CONDOMINIUM AUTHORITY TRIBUNAL

DATE: November 27, 2018
CASE: 2018-00002R
Citation: Rafael Barreto-Rivera v Metropolitan Toronto Condominium Corporation No. 704, 2018 ONCAT 11

Order under section 1.44 of the *Condominium Act, 1998.*

Adjudicator: Patricia McQuaid, Member

The Applicant
Rafael Barreto-Rivera
Self-Represented

The Respondent
Metropolitan Toronto Condominium Corporation No. 704
Gavin McDonald, Agent

Hearing: August 24 - November 12, 2018
Written online hearing

REASONS FOR DECISION

A. OVERVIEW

[1] Rafael Barreto-Rivera (the "Applicant") is a unit owner of Metropolitan Toronto Condominium Corporation No. 704 ("'MTCC 704" or the "Respondent"). MTCC 704 is a small condominium consisting of eight residential units. Mr. Barreto-Rivera made a Request for Records to MTCC 704, dated November 2, 2017, under the *Condominium Act, 1998* (the "Act"). That request related to one record: minutes of the February 2, 2016 owners' meeting. The Applicant initiated the Condominium Authority Tribunal (the "Tribunal" or "CAT") processes and concluded the Stage 2 - Mediation on July 30, 2018, moving the case forward to Stage 3 - Tribunal Decision.

[2] The Applicant and Respondent agree that no formal minutes of the February 2, 2016 meeting were ever drafted by the Respondent.

[3] The Applicant submits that the Respondent's failure to comply with s. 55(1) of the Act, specifically the requirement that the condominium corporation keep the

minutes of owners' meetings, despite his repeated requests that it provide minutes for the February 2, 2016 meeting, has violated his right as a unit owner to obtain timely access to what he characterizes to be an important record. The Applicant seeks both costs and a penalty as a result of the Respondent's failure to maintain and provide the minutes in question.

[4] The Respondent states that it has distributed a summary of the discussion at the February 2, 2016 meeting. It has agreed that these are not minutes and has asserted that minutes were not required as the meeting was not an owners' meeting per se, but rather an information session for owners about a particular issue: windows.

[5] The Applicant gave testimony through the CAT-ODR system. The Respondent chose not to cross-examine the Applicant, nor did it call any witnesses to give testimony. Numerous documents were submitted by the Applicant as evidence before me and the Respondent took no issue with these. Both users provided both opening statements and closing submissions.

[6] After considering the evidence and submissions, and for the reasons set out below, I have decided as follows: the Applicant was entitled to receive minutes of the February 2, 2016 owners' meeting and that MTCC704 refused to provide these without reasonable excuse**.** As a result, I order the Respondent to pay to the Applicant a penalty in the amount of $500.

B. ISSUES & ANALYSIS

Issue 1: Did the Respondent refuse to provide minutes for the February 2, 2016 meeting? If the answer to this question is yes, did the Respondent have a reasonable excuse for that refusal?

[7] For an analysis of this first issue, it is necessary to have an understanding of the chronology of how the February 2, 2016 meeting came to be and the subsequent requests for minutes of that meeting, as revealed in the documents filed at the hearing. Further, the critical fact that defines this dispute is that minutes for the meeting do not exist. Therefore, I must also consider whether, in light of this fact, there can be a refusal to examine or obtain a copy of the record requested. Corollary to this is the issue of the adequacy of record keeping pursuant to s. 55 of the Act

Chronology of Events

[8] The starting point in the timeline is a January 4, 2016 email to the condominium owners from the secretary of the condominium, in which she noted that the Board of Directors (the "Board") was arranging to hold an "owners' meeting" in February with the heritage architect to answer questions about window repair and replacement.

[9] The minutes of the January 5, 2016 Board meeting reference, with respect to the windows, that the Board would be setting up an "owners' meeting" with the architect to discuss the windows plan for the building. In a January 7th email with the subject line "Storm windows, owners meeting Feb 1," the condominium secretary confirmed the date, time and location for the meeting. The date was corrected to February 2nd in a subsequent email.

[10] On January 30th, another email was sent confirming the meeting, which is referred to as the "owners' meeting," and advised that the heritage architect would discuss her recommendations and answer questions. Those recommendations were summarized in the email and a quotation and invoice for some of the work recommended by her was attached.

[11] The meeting took place as scheduled on February 2nd. The next day, the Applicant sent an email to the Board and owners with three suggestions flowing from "yesterday evening's owners' meeting". These reflected a possible disagreement about the recommendations and the use of reserve funds to pay for the window improvements.

[12] On February 7th, the condominium secretary circulated a three page summary of the discussion at the February 2nd "windows meeting". The summary made note of who was present and set out the options presented by the architect and the various owner's questions and concerns as well as the architect's response. The Applicant sent an email in response on February 12th. In that email, he set out what he believed to be important omissions from the summary. He ended his email by stating that he looked forward to receipt of the official minutes of the February 2, 2016 owners' meeting as required by the Act.

[13] There appears to have been a Board meeting following the owners' meeting, also on February 2nd. The minutes of that meeting reveal that three Board members were present and there was one business item, a motion to approve the architect proceeding with research into window restoration options.

[14] As noted previously, the Applicant and the Respondent agree that the summary delivered to the owners on February 7th were not minutes of the meeting. Minutes of the February 2nd meeting with owners were never forthcoming. The Applicant

sent repeated requests for draft minutes for the meeting and pointed out the obligation under their condominium by-laws and the Act to do so. For example, MTCC 704 by-laws state a copy of the minutes of meetings of the members and the Board shall be furnished to each owner within 20 days of the meeting.

[15] It should have been clear to the Board, based on the Applicant's February 12th email, that the Applicant was of the view that the February 2nd meeting was in fact an owners' meeting that required minutes. Underlying that repeated request was the concern that without minutes being circulated there was no opportunity for owners to comment upon and subsequently approve those minutes, and therefore, flowing from that, no official MTCC 704 record of the meeting. In his evidence, the Applicant stated that in his 32 years as an owner, owners' meetings have always been the subject of routinely produced draft minutes which are distributed for subsequent review, corrections made if necessary and final approval given by the unit owners who were present at the meeting.

[16] There was, at this point in February 2016, an opportunity for the Board to respond to the Applicant either to explain why draft minutes would not be circulated or to re-draft the summary in a minute format. However, the Board did neither. It was not until the May 2017 Board meeting that the secretary, when asked by the Applicant why minutes for the February 2, 2016 meeting had not been produced, explained that the February 2nd meeting was not an owners' meeting per se as no official agenda had been distributed or voted upon, and no motions were accepted, made or voted upon. The secretary stated that detailed notes had been distributed and she would not be reformatting them as minutes.

[17] Almost a year later, at the April 2018 Board meeting, after the Applicant had initiated the Tribunal process, the Board invited the Applicant or any other owner who had an issue with the notes from the "windows meeting" to submit corrections or amendments to the notes which the Board would then distribute to all owners.

Analysis

[18] The Respondent, in closing submissions, stated that the Board reasoned that the February 2, 2016 meeting was an informal session rather than any kind of meeting where official business was taking place, with no votes taking place or agenda. While informal notes were taken, they determined that they were not comprehensive enough to constitute a proper set of minutes.

[19] The facts as set out in the above chronology belie those assertions. In all the communications to owners prior to February 2nd, the meeting was called an "owners meeting". While perhaps not a formal agenda, it was clear to the owners

what was to be discussed as per the January 30, 2016 email. The notes made at the February 2nd meeting appear to contain some detail about what transpired at the meeting (though they are not adequate from the Applicant's perspective). Further, there is no definition of "owners' meeting" that suggests it must include a vote.

[20] Characterizing the meeting, for the first time,15 months after the event, as an information session, and not an owners' meeting per se, is not credible. I need not ascribe any motive to the Board that they may have been attempting to avoid their duties under the Act. However, the various emails exchanged between the Applicant and Respondent after the meeting show that a significant expenditure was being contemplated and the issue of whether that expenditure was appropriate, and the manner by which it would be funded, were contentious issues. Based on the evidence, this was an important owners' meeting.

[21] I do find, based on the evidence before me, that minutes for the February 2, 2016 meeting, appropriately characterized as an owners' meeting, were required under s. 55(1) of the Act. While the summary that was circulated might be considered sufficient to qualify as a record of the meeting, as inferred from the Board's April 18, 2018 offer to owners, the summary/notes are not considered by either User to be minutes and were not intended to be such, as readily admitted by the Respondent. And critically from the Applicant's perspective, there was no opportunity for owners to comment and vote upon them.

[22] Creating the minutes now would seem to be an artificial exercise. This leads then to the issue of whether the failure to produce minutes for the February 2, 2016 meeting can give rise to a refusal under s. 55 of the Act. Section 55(3) states that the corporation shall permit an owner to examine or obtain copies of the records of the corporation. Clearly, the record in question, does not exist. Does this equate to a refusal to provide the record, without reasonable excuse?

[23] The facts as found lead me to the conclusion that it does. For reasons that are not apparent, when confronted on February 12th with the Applicant's clearly articulated expectation that minutes would be produced and his demand, based on the condominium's by-laws, that they be provided, the Respondent chose not to respond or offer an explanation (or excuse) for not doing so, for months. By May 2017, producing minutes may well have seemed a moot exercise. For the Tribunal to conclude that there is no lack of compliance with a request for records when the corporation fails to keep the record that it ought to have kept, would open the door to a corporation intentionally not maintaining a record so as to avoid its disclosure obligations under the Act. While I am not suggesting any such intention on the

facts before me, I do find that there was no credible rationale for not creating and distributing the minutes, at least in response to the Applicant's request to do so, which, in effect, gives rise to a refusal to produce the record.

Issue 2: Does the refusal to provide the record warrant an award of costs or a penalty?

[24] Under s. 1.44(1)4 of the Act, and pursuant to Rule 32 of the Tribunal's Rules of Practice, the Tribunal may direct a user to pay the costs of the other user. The Applicant seeks reimbursement of his costs paid to the Tribunal in the amount of $200. The award of costs is discretionary. In the usual course, an Applicant seeks disclosure of a record. Here, the Applicant very likely knew when making his records request in November 2017 and initiating the CAT process that there would be no order for production of the record, because it does not exist. As he stated in his closing submissions, this proceeding, and an award of his costs and a penalty are all "in order to ensure that in future, the Board in a timely manner diligently produces, safely stores and properly distributes the minutes of MTCC#704 owners' meetings" as required by the by-laws and the Act.

[25] The Applicant utilized the CAT process as he was entitled to do, but his goal was not to obtain a record. Rather, he wanted to make an important point, as an owner, to his Board. He has been successful in that regard. However, in the circumstances of this case, where the Applicant consciously chose to pursue the CAT process for this specific purpose and recognizing that the Respondent's conduct throughout the CAT process has been, for the most part, timely and appropriate, I do not find that an award of costs is appropriate.

[26] On the issue of penalty, I have reached a different conclusion. Section 1.44(1) 6 gives discretion to the Tribunal to order a corporation to pay a penalty to a person entitled to examine or obtain copies under s.55(3) if the Tribunal considers that the corporation has, without reasonable excuse, refused the person copies under the section. The situation in which the Applicant and Respondent have been placed was avoidable. And this being a small condominium where owners and Board members are indeed close neighbours would seem to make the situation more regrettable. The Respondent had ample opportunity to produce minutes for the February 2, 2016 owners' meeting at a time somewhat contemporaneous to the event, within the period specified by its by-laws, or in short order following the Applicant's demand. It steadfastly refused to do so. However, the Respondent has submitted that if it is determined that minutes ought to have been recorded, they accept responsibility for that and will not make that mistake going forward.

[27] In coming to the decision regarding the amount of the penalty, I note that under the previous legislation the standard penalty for a corporation that without reasonable excuse did not provide records was $500, regardless of whether there was a refusal or simply a failure to do so. The penalty the Tribunal is authorized to impose applies only in the case of a refusal to provide records. This seems consistent with prior court decisions not to enforce payment of this penalty amount if the condominium corporation had made a reasonable effort to provide access to the requested records. On the facts of this case, there was no genuine effort by the Board to produce minutes for the meeting. The change in the legislated penalty from a fixed amount of $500 to a range of up to $5,000, suggests the legislature intends that the penalty imposed by this Tribunal should proportionately reflect the nature or severity of the refusal.

[28] In weighing these factors I find that a penalty at the lower range, in the amount of $500 is appropriate.

[29] Finally, I note that the Applicant cited ss. 137(1) and (2) of the Act in his closing submissions. Section 137(1) of the Act states that a corporation that contravenes s. 55(1) is guilty of an offence. Section 137(2) places liability on officers or directors. These sections speak to provincial offences over which this Tribunal has no jurisdiction. The Applicant has also requested that the current Board members be prohibited from serving on a Board in the future. This too may be relief that is outside the current jurisdiction of the Tribunal to consider. However, I need not decide that issue as in my view, based on the evidence, it is not necessary or just relief in these circumstances

C. CONCLUSION & ORDER

[30] I find that the Applicant was entitled to receive minutes of the February 2, 2016 owners' meeting and that MTCC No.704 refused to provide these without reasonable excuse**.**

[31] Therefore, pursuant to the authority set out in section 1.44(1) of the Act, the Tribunal orders that:

1. MTCC No.704 shall pay a penalty in the amount of $500 to Mr. Barreto-Rivera within 30 days of the date of this decision.

2. The Applicant shall be given a credit toward his next monthly contribution to common expenses equal to his proportionate share of the $500 penalty (applying the proportions set out in schedule D to the declaration) as if he has prepaid the same.

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Patricia McQuaid
Member, Condominium Authority Tribunal

RELEASED ON: November 27, 2018