

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: October 23, 2019

CASE: 2019-00041R

Citation: 2342941 Ontario Inc. v Toronto Standard Condominium Corporation No. 2329, 2019 ONCAT 44

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

Member: Patricia McQuaid, Member

The Applicant

2342941 Ontario Inc.

XianChen An, Counsel

The Respondent

Toronto Standard Condominium Corporation No. 2329

Hearing: July 11 – October 2, 2019, Written online hearing

REASONS FOR DECISION

A. OVERVIEW

- [1] 2342941 Ontario Inc. (the “Applicant”) is the owner of a unit in the commercial retail space of Toronto Standard Condominium Corporation No. 2329 (“TSCC 2329” or the “Respondent”). Wei Wang is the director and shareholder of the Applicant. The Applicant, together with other unit owners in the commercial retail space, first requested certain records from TSCC 2329 in December 2018 and then on March 5, 2019. The requests were not made on the prescribed form as required by the *Condominium Act* (the “Act”). TSCC 2329, through its legal counsel, advised the Applicant by letter dated March 7, 2019 that it had no obligation to respond to the records request because it was not submitted on the mandatory form and provided a copy of the form for completion by the Applicant. Counsel also stated that once the proper form was submitted, they would respond to the request accordingly.
- [2] The Applicant completed the prescribed Request for Records form (the “Request”) on March 8, 2019 and sent a copy of it by fax to the Respondent’s counsel and the Respondent’s condominium management provider, Larlyn Property Management Ltd., at 7340 Bramalea Road Unit 20, which is the address for service provided to

the Condominium Authority Ontario public registry. The Respondent did not respond to the Request as required by s. 13.3(6) of Regulation 48/01 made under the Act (the "Regulation"). As a result, the Applicant filed a case with the Tribunal.

[3] The Applicant requested the following records:

Core records:

1. Condominium corporation by-laws
2. Condominium corporation rules
3. Record of owners and mortgagees
4. Periodic information certificates from the past 12 months
5. Budget for the corporation's current fiscal year, including any amendments
6. Most recent approved financial statements
7. Most recent auditor's report
8. The current plan for future funding of the reserve fund
9. Mutual use agreements (also known as shared facilities or reciprocal agreements) – ss. 113 or 154(5) of the Act
10. Minutes of meetings held within the last 12 months

Non-core records:

1. Budget statements – January 2015 to present
2. Audited financial statements – January 2015 to present
3. All records of expenditures of the reserve fund exceeding \$5000 such as contracts, invoices and receipts – January 2015 to present
4. All notices required to be provided to owners for the addition, alteration or improvement to the common elements under s. 97(3) of the Act and s. 13.1(1)13 of the Regulation – January 2015 to present
5. All minutes of Board meetings and Owner meetings - January 2015- March 2018

6. A copy of the settlement agreement reached between TSCC 2329 on behalf of the owners and the Developer in relation to Court file no. CV-15-538102
 7. An account of the money received by TSCC 2329 on behalf of the owners under the aforementioned settlement agreement, including, but not limited to, a record of receipts, invoices and expenditures incurred with the use of that money
- [4] The Applicant provided notice of this proceeding to the Respondent by courier at the property management office at 384 Yonge Street on April 24 and May 24, 2019. TSCC 2329 has not responded to the notice of case before the Tribunal and did not join the case. It has not participated at the prior stage of the Tribunal proceeding (Stage 1- Negotiation), nor in this hearing, despite being given an opportunity to do so. At my request, the Tribunal clerk contacted TSCC 2329 through its condominium manager in July and again in September. Notice of this case was again provided to it; however, it still did not join.
- [5] In addition to seeking the requested records, the Applicant has, in this hearing, asked that a penalty be awarded to it; specifically, that TSCC 2329 be ordered to pay a penalty in the amount of \$5000 pursuant to s. 1.44(1)(6) of the Act.

B. RESULT

- [6] For the reasons set out below, I find that the Applicant is entitled to all of the records requested. Further, the Respondent is ordered to pay a penalty in the amount of \$3000 for its refusal to provide the records without reasonable excuse.
- [7] Further, pursuant to s.1.44(1)4 of the Act, I award costs of \$150 to the Applicant representing the filing fees it paid to the Tribunal.

C. ISSUES AND ANALYSIS

Is the Applicant entitled to receive copies of the requested core records?

- [8] The first issue is whether the Applicant is entitled to the ten requested core records listed above in paragraph 3. These are all core records as defined in s. 1 of the Regulation. There is a clear entitlement to these records under s.55(3) of the Act.

Is the Applicant entitled to receive copies of the requested non-core records?

- [9] Section 55(1) of the Act lists records that a condominium corporation is required to keep. The first of these are the financial records of the corporation. The Applicant submits that the first three of the requested non-core records - the budget

statements, audited financial statements and all records of expenditures of the reserve fund exceeding \$5000 such as contracts, invoices and receipts - are in the nature of financial records of the corporation to which it is entitled. Further, for clarity regarding the third record, the Applicant requested that the following words be added, "including, but not limited to, the registered four way shared facilities agreement, and all records of expenditures incurred under that agreement". I granted that request as it provides additional clarification to the requested records and falls within the parameters of 'financial records'. The Applicant has requested these records for the period of January 2015 to present, which for the purposes of this case, I determine to be until the date of the request, namely March 8, 2019

- [10] In accordance with the principle of transparency which s. 55 of the Act articulates, I conclude that the Applicant is entitled to these three records.
- [11] The fourth non-core record requested is "all notices required to be provided to owners for the addition, alteration or improvement to the common elements under s. 97(3) of the Act and s. 13.1(1)13 of the Regulation – January 2015 to present" (again, March 8, 2019). Section 97(3) states that a corporation may make an addition, alteration or improvement to the common elements if the corporation sends a notice to the owners describing the proposed addition, alteration improvement or change, contains a statement of the estimated cost and indicates the manner in which the corporation proposes to pay the cost. I note that s. 13.1(1)13 of the Regulation makes specific reference to records under s. 97 of the Act. This is a prescribed record under s. 55(1)11 of the Act and a record which the Applicant is entitled to receive.
- [12] The fifth non-core record requested is "all minutes of Board meetings and Owner meetings from January 2015 to March 2018." Minutes of board and owner meetings are records which the condominium corporation is required to keep under s. 55(1)2 of the Act. These too are records which the Applicant is entitled to receive, subject to any redaction that may be permitted under s. 55(4) of the Act.
- [13] The last two of the non-core records relate to the civil action commenced by TSCC 2329 on its own behalf and on behalf of all unit holders of TSCC 2329 against the builder and developer of the TSCC 2329 building in November 2015 (Court file no. CV 15 - 538102). The Applicant provided witness testimony from Wei Wang and Ti-Fen Hsu regarding this civil suit. Ti-Fen Hsu is also a unit owner in TSCC 2329 and was on the Board of TSCC 2329 from 2017 to early 2019.
- [14] Ti-Fen Hsu testified that the civil action was funded by a special assessment levied on the unit owners. The owners were advised by counsel for TSCC 2329 by letter dated July 6, 2018 that a settlement had been reached. The settlement involved

payment to TSCC 2329 of \$1.7 million and amendment to the four way shared facilities agreement. Owners were then advised by the TSCC 2329 Board in August 2019 that the settlement resulted in a net payment of slightly more than \$700000. The Board also indicated at that time that they had done their best to ensure the best result for unit owners.

- [15] I note here that Ti-Fen Hsu's testimony includes statements of concern about the TSCC 2329 Board's management of funds and the conduct of litigation on the corporation and owners' behalf. I reiterated to the Applicant in the hearing that issues of that nature are not within the Tribunal's current jurisdiction to determine. This hearing concerns entitlement and access to records pursuant to the Act and the lack of a response by TSCC 2329 to the Request.
- [16] On its face, the settlement agreement might fall within the exception in s. 55(4) of the Act: the right to examine records does not apply to records relating to actual or contemplated litigation. However, the corporation may waive reliance on that exception and disclose the document pursuant to s. 55(6). The Applicant submits that this exclusion does not apply as the litigation in question was commenced by the corporation on its own behalf and, as stated in the Statement of Claim, also on behalf of the unit owners, as authorized by s. 23 of the Act.
- [17] Section 23 gives the corporation authority to commence an action on its own behalf and on behalf of owners. It also indicates that notice must be given to the owners before commencing the action and that the legal costs of the action commenced on behalf of owners shall be borne by those owners in the proportion in which their interests are affected. The jurisprudence has characterized the corporation's power under s. 23 as one that is triggered by a problem common to the condominium as a whole and to the owners as a group; the corporation is entitled to recover damages where the real injury is to the owners as a group: *1420041 Ontario Inc. v. 1 King West Inc.*, 2012 ONCA 249 (CanLII).
- [18] The Applicant submits that in commencing the action on behalf of the unit owners, TSCC 2329 was, in effect, acting as agent for the unit owners and therefore the litigation privilege exception in s.55(4) cannot be asserted to shield the records from access by the Applicant. Section 55(4)(b) does not address an action commenced under s. 23 as distinct from another type of action. However, as mentioned above, s.55(6) expressly permits a condominium corporation to disclose records relating to litigation.
- [19] Based on the evidence before me, I conclude that this settlement agreement is the kind of document that can, and should, be disclosed by the Respondent as the agent condominium corporation to the Applicant. In particular, I note the fact that

the unit owners funded this litigation, commenced on their behalf, through a special assessment. As well, the communications from the Board and the condominium corporation counsel to owners regarding the litigation and its outcome bolster the conclusion that they were reporting to the unit owners. The settlement agreement documents what is in essence an asset of both the corporation and the unit owners (as recorded in the balance sheet dated July 31, 2018 which was provided to owners). The settlement agreement is, on these facts, a record to which the Applicant is entitled under the Act.

[20] The last of the non-core records is an account of the money received by TSCC 2329 on behalf of the owners under the settlement agreement, including, but not limited to, a record of receipts, invoices and expenditures incurred with the use of that money. This request flows from the settlement agreement itself. While there is no obligation on an applicant to provide a reason for the requests, the Applicant's concern about the unexplained difference between the gross and net amount of the settlement funds (\$1.7 million versus \$700000) received, appears to be a motivating factor. TSCC 2329 stated in communications to unit owners that it was aiming to be as transparent as possible when informing owners about what happened and from the Applicant's perspective this record is required for transparency. Such an account is a financial record of the corporation encompassed by s. 55(1)1.

[21] Therefore, as set out above, I have concluded that the Applicant is entitled to each of the non-core records requested.

Should the Respondent be required to pay a penalty under s. 1.44(1)6 of the Act for failure to provide the Applicant with the records requested without reasonable excuse, and if so, in what amount?

[22] As noted above, the Respondent did not participate at any stage of the Tribunal processes. As a result, no excuse, reasonable or not, was ever given for its failure to provide these various records. There is no evidence before me, for example, that the Request was not delivered in the proper format or that TSCC 2329 had no notice of the Request. Indeed, Wei Wang, in testimony, stated that in June she was contacted by the property manager "to complain to me that my request for records should not have been filed in my company's name, and attempted to discourage me from continuing this claim at the Tribunal." While the rationale for the statement is unknown, the fact of the contact itself makes it clear that TSCC 2329 was aware of the Request and this case. Most of the records requested are not records which might give rise to any ambiguity for a condominium corporation.

I see no basis to conclude that the Respondent did not understand the request and find that a penalty is warranted in this case.

- [23] The Applicant submits that a \$5000 penalty is warranted given that the Respondent has demonstrated “nothing less than a complete disregard and default on its obligations to provide disclosure under the Act.” No response has been forthcoming from TSCC 2329 as required by s. 13.3(7) of the Regulation, nor have any of the records been provided since the March request.
- [24] In assessing what the amount of the penalty should be, I note that the Applicant’s entitlement to most of these records is clear. The two records relating to the settlement of the civil action may have caused the Respondent to take time to consider its response, but even that is speculation given the complete lack of response to this case.
- [25] Previous Tribunal decisions have noted that a penalty may be awarded to encourage condominium corporations to diligently fulfill their legal responsibilities under the Act. Not only is there no evidence before me that TSCC 2329 took any steps to respond to the Request for Records as it is required to do under the Act (even after it pointed out to the Applicant that it would only respond to a request for records when provided with the prescribed form), it then failed to participate in this hearing process despite being notified that it was taking place. Its lack of response throughout is noteworthy. The failure of TSCC 2329 to participate in these proceedings and its failure before that to respond to the Request for Records amplify its refusal to provide the records and underline the lack of any reasonable excuse for so doing.
- [26] This conduct leads me to conclude that the Respondent wilfully disregarded its legal obligations under the Act relating to the Applicant’s request. This is unacceptable conduct that requires sanction. If there was any impediment to providing the records requested, TSCC 2329 had an opportunity at various stages of this proceeding to offer an explanation, but it failed to avail itself of that opportunity. In these circumstances, I find that a substantial penalty is warranted to reflect the severity and nature of the refusal and award a penalty of \$3000.

Is the Applicant entitled to costs?

- [27] Section 1.44(1)4 of the Act gives the Tribunal discretion to order costs. The Applicant initially requested costs in the amount of \$5000 asserting that this was an exceptional case warranting such an amount; however, the Applicant withdrew its request for that amount in final submissions on October 2, 2019. I do note that to bring this matter forward to Stage 3, the Applicant has paid \$150 in filing fees.

These are costs that would not have been incurred had TSCC 2329 been responsive to the Applicant's Request for Records. I therefore award the Applicant costs in the amount of \$150.

D. ORDER

[28] Therefore, for the reasons set out above, the Tribunal orders as follows.

1. TSCC 2329 shall provide the Applicant with the following records within 30 days of this decision:

Core records:

- a. Condominium corporation by-laws
- b. Condominium corporation rules
- c. Record of owners and mortgagees
- d. Periodic information certificates from the past 12 months
- e. Budget for the corporation's current fiscal year, including any amendments
- f. Most recent approved financial statements
- g. Most recent auditor's report
- h. The current plan for future funding of the reserve fund
- i. Mutual use agreements (also known as shared facilities or reciprocal agreements) – ss. 113 or 154(5) of the Act
- j. Minutes of meetings held within the last 12 months

Non-core records:

- a. Budget statements – January 2015 to March 8, 2019
- b. Audited financial statements – January 2015 to March 8, 2019
- c. All records of expenditures of the reserve fund exceeding \$5000 such as contracts, invoices and receipts including, but not limited to, the registered four way shared facilities agreement, and all records of

expenditures incurred under that agreement – January 2015 to March 8, 2019

- d. All notices required to be provided to owners for the addition, alteration or improvement to the common elements under s. 97(3) of the Act and s. 13.1(1)13 of the Regulation – January 2015 to March 8, 2019
 - e. All minutes of Board meetings and Owner meetings - January 2015 to March 2018
 - f. A copy of the settlement agreement reached between TSCC 2329 on behalf of the owners and the Developer in relation to Court file no. CV-15-538102
 - g. An account of the money received by TSCC 2329 on behalf of the owners under the aforementioned settlement agreement, including, but not limited to, a record of receipts, invoices and expenditures incurred with the use of that money.
- 2. These records shall be provided in electronic format where available. If not available electronically, the records will be provided in paper copy and there will be no cost to the Applicant for the records.
 - 3. TSCC 2329 shall pay a penalty in the amount of \$3000 to the Applicant within 30 days of this decision.
 - 4. TSCC 2329 shall pay costs in the amount of \$150 to the Applicant within 30 days of this decision.
 - 5. In the event that the penalty or costs are not provided to the Applicant within 30 days of this Order, the Applicant will be entitled to set-off this amount against the common expenses attributable to the Applicant's unit(s) in accordance with Section 1.45(3) of the Act.
 - 6. In order to ensure that the Applicant does not have to pay any portion of the penalty and cost awards, the Applicant shall also be given a credit toward the common expenses attributable to the Applicant's unit in the amount equivalent to the Applicant's proportionate share of the penalty and costs awarded.

Member, Condominium Authority Tribunal

Released on: October 23, 2019