specific requests for declaratory relief. In any event, any order obtained in this case would be limited to the Respondents named in this application.

[43] In this case, all unit owners were given notice of the new rule with respect to short term tenancies on April 11, 2016 and were advised of the 30 day time limit under which they could requisition a meeting of the owners to vote on the rule. No such requisition was made and as a result the rule became valid and enforceable on May 11th, 2016.

[44] While Menzies indicated in his correspondence that he represented other "owners", DGM was the sole Applicant seeking injunctive relief and the only unit owner to take any step in opposing the rule.

[45] Sections 109 and 110 of the *Act* require that notice be given to every owner only when the condominium corporation seeks to amend its declaration or description. I am satisfied that notice to other unit owners was not required in this case. Their participation is not necessary to determine the issues in this case and no other unit owner is directly affected by any order that might be made. If other owners are engaged in similar activities, OCSCC 961 will have to bring a further application should that be necessary.

c) Do the Declaration, the Bylaws and the Rule prohibit the form of short term rental or other uses engaged in by the Respondents?

[4] *Nipissing Condominium Corporation No. 4 v. Kilfoyl*, 2009 CanLII 46654 (ON SC) ; *Metropolitan Toronto Condominium Corp. No. 850 v. Oikle,* [1994] O.J. No. 3055; *Muskoka Condominium Corporation No. 39 v. Kreutzweiser*, 2010 ONSC 2463 (CanLII)

[46] Section 7(4)(b) of the *Act* provides that a Condominium Declaration may contain conditions or restrictions with respect to the occupation and use of units, as well as conditions or restrictions with respect to the lease of units.

[47] Article 3.1 of OCSCC 961's Declaration provides that its residential units are to be occupied "only for the purpose of a single family dwelling which includes a home office […] and for no other purpose".

[48] In the absence of a definition in the condominium documents of what constitutes a "single family", the courts have defined a "family" as a "*social unit consisting of parent(s) and their children, whether natural or adopted, and includes other relatives if living with the primary group*". [5]

[49] I accept the Applicant's argument that a "one family residence" is "a basic social unit which involves more than merely sharing short term temporary sleeping quarters and shared facilities on a rental basis" and that courts have ordered compliance and enforced single-family provisions.[6]

[50] Based on the evidence before me, there is no doubt that the Respondents, who have leased their unit, on a repeated short-term basis in a hotel-like operation, are in breach of the Declaration.

[51] "Single family use" cannot be interpreted to include one's operation of a hotel-like business, with units being offered to complete strangers on the internet, on a repeated basis, for durations as short as a single night. Single family use is incompatible with the concepts of "check in" and "check out" times, "cancellation policies", "security deposits", "cleaning fees",

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[5] *Chan v. T.S.C.C. No. 1834*, 2011 ONSC 108, paras. 29-31; aff'd 2012 ONCA 312 –*York Condominium Corporation No. 17 v. An Ge*, 2013 ONSC 3328, para. 27-29;Audrey Loeb, *Condominium Law and Administration* (Toronto: Carswell), at chapter 3(1)(b)(ii)(G)

[6] *York Condominium Corporation No. 17 v. An Ge*, 2013 ONSC 3328, paras. 27-29; *Nipissing Condominium Corporation No. 4 v. Kilfoyl*, 2010 ONCA 217;*Chan v. TSCC No. 1834*, 2011 ONSC 108, paras. 32; aff'd 2012 ONCA 312; *Ballingall v. Carleton Condominium Corporation No. 111*, 2015 ONSC 2484;Audrey Loeb, *Condominium Law and Administration* (Toronto: Carswell),

instructions on what to do with dirty towels/sheets and it does not operate on credit card payments.

[52] Moreover "Single family use" could not have contemplated including the use of a unit to house out-of-town witnesses and experts for trial preparation or the unit being offered on silent auctions for not-for-profit organizations or to hold a law firm's office functions and Christmas parties. What has happened in this case is a commercial use of the unit.

[53] Section 58 of the *Act* gives OCSCC 961's directors the authority to make rules as follows:

> 58. (1) The board may make, amend or repeal rules respecting the use of common elements and units to,
>
> > (a) promote the safety, security or welfare of the owners and of the property and assets of the corporation; or
> >
> > (b) prevent unreasonable interference with the use and enjoyment of the common elements, the units or the assets of the corporation.
>
> (2) The rules shall be reasonable and consistent with this Act, the declaration and the by-laws.

[54] Rules preventing short-term leasing that are not so overly restrictive as to completely negate or fundamentally alter the right of owners to lease their units to traditional tenants have been found valid and in compliance with s. 58 of the *Act*. Specifically, rules requiring that leases be in excess of 4 months have been found to be valid and enforceable.[7]

[55] I conclude that the Declaration and the Rule validly prohibit the form of short term rental or other uses engaged in by the Respondents.

d) Has the application become moot since Menzies has undertaken not to lease the unit?

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[7] *MTCC No 850 v. Sylvia Oikle*, [1994] O.J. No. 3055 (S.C.J) at para. 31;*Skyline Executive Properties Inc. v. Metro Toronto Condominium Corp. No. 1280*, [2001] O.J. No. 3512 (S.C.J.) at paras. 17-19;*Apartments International Inc. v. Metro Toronto Condominium Corp. No. 1280*, [2002] O.J. No. 3821 (S.C.J.) at para. 28 ; *Ballingall v. Carleton Condominium Corporation No. 111*, 2015 ONSC 2484 at paras. 73-74 .

[56] As recently as October 13. 2016. Norma White swore an affidavit contesting the validity of the rule. Notwithstanding that Justice Scott set aside DGM's ex parte injunction on May 13th, 2016 and the rule had become valid and enforceable as of that May 12th, the Respondents continued to lease out the unit in contravention of the rule.

[57] Lisa Miall, DGM's booking agent, deposes that bookings had been made prior to her being informed of the new rule and that the decision to honour existing contracts was hers as well as that of the owners as this would have resulted in a loss of revenue for the owners and a salary for her and that this would be an inconvenience for the people who had booked the unit.

[58] Both Ms. White and Ms. Miall are very critical of the Board who they accuse of slanderous conduct. Their responding material dated October 18, continues to support request for injunctive relief even though DGM's application was formally abandoned on October 13th, 2016.

[59] Given the Respondents' continued use of their unit in violation of the rule, their continued objections and the lack of any acknowledgement on their part that the rule is enforceable and valid, an order directing their compliance is to issue.

[60] Absent any agreement by the parties on the matter of costs, the successful Applicant is to provide me with its submission on costs with respect to this application and the DGM's abandoned application within 20 days of the release of this decision. These submissions are not to exceed ten pages in length. (excluding attachments) The Respondents are to provide responding submissions also limited to 10 pages in length (excluding attachments)

Justice Robert Beaudoin

Released: December 8, 2016

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Respondents

REASONS FOR JUDGMENT

Beaudoin J.

Released: December 8, 2016