CONDOMINIUM AUTHORITY TRIBUNAL

DATE: June 17, 2022
CASE: 2022-00238N
Citation: Friedlander v. York Condominium Corporation No. 427, 2022 ONCAT 67

Order under Rule 4 of the Condominium Authority Tribunal's Rules of Practice.

Member: Mary Ann Spencer, Member

The Applicant,
Olga Friedlander
Represented by Victor Yee, Counsel

The Respondent,
York Condominium Corporation No. 427
Represented by Athina Ionita, Counsel

The Intervenor,
Paritosh Mehta
Represented by Ava Naraghi, Counsel

MOTION ORDER

[1] The Stage 3 – Tribunal Decision proceeding in this matter began on March 17, 2022 under case number 2022-00002N. The Applicant brought the application for an order requiring the Respondent to enforce its 2011 flooring rule. She alleges that Paritosh Mehta, the owner of the unit above the Applicant's, failed to comply with that rule when renovating his unit. Mr. Mehta was not originally named as party in this matter and the Respondent filed a motion to add him. On April 5, 2022, the Tribunal ordered that he be added to the matter as an Intervenor. As a result, case number 2022-00002N was closed and re-opened as the current case on April 26, 2022.

[2] Document disclosure in this matter ended on May 10, 2022. The Applicant has brought a motion that she now be permitted to file a report from acoustical consulting firm SoftdB dated June 1, 2022. The Respondent objects to the admission of this document. The Intervenor has no objection.

[3] The Stage 3 proceeding is now at the witness testimony stage. The Applicant's written witness testimony was filed by the due date of May 25, 2022 and the event

permitting the Respondent to file its written testimony ends on June 16, 2022. As a schedule accommodation, written cross-examination of the Applicant has been deferred until after the Respondent's evidence has been submitted.

[4] The Tribunal's decision in *Russell v. York Condominium Corporation No. 50*, 2021 ONCAT 74 (CanLII) summarizes the factors to be considered when a party requests the admission of late evidence. At paragraph 4, the Tribunal wrote:

> The hearing is nearing completion. One witness for YCC50 has completed her testimony and cross-examination. The second witness is in his second and final round of cross-examination questions. The bar for admitting new evidence becomes higher as the hearing proceeds. Proposed disclosure this late in the proceedings will only be granted in unusual circumstances. The evidence must be material, of significant probative value and cannot have reasonably been discovered earlier. Even if those conditions are met, the balance between the public interest in expeditious hearings and fairness to both parties must be assessed.

[5] Counsel for the Applicant submits that the information contained in the June 1, 2022 SoftdB report, which includes specific findings with respect to noise within the Applicant's unit, is relevant to this proceeding as it may help the Tribunal determine what comprises "unreasonable" noise. He advises that there was no deliberate attempt to withhold this report as he was not made aware of its existence until June 2, 2022 and notes that it was the Respondent which "insisted on the issues of unreasonable noise" being added to this matter. He further submits that the Respondent will not be prejudiced by the report because it has yet to submit its evidence and will have the opportunity to cross-examine the Applicant. He also advised that the Applicant would be amenable to granting the Respondent an extension to time to submit its testimony in order to review the new evidence.

[6] The Tribunal's jurisdiction in this case as set out in section 1 (1) (d) (iii.1) of Ontario Regulation 179/17 is over disputes with respect to the provisions of the declaration, by-laws or rules of a corporation that "prohibit, restrict or otherwise govern the activities described in subsection 117 (2) of the Act or section 26 of Ontario Regulation 48/01." Subsection 117 (2) of the *Condominium Act, 1998* states:

> No person shall carry on an activity or permit an activity to be carried on in a unit, the common elements or the assets, if any, of the corporation if the activity results in the creation of or continuation of,
>
> (a) any unreasonable noise that is a nuisance, annoyance or disruption to an

> individual in a unit, the common elements or the assets, if any, of the corporation;

[7] The Stage 2 Summary and Order in this matter states that enforcement of the Respondent's 2011 flooring rule is a key issue in this matter. The issues were set out as follows:

- Was the 2011 Flooring Rule properly enacted?
- If so, is the 2011 Flooring valid and enforceable?
- Regardless of the answers to the above, YCC 427 wishes a further issue to be addressed, namely: has YCC427 fulfilled its legal obligation to enforce compliance with the *Condominium Act, 1998* and its governing documents, in particular, its declaration, by-laws and rules.
- YCC427 also takes the position that it is unable to identify, observe or verify the presence of any excessive noise. It reserves its right to raise additional defences.

I note that early in this proceeding, an additional issue was added with respect to the applicability of the 2011 flooring rule given that on April 13, 2022, in accordance with section 58(6) of the Act, YCC 427 gave its owners notice of a revision of that rule.

[8] Counsel for the Respondent submits that the issue of "unreasonable" or nuisance noise was not added at the Respondent's insistence. I agree. This issue underlies the Applicant's application to the Tribunal. The Applicant is alleging she is experiencing noise as a result of the installation of new flooring in the unit above her and is requesting the Tribunal order the Respondent to enforce the 2011 flooring rule which sets out specific standard for noise transmission from new flooring. At paragraph 5, the rule states:

> If the Property Manager or Board of Directors reasonably determines that noise is being transmitted from a unit with hard surface flooring so as to be a nuisance or disruptive, then the Owner of the unit from which the noise is transmitted shall, at hislher expense, take such steps as to abate the noise as directed by the Property Manager or Board of Directors.

The Tribunal must first determine whether the noise the Applicant asserts she is experiencing can reasonably be determined to be "a nuisance or disturbing" in order to decide if the corporation has met its obligations to enforce its rules and if the Tribunal should issue the compliance order the Applicant requests.

[9] With respect to the probative value of the June 1, 2022 SoftdB report, I note that the Applicant and the Respondent each paid 50% of the cost of an acoustical investigation by consultant Thornton Thomasetti. Both parties filed copies of the consultant's report dated August 31, 2021 as evidence. Thornton Thomasetti performed acoustical testing and the report sets out the measurement of the transmission of noise from the Intervenor's unit to the Applicant's. It also assesses the compliance of the results with various standards and guidelines. The SoftdB report sets out the results of SoftdB's recording of noises in the Applicant's unit over a 24-hour period spanning May 6 and 7, 2022. Given a fundamental issue to be decided in this matter is whether the noise the Applicant is experiencing is 'disturbing,' I accept the Applicant's submission that the findings in the SoftdB report may be of some assistance in making this determination.

[10] However, I must also consider whether the SoftdB report could have been made available earlier than June 2, 2022. This is not a report that the Applicant discovered after the May 10, 2022 disclosure deadline in this matter. Rather, it is a report that the Applicant commissioned. While the date she retained SoftdB is unknown, the fact that readings were taken on May 6 and 7, 2022 suggests that it was well after this proceeding was underway. I note that the Applicant testified that the Thornton Thomasetti report was made available to her counsel on September 2, 2021. If the Applicant believed she needed to obtain additional expert evidence to support her case, she had ample opportunity to do so both before she filed her application with the Tribunal on January 1, 2022 and, given the procedural delay as a result of the motion to add a party, well before disclosure of documents was scheduled.

[11] The Stage 3 proceeding in this matter is still at a relatively early stage and I find that admission of the June 1, 2022 SoftdB report would not be unduly prejudicial to the Respondent or the Intervenor who have yet to either cross-examine the Applicant or submit their own witnesses' testimony. However, I acknowledge that the only witnesses Counsel for the Respondent indicated she intends to call are its current condominium managers whose employment with the Respondent will end on June 28, 2022 and the schedule has already been amended to accommodate their availability. However, as noted by Counsel for the Applicant, summonses can be issued to these witnesses if they are not prepared to testify voluntarily should the Respondent request an adjournment to review and respond to the new document. I also note that the Intervenor, whose unit is the alleged source of disturbing noise and who potentially could be financially impacted should a decision be made in the Applicant's favour, has no objection to admission of the June 1, 2022 SoftdB report.

[12] Finally, Counsel for the Respondent submitted that further delay in this matter runs counter to the Tribunal's principles of efficient and cost-effective resolution. In this case, however, it is the Applicant who is alleging that noise from the Intervenor's unit is disturbing her and who is requesting a compliance order. It is the Applicant who potentially could benefit most from an expedient decision.

[13] Notwithstanding that I have found that the Applicant could have retained SoftdB and received their report well before she filed her case with the Tribunal, based on its potential probative value, the fact that the Intervenor does not object to its admission, and the fact that the Respondent would not be unduly prejudiced by a delay, I grant the Applicant's motion.

[14] I note that Counsel for the Applicant indicated that the Applicant would not object to requests by the Respondent or the Intervenor for additional time to submit their witness testimony. Counsel for the Respondent indicated that the Respondent might wish to call additional witnesses or obtain a further acoustical report to respond to the new report. I am prepared to consider a request for an adjournment for a reasonable period of time in this matter should either the Respondent or the Intervenor request one.

ORDER

[15] Pursuant to Rule 4 of the CAT's Rules of Practice, the Tribunal grants the Applicant's request to file the June 1, 2022 SoftdB report.

Mary Ann Spencer
Member, Condominium Authority Tribunal

Released on: June 17, 2022