

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: April 10, 2019

CASE: 2018-00353R

Citation: Lucian Sava v York Condominium Corporation No. 386, 2019 ONCAT 8

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

Adjudicator: Laurie Sanford, Member

The Applicant

Lucian Sava

Self-Represented

The Respondent

York Condominium Corporation No. 386

Srdjan Besir, Agent

Hearing: January 8 to March 19, 2019

REASONS FOR DECISION

A. OVERVIEW

- [1] Mr. Lucian Sava is a unit owner of York Condominium Corporation No. 386 ("YCC386"). He has requested records from YCC386 and many of these records have been provided. Four records that were requested remain outstanding. Additionally, Mr. Sava has requested information about an ongoing lawsuit involving YCC386. Mr. Sava is claiming costs in this matter and a penalty from YCC386 for its failure to provide the records. Mr. Sava also claims certain other penalties and damages.
- [2] YCC386 has provided a variety of occasionally contradictory explanations as to why Mr. Sava has not received the records he is requesting. The most recent position was set out by Mr. Besir, the agent for YCC386, in closing submissions; YCC386 acknowledges Mr. Sava's entitlement to the records and will provide them when Mr. Sava pays \$500 to the condominium corporation for their costs of producing the records.
- [3] For the reasons set out below, I find that Mr. Sava is entitled to the records he has requested, subject to the right of YCC386 to redact certain information. I find that

YCC386's earlier objections to giving Mr. Sava the requested records, with appropriate redactions, are without merit. Mr. Sava is also entitled to costs as detailed below. Mr. Sava's request for other types of penalties is not warranted. His claim for damages is denied because Mr. Sava has not established his right to them.

- [4] YCC386 shall pay a penalty for their failure to provide the requested records without reasonable excuse. YCC386 is entitled to charge a reasonable amount for the production of the requested records. Both amounts are calculated as set out below.

B. PRELIMINARY MATTERS

- [5] This hearing concerned a records request made by Mr. Sava in September 2018 under section 55 of the *Condominium Act, 1998* (the "Act"). The online hearing was held from January 8, 2019 to March 19, 2019. Mr. Besir originally joined the hearing as the agent for YCC386 but left the proceeding in February. YCC386 appointed a new representative, who did not participate in the hearing. YCC386 then appointed a third representative who also did not participate in the hearing. Mr. Besir was re-appointed the agent for YCC386 at the time of the closing submissions.

C. ISSUES & ANALYSIS

- [6] The participants in this hearing, called "Users", agree that there are four types of records that remain in dispute between them. During the course of the hearing, Mr. Sava clarified his request for these records as follows:
- a) Paper copies of records relating to the refund of a 2017 Special Assessment totalling approximately \$59,987.88. Mr. Sava requests records showing: i) the amount of the original contribution by unit with proof of payment; ii) the amount refunded by unit with proof of payment, and iii) the outstanding balance of the Special Assessment.
 - b) Paper copies of reports from Hayatt Engineering Inc. prepared between April 1, 2018 and July 11, 2018 and concerning roof leaks in Mr. Sava's unit.
 - c) Paper copies of YCC386's records of the Request for Service by Mr. Sava from January 17, 2018 to December 1, 2018 concerning Mr. Sava's unit, complete with the superintendent's report and the date, time, action taken, and unit holder's signature (after the service was completed by the contractor).

- d) Paper copies of minutes of the meetings of the Board of Directors of YCC386 from February, 2018 to September 14, 2018 with references to individual owners or units redacted.
- [7] Additionally, Mr. Sava requested the name and address of the Court in which a legal action involving YCC386 is scheduled to be heard. Mr. Besir committed to supplying Mr. Sava with this information when it was available.
- [8] During the hearing, the Users raised several issues surrounding each type of record that Mr. Sava has requested, namely:
- a) Is Mr. Sava entitled to the records he is requesting and if so, on what basis? Specifically, is YCC386 entitled to redact information from the records?
 - b) Is YCC386 entitled to claim a cost for producing the records and if so, how is the cost to be calculated?
 - c) Is Mr. Sava entitled to claim costs in this matter and if so, in what amount?
 - d) Is Mr. Sava entitled to any penalty from YCC386 for its failure to provide the records and if so, in what amount?
 - e) Is Mr. Sava entitled to claim other penalties or damages in this matter and, if so, in what amounts?

Issue 1: Is Mr. Sava entitled to receive paper copies of the records he is requesting and, if so, on what basis?

Paper copies of the refund of the 2017 Special Assessment

- [9] YCC386 has taken various positions concerning Mr. Sava's entitlement to receive details of the refund of a 2017 Special Assessment. In an undated memorandum, the Building Manager advised Mr. Sava that his request had been denied because the record was "private". In an unsworn witness statement dated January 16, 2019, the Building Manager wrote that Mr. Sava had either already received the records or was not entitled to them because the management either did not have the information or could not disclose it because it was private. In an unsworn and undated statement, Mr. Besir wrote:

It is clear that Mr. Lucian Sava has the right to require corporate documents and it is also clear that Mr. Sava (as well as all other unit owners) has the right to get them without a charge, except for some reasonable photocopying fees (if any).

However, I am hoping that my statement will prove that, in this case, that right has been misused and that the motivation for this request is way out of reasonable need.

[10] In YCC386's closing statement, Mr. Besir wrote that Mr. Sava was not entitled to the refund of the Special Assessment since he had never paid the assessment. YCC386 apparently regards this request as evidence of bad faith on Mr. Sava's part. It is YCC386's position that Mr. Sava, by making a series of requests for unrelated records, was demonstrating bad faith and was requesting records to keep the office staff busy and away from their regular duties.

[11] Mr. Besir recited a history of what he characterised as "unacceptable" and "harassing" conduct on the part of Mr. Sava. He wrote that Mr. Sava had been rude to members of the staff. Mr. Besir noted that Mr. Sava was not following the rules of YCC386 and as an example cited the fact that Mr. Sava had not provided the management with a key to his unit. Mr. Besir concluded by saying:

I hope that I have explained to Tribunal that this case is not just a simple case. I am not saying that Mr. Sava(sic) does not have the right to review the documents, however, the fact that he is asking, for example, for the list of unit owners who got reimbursed for the Special Assessment, or for the list of mortgagees, tells me that something is wrong. His motivation is definitely not to fix some problem in the corporation or to get some service that we failed to provide him. This is something different ...

[12] Subsection 55(3) of the Act sets out the entitlement of condominium unit owners to records of the condominium, including financial statements. This entitlement is designed to promote transparency between condominium corporations and the unit owners. The right of a unit owner to the records enumerated in the Act is not dependent on good behaviour. Having said that, there are some express exceptions to the right to records established in the Act and in Ontario Regulation 48/01 to the Act (the "Regulation").

[13] One basis on which records may be denied by a condominium corporation is set out in subparagraph 13.3(1)(a) of the Regulation. That provision requires that the request for records must be "solely related to that person's interests as an owner, a purchaser or a mortgagee of a unit, as the case may be, having regard to the purposes of the Act ..." In the request for records form, a unit owner must certify that this is the purpose of his or her request. Mr. Sava has made this certification. It is up to YCC386 to establish, on a balance of probabilities, that Mr. Sava is not making the records request for purposes solely related to his interest as an owner, having regard to the purposes of the Act. The question is whether YCC386 has done so in this case.

- [14] I conclude the YCC386 has not established that Mr. Sava's request violates the provisions of subparagraph 13.3(1)(a) of the Regulation. Mr. Sava's past conduct, while seen as unacceptable to YCC386, does not relate to his purpose in requesting the records. The fact that Mr. Sava is making "unrelated" requests for records is not a ground for denying him a record. Nor is YCC386's suspicion that Mr. Sava is not requesting the records to "fix some problem" or "get some service". Likewise, the fact that Mr. Sava may not be eligible to receive the 2017 Special Assessment refund is not a ground for refusing access to records. There may be many reasons for a unit owner to request records that may extend beyond a desire to fix a problem, request a service or to qualify for a refund. It is also unnecessary for records requested to relate to each other.
- [15] Subparagraph 55(4)(c) of the Act establishes an exception to the general rule of entitlement to records when the records relate to specific units or owners. In considering how this rule applies in this case, it is relevant to refer to a decision of this Tribunal in the case of *Mellon v Halton Condominium Corporation No. 70*, 2019 ONCAT 2 (CanLII). The Tribunal found that the condominium corporation could redact information relating to specific units and owners other than the owner requesting the record. The Tribunal held that this information might go beyond the names and unit numbers to include other information which might serve to identify unit owners.
- [16] I find that Mr. Sava is entitled to a paper copy of records of the refund of a 2017 Special Assessment totalling approximately \$59,987.88. These records are to show a) the amount of the original contribution by unit with proof of payment; b) the amount refunded by unit with proof of payment, and c) the outstanding balance of the Special Assessment.
- [17] YCC386 will be entitled to redact from these records identifying information about specific units other than Mr. Sava's or unit owners other than Mr. Sava. During the hearing, I explained to Mr. Sava that these redactions might minimise the usefulness to him of the records and I asked him if, in light of this, he wished to proceed with the request. He confirmed that he did.
- [18] YCC386 is entitled to charge a reasonable amount for the labour of locating the records and performing the redaction. How these costs are to be calculated is considered below.

Paper copies of reports from Hayatt Engineering

- [19] Mr. Sava requests paper copies of reports from Hayatt Engineering Inc. prepared between April 1, 2018 and July 11, 2018 and concerning roof leaks in Mr. Sava's

unit. YCC386 initially took the position that Mr. Sava has already received these records. Mr. Sava denies this. Mr. Besir acknowledges that Mr. Sava is entitled to the records but again takes the position that Mr. Sava is not acting in good faith in requesting them.

[20] Making repeated requests for the same records, where those records have already been received, might be evidence of bad faith but in this case, Mr. Sava denies having received these reports. I prefer the evidence of Mr. Sava for the following reasons. Mr. Sava gave his testimony under “affirmation”. That is, he promised to tell the truth and acknowledged possible legal consequences if he was not truthful. YCC386 ignored my express instructions to have its witnesses affirm their testimony and gave statements without the requested affirmations. Mr. Sava was denied an opportunity to cross-examine the witnesses of YCC386 as the condominium corporation chose not to participate in that part of the hearing. YCC386 chose not to cross-examine Mr. Sava. However, I asked him several questions of clarification and elaboration. His answers were candid and straightforward, even when his testimony was against his interest. For these reasons, I prefer his testimony that he has not received the Hayatt Engineering reports.

[21] Under subsection 55(3) of the Act, Mr. Sava is entitled to paper copies of reports from Hayatt Engineering Inc. prepared between April 1, 2018 and July 11, 2018 concerning roof leaks in his unit. The question of what costs YCC386 is entitled to in preparing these documents will be considered below.

Paper copies of YCC386’s records of the Request for Service from Mr. Sava from January 17, 2018 to December 1, 2018

[22] Initially, YCC386 took the position that Mr. Sava already had these records, which he denies. In its closing statement, YCC386 acknowledged that Mr. Sava is entitled to the records but suggested that Mr. Sava is acting in bad faith in making the request. For the reasons noted above, I accept Mr. Sava’s testimony that he has not received these records and find that YCC386’s rationale for denying him the records is without merit.

[23] I find that Mr. Sava is entitled to paper copies of YCC386’s records of the Request for Service by Mr. Sava from January 17, 2018 to December 1, 2018 concerning Mr. Sava’s unit, complete with the superintendent’s report and the date, time, action taken, and unit holder’s signature (after the service was completed by the contractor).

Examination of paper copies of Minutes of the meetings of the Board of Directors of YCC386 from February, 2018 to September 14, 2018

[24] At the outset of the hearing, Mr. Sava asked to examine the paper copies of the minutes of the Board meetings. During the hearing, he revised his request and now wishes paper copies of the minutes. YCC386 initially took the position that Mr. Sava already had these records. Mr. Sava advises that he has only received some of the minutes and, in one case, only partial minutes of one meeting. I accept his testimony for the reasons noted above. I find that he is entitled to these records under subsection 55(3) of the Act. I also conclude that YCC386 is entitled to redact from the minutes any information relating to units other than Mr. Sava's or unit owners other than Mr. Sava. It should be noted that these records are "core records" as defined in subparagraph 1(1)(9) of the Regulation, a fact which will have consequences when considering the costs which YCC386 may claim in preparing them.

Information related to a Court proceeding involving YCC386

[25] Mr. Sava is requesting the location of the Court in which a legal proceeding involving YCC386 will be conducted. This is information rather than a specific record and therefore is not covered under the records request provisions of the Act and Regulation. Accordingly, I make no order with respect to this request. However, I note that Mr. Besir has agreed to give Mr. Sava that information when it is available.

Issue 2: Is YCC386 entitled to claim a cost for producing the records and if so, how is the cost to be calculated?

[26] The combined effect of subsection 55(3) and subparagraph 55(3.1)(c) of the Act, read together with subsections 13.3 (7),(8) and (9) of the Regulation, is that YCC386 has the discretion to charge a reasonable amount for the labour and delivery costs of the non-core records produced. This would include a reasonable amount to reimburse the condominium corporation for labour costs incurred in redacting information from these records. Under the Regulation, YCC386 may also charge up to \$0.20 per page to photocopy or print the records.

[27] Where the records requested are core records, the amount that YCC386 may charge is calculated differently. Mr. Sava has asked for paper copies of the minutes of the Board of Directors of YCC386 from February 14, 2018 to September 14, 2018. Mr. Sava acknowledges that information about specific units and unit owners may need to be redacted from those minutes and I find that YCC386 is entitled to charge a reasonable amount for the labour involved in

performing the redaction. Beyond that, the provisions of subparagraph 13(8)6 ii of the Regulation restrict YCC386 to charging the photocopying or printing charges noted above for any copies made.

- [28] The first question to be addressed is whether the charge that YCC386 is proposing for producing the records, \$500 and \$0.25 per page for photocopying, is in accordance with the Act and Regulation. YCC386 provided no supporting information for this charge. However, in the unaffirmed written testimony of Mr. Besir, he writes:

In September 2019 (sic), Mr. Sava submitted another request for documents. This time his request was extended once or twice. I informed the Board about it and the Board's reaction was that that this must stop. The Board asked me if we can charge Mr. Sava for this because the office staff would spend time preparing documents instead of doing regular duties and this would be a cost for the corporation. We (Board and Management) agreed to ask Mr. Sava for \$ 500.00 to pay for this request.

- [29] It seems apparent from this explanation that the amount quoted was designed in part to discourage Mr. Sava from making further requests for records. The amount of the proposed charge appears to have been set arbitrarily. I find that the proposed charge is not an estimation of the actual labour costs expected to be incurred, and is not reasonable. Additionally, the photocopying charge is in excess of the maximum of \$0.20 expressly stated in the Regulation.
- [30] The next question is how the costs should be calculated. YCC386 has offered no testimony and made no submissions of how much work will be involved in producing the records. It has also made no reference to any of the work requiring specialised knowledge. In fact, YCC386 twice referred to the work being done by its office staff.
- [31] I find that the labour that will be required to locate, prepare and reproduce the non-core records and to reproduce the core records is clerical in nature. In this case, the redaction of references to names and unit numbers may also be performed by clerical staff as it does not require reviewing specialised records, such as Court filings. As noted below, Mr. Sava has submitted that an hourly rate of \$24 is an average clerical rate based on his research. YCC386 submitted no evidence of the hourly rate for their staff. Based on the evidence and submissions before me, I conclude that YCC386 will be entitled to charge \$24 an hour for the labour involved in producing the records. YCC386 may also charge \$0.20 per page of photocopying. YCC386 will provide an accounting of the labour and photocopying charges involved to Mr. Sava and he will be entitled to bring a subsequent claim to

this Tribunal if he feels that YCC386 is charging an excessive amount for the production of the records.

Issue 3: Is Mr. Sava entitled to his costs in this matter and, if so, in what amount?

[32] Costs in a proceeding are in the discretion of the Tribunal under subparagraph 1.44(1)4 of the Act and under the Tribunal's Rules of Practice.

Rule 32 states:

32.1 The CAT may order a User to pay to another User or to the CAT any reasonable expenses or other costs related to the use of the CAT, including:

(a) any fees paid to the CAT by the other User;

(b) the other User's expenses or other costs that were directly related to this other User's participation in the Case; and

(c) the other User's or the CAT's expenses or other costs that were directly related to a User's behaviour during the Case that was unreasonable or for an improper purpose, or that caused an unreasonable delay.

[33] There are two considerations in the award of costs. First, does the conduct of a User justify the award of costs to either party and, second, in what amount? I find that YCC386's conduct in this case has had the effect of putting Mr. Sava to time and expense that could have been avoided. The confusion caused by YCC386's occasionally conflicting explanations of its refusal to provide the records added to the time taken in this hearing. Also causing delay was YCC386's decision to dip in and out of the hearing. On at least two occasions, the hearing was delayed in a futile attempt to allow a new YCC386 representative to participate. Mr. Sava was denied an opportunity to cross-examine YCC386's witnesses because the condominium corporation chose not to participate in that phase of the hearing. YCC386 chose not to follow my instructions to affirm their witnesses' testimony. I conclude that it is appropriate for YCC386 to pay Mr. Sava a reasonable amount for the costs and expenses he has incurred.

[34] Mr. Sava claims \$200 for the fees he paid to the Tribunal to initiate each stage of this proceeding and it is appropriate that YCC386 reimburse him for this amount. Concerning the time that Mr. Sava has spent pursuing his claim, Mr. Sava claims 16 hours for writing and posting his various documents and submissions. Mr. Sava proposes charging \$24 per hour for these costs. He bases this hourly rate on the average charge for clerical work that he found on the internet. Mr. Sava has provided detailed back-up of the hours he has spent and I find these costs are reasonable. I award him 16 hours at \$24 per hour or \$384. Mr. Sava photocopied

certain documents and then scanned them to upload them to the Tribunal's online system. He appears to have done this out of an abundance of caution and I find that he is entitled to either his photocopying costs or his scanning costs but not both. Mr. Sava claims \$0.20 per page for scanning for a total amount of \$7.00 and claims an additional one-and-one-quarter hours for time spent scanning. Mr. Sava used his own photocopier and scanner to copy and print the documents but submits that if YCC386 is entitled to charge \$0.20 for reproducing documents, he should also be allowed this amount. I find this argument persuasive and allow \$7 for the scanning. His labour in scanning is \$30, which I will allow. The total cost award is \$621 which I will direct YCC386 to pay to Mr. Sava within 30 days of the date of this Decision.

Issue 4: Is Mr. Sava entitled to any penalty from YCC386 for its failure to provide the records and if so, in what amount?

- [35] Subsection 1.44(1) 6 of the Act gives the Tribunal the jurisdiction to order a penalty be paid to Mr. Sava if the Tribunal considers that YCC386 refused to provide Mr. Sava the records he requested without reasonable excuse. As I have found above, YCC386's reasons for denying Mr. Sava the records he requested were without merit. The delay in providing Mr. Sava with the records was exacerbated by YCC386's conflicting explanations and intermittent participation in the hearing. Mr. Sava requests a penalty of \$2,500 from YCC386 and a further penalty of \$250 for YCC386's delays in this proceeding.
- [36] What penalty is appropriate depends on the specific facts in each case. In assessing the amount, the Tribunal considers the purpose of the penalty. A penalty may communicate to the interested public what conduct is considered unacceptable. The amount of the penalty may also serve as a reflection of the importance that the Tribunal attaches to providing dispute resolution in a fair, convenient and timely manner.
- [37] The Tribunal has addressed the matter of penalties in a number of cases. In two of these cases, *Terrance Arrowsmith v Peel Condominium Corporation No. 94*, 2018 ONCAT 10 (CanLII) and *Browne v Peel Condominium Corporation No.94*, 2019 ONCAT 1 (CanLII), the Tribunal considered the situation where the condominium corporation advanced reasons for refusing to produce the records but then declined to participate in the hearing. In each case, the Tribunal found that the reasons given did not constitute a reasonable excuse. A penalty of \$500 was found to be appropriate in each instance.
- [38] I consider that YCC386's failure to provide the records merits a higher penalty in this case. The delay in providing the records was exacerbated by having multiple

representatives, two of whom chose not to participate in the hearing. By dipping in and out of the hearing, YCC386 denied Mr. Sava his right to cross-examine its witnesses, which undermined the fairness of the hearing process. In the circumstances of this case, I consider that \$750 is a reasonable penalty. This amount is payable by YCC386 to Mr. Sava within 30 days of the date of this Decision.

Issue 5: Is Mr. Sava entitled to claim other penalties or damages in this matter and, if so, in what amount?

[39] Mr. Sava claims a series of what he has labelled “penalties” for such things as “inappropriate conduct”, “violations of CAT Netiquette” causing hurt due to sarcasm, and injury to feelings and dignity. Penalties of this nature are not expressly within the jurisdiction of the Tribunal. In any event, I do not believe they would be justified in this case.

[40] Some of what Mr. Sava claims, such as hurt feelings and loss of dignity, might better be considered claims for damages. Damages are monetary compensation for injuries or losses caused by another in situations that attract a legal liability. Under subparagraph 1.44(1)3 of the Act, the Tribunal does have the jurisdiction to award damages that result from an act of “non-compliance”. However, even if the non-compliance referred to extends to non-compliance with the rules and norms of the Tribunal, this is not an appropriate case to allow these claims. At times, both Users advanced their cases with more vigour than civility. As Mr. Besir noted, there were employees of YCC386 who might also claim some bruised feelings as a result of this hearing. It is not appropriate to award any such damages in this matter.

D. ORDER

[41] The Tribunal directs YCC386 to provide Mr. Sava the following records within 14 days of the date on which Mr. Sava pays the amount set out in paragraph 43 below:

- a) Paper copies of records of the refund of a 2017 Special Assessment totalling approximately \$59,987.88. These records will show: i) the amount of the original contribution by unit with proof of payment; ii) the amount refunded by unit with proof of payment, and iii) the outstanding balance of the Special Assessment.
- b) Paper copies of reports from Hayatt Engineering Inc. prepared between April 1, 2018 and July 11, 2018 and concerning roof leaks in Mr. Sava’s unit.

- c) Paper copies of YCC386's records of the Request for Service from Mr. Sava from January 17, 2018 to December 1, 2018 concerning Mr. Sava's unit, complete with the superintendent's report and the date, time, action taken, and unit holder's signature (after the service was completed by the contractor).
- d) Paper copies of minutes of the meetings of the Board of Directors of YCC386 from February, 2018 to September 14, 2018.

[42] YCC386 may redact from the records concerning the refund of the special assessment and the minutes of the Board of Directors, set out in subparagraph 41 a) and d) above, information which may serve to identify specific units other than Mr. Sava's or unit owners other than Mr. Sava.

[43] YCC386 may charge Mr. Sava the amount of \$24 per hour for the labour costs of producing the records set out in subparagraph 41 a), b) and c) of this Order and \$24 per hour for performing the redactions specified in paragraph 42 of this Order. YCC386 may also charge Mr. Sava \$0.20 per page for photocopying. YCC386 will provide Mr. Sava with an accounting of the labour costs and photocopying charges, calculated in accordance with this paragraph. Mr. Sava will pay these amounts before he receives the records listed in paragraph 41 of this Decision.

[44] The Tribunal also directs YCC386 to pay costs to Mr. Sava in the amount of \$612 and a penalty in the amount of \$750 to Mr. Sava, both amounts payable within 30 days of the date of this Decision.

Laurie Sanford
Member, Condominium Authority Tribunal

Released on: April 10, 2019