

2019 ONSC 7127
Ontario Superior Court of Justice

Mohamoud v. Carleton Condominium Corporation No. 25

2019 CarswellOnt 20161, 2019 ONSC 7127, 100 B.L.R. (5th) 147, 313 A.C.W.S. (3d) 879

**SADIYA ALI MOHAMOUD (Applicant) and CARLETON
CONDOMINIUM CORPORATION NO. 25 (Respondent)**

Heather J. Williams J.

Heard: October 17, 2019
Judgment: December 9, 2019
Docket: 18-77930

Counsel: Rodrigue Escayola, David Plotkin, for Applicant
Melinda Andrews, for Respondent

Subject: Property

Related Abridgment Classifications

Real property

X Condominiums

X.5 Common elements

X.5.d Miscellaneous

Headnote

Real property --- Condominiums — Common elements — Miscellaneous

Owner, who was susceptible to noise, made complaint about fan noise in her condominium unit — Condominium ultimately replaced fan — Owner claimed condominium's delay meant it failed to meet its statutory obligation to maintain and repair common elements and that it acted toward her in manner that was oppressive or unfairly prejudicial — Owner brought application for relief against condominium — Application dismissed — Not shown that any noise generated by fans had been caused by failure to repair or maintain them earlier than it did — Fans were inspected and maintained on regular basis, and specific fans were examined on several occasions in targeted manner to determine if they were causing noise owner hearing — Although not perfect, condominium responded to owner in appropriate and reasonable manner — Condominium met with owner, communicated with her orally and in writing, visited her unit on multiple occasions and retained contractors and experts to investigate and followed their recommendations — Oppression was not made out.

Table of Authorities

Cases considered by Heather J. Williams J.:

Browne v. Strata Plan LMS 582 (2007), 2007 BCSC 206, 2007 CarswellBC 314, 53 R.P.R. (4th) 303, 70 B.C.L.R. (4th) 102 (B.C. S.C. [In Chambers]) — referred to

Sterloff v. Strata Plan No. VR 2613 (1994), 38 R.P.R. (2d) 102, 1994 CarswellBC 801 (B.C. S.C.) — referred to

Weir v. Peel Condominium Corporation No. 485 (2017), 2017 ONSC 6265, 2017 CarswellOnt 16292, 77 B.L.R. (5th) 138 (Ont. S.C.J.) — referred to

Weir v. Strata Plan NW 17 (2010), 2010 BCSC 784, 2010 CarswellBC 1372, 95 C.L.R. (3d) 217 (B.C. S.C.) — referred to

Yamagata v. The Owners, Strata Plan NW 1546 (2019), 2019 BCSC 286, 2019 CarswellBC 461 (B.C. S.C.) — referred to

Statutes considered:

Condominium Act, 1998, S.O. 1998, c. 19

Generally — referred to

s. 89 — referred to

s. 90 — referred to

s. 135(2) — considered

APPLICATION by owner against condominium corporation arising out of noise complaints.

Heather J. Williams J.:

Overview

1 This is a claim against a condominium corporation by a unit owner. The unit owner alleges that the corporation: (1) failed to meet its statutory obligation to maintain and repair common elements; and (2) acted toward her in a manner that was oppressive or unfairly prejudicial or that unfairly disregarded her interests.

2 For the reasons below, the unit owner's application is dismissed.

The Facts

3 In April 2014, the unit owner, Sadiya Ali Mohamoud, notified the property manager of Carleton Condominium Corporation No. 25 that she was being disturbed by noise. Ms. Mohamoud's complaint was in writing. Ms. Mohamoud said she had made an earlier, oral complaint that had been ignored.

4 Ms. Mohamoud informed the property manager that she could hear a vibrating noise, like a loud fan or a slow motor running above her unit. She said that it caused a great deal of discomfort.

5 Ms. Mohamoud lives on the top floor of a 15-storey building. She bought her unit in August of 2009. She said that she did not notice the noise until 2013.

6 There was evidence that Ms. Mohamoud was particularly susceptible to noise and vibrations because of a car accident.

7 In July 2019, CCC25 replaced two exhaust fans above Ms. Mohamoud's unit. Ms. Mohamoud said that although this did not solve the problem entirely, it reduced the noise to a tolerable level.

Ms. Mohamoud's position

8 Ms. Mohamoud argues that by failing to replace the two fans above her unit until 2019, CCC25 failed to comply with its obligation to repair and maintain the condominium's common elements for more than five years. Ms. Mohamoud also argues that CCC25's conduct in response to her noise complaint was oppressive and unfairly prejudicial and that it unfairly disregarded her interests, entitling her to an oppression remedy under s. 135(2) of the *Condominium Act, 1998*, S.O. 1998, c. 19.

9 Ms. Mohamoud argues that the length of time it took for CCC25 to consider her complaint and to replace the two fans was unconscionable, particularly when her initial written complaint had identified the noise as "a loud fan." Ms. Mohamoud argues that CCC25 acted unreasonably throughout its investigation. She argues that CCC25 waited six months after she made her written complaint before entering her unit for the first time, that it did nothing other than regular maintenance for 10 months, that it waited 25 months before retaining a sound expert, that it failed to conduct what was described as an "on and off" test for almost 34 months, that it then waited another 30 months before replacing the fans and that, after acquiring the replacement fans, it "sat on them" for nine months before installing them.

10 Ms. Mohamoud also argues that CCC25 ignored her, refused to believe her and deliberately delayed responding to her complaints.

Did CCC25 breach its statutory obligation by failing to repair and maintain the condominium's common elements?

11 It is not in dispute that a condominium corporation has a statutory obligation to repair and maintain the condominium's common elements. (*Condominium Act, 1998*, S.O. 1998, c. 19, ss. 89 and 90.)

12 However, a condominium corporation is not an insurer and does not have a duty to address every problem reported by a unit owner, regardless of its cause. (*Yamagata v. The Owners, Strata Plan NW 1546*, 2019 BCSC 286 (B.C. S.C.) at para. 49.)

13 Ms. Mohamoud's claim for failure to repair and maintain is rooted in CCC25's failure to replace the exhaust fans described as "the 03/04 fans" ¹ earlier than it did.

14 Although Ms. Mohamoud says that once these fans were replaced, the noise level in her unit dropped, her evidence did not satisfy me that any noise generated by the fans had been caused by a failure to repair or maintain them.

15 There was evidence that the fans were inspected and maintained on a regular basis; for many years before Ms. Mohamoud raised the noise issue, CCC25 had contracted with a company known as Ilott Mechanical for quarterly inspections and maintenance of the fans and the associated air circulation equipment.

16 After Ms. Mohamoud brought her concerns to the attention of CCC25's property manager, the fans were inspected specifically with a view to identifying the source of the sound she was hearing. In August 2014, Ilott Mechanical inspected the roof of the building, where the fans were located, and found nothing that was rattling. On January 23, 2015, Ilott Mechanical inspected and serviced the fans and was unable to identify any problems. On June 3, 2016, Ilott Mechanical inspected the fans and exchanged some of the blower assemblies so that quieter blowers were placed above Ms. Mohamoud's unit. This did not solve the problem.

17 Ms. Mohamoud relies on the evidence of a sound engineer, Martin Villeneuve of Swallow Acoustic Consultants Ltd. Mr. Villeneuve said in his report of July 24, 2018 that in June 2018, the fans closest to Ms. Mohamoud's unit appeared old, showed signs of rust, dust and dirt and did not appear to have any vibration isolation. On cross-examination, however, Mr. Villeneuve said that he had not tested the fans, that he is not a fan technician and that his comment was based on visual inspection only.

18 In September 2018, three months after Mr. Villeneuve's inspection, mechanical engineers Goodkey, Weedmark & Associates Limited inspected the 03 and 04 fans and concluded that neither fan was noisy. Goodkey said that, according to industry standards, the 03 fan was actually quiet. Goodkey identified what it described as a "slight bearing noise" caused by the 04 fan and said that the fan should be serviced. It also said that both fans should be cleaned, but that this would not be expected to affect their noise levels.

19 The work Goodkey recommended was completed on October 5, 2018. In an email dated October 18, 2018, Ms. Mohamoud's lawyer said that this work had no impact on the noise or vibration, which continued to be present.

20 The standard to be met by a condominium corporation when repairing and maintaining its common elements is one of reasonableness. (*Weir v. Peel Condominium Corporation No. 485*, 2017 ONSC 6265 (Ont. S.C.J.) at para. 112.) In this case: (1) the two fans had been inspected and maintained by a contractor on a routine basis; (2) the two fans were examined on several occasions in a targeted manner to determine if they were causing the noise Ms. Mohamoud was hearing; and (3) although Ms. Mohamoud argues that a failure to repair and maintain the fans caused the offending noise, in October 2018, she reported that the noise did not go away after the maintenance recommended by a mechanical engineer had been carried out.

21 I find that the noise Ms. Mohamoud complained of was not caused by any failure on the part of CCC25 to repair or maintain its common elements as alleged by Ms. Mohamoud.

Did CCC25 act toward Ms. Mohamoud in a manner that was oppressive, unfairly prejudicial or that unfairly disregarded her interests?

22 Ms. Mohamoud argues that CCC25 acted toward her in a manner that was oppressive, unfairly prejudicial or that unfairly disregarded her interests, within the meaning of s. 135(2) of the *Condominium Act*, in that it ignored her, disbelieved her complaints about the noise and deliberately dragged its heels when responding to her complaints.

23 For the following reasons, I do not accept Ms. Mohamoud's argument and find that CCC25 responded to her complaints in an appropriate and reasonable manner.

24 While, at first blush, it could appear that CCC25 did not address a noise problem for more than five years, particularly when Ms. Mohamoud had identified its likely source in her first written complaint of April 2014, this is an overly simplistic assessment of what happened. Such a conclusion would also require, as CCC25's lawyer, Ms. Andrews, put it, glossing over certain facts and time periods in the relevant chronology.

25 The chronology of events does not suggest five years of inactivity on the part of CCC25.

26 There were times when CCC25 was at a loss to identify the cause of the noise. However, CCC25 was not alone. In the spring of 2015, Ms. Mohamoud retained a consultant, State of the Art Acoustik, which concluded that none of the noise levels in Ms. Mohamoud's unit exceeded the guidelines of the American Society of Heating, Refrigeration and Air-Conditioning Engineers and that highway traffic and the refrigerator were the sources of the loudest noises in the unit.

27 Ms. Mohamoud was critical of CCC25 for having replaced what were described as the 05 and 06 fans in April of 2017 and for waiting until July 2019 to replace the 03 and 04 fans. Ms. Mohamoud argued that CCC25 replaced the wrong fans in 2017. However, in February of 2017, when an "on/off" test was conducted, Ms. Mohamoud had reported that turning off the 05 and 06 fans eliminated the noise problem entirely, a fact that did not come up in the submissions made on Ms. Mohamoud's behalf.

28 Ms. Mohamoud also argued that it was unreasonable for CCC25 to have waited nine months to install the new 03 and 04 fans after receiving them. However, the evidence showed that a consultant retained by Ms. Mohamoud had objected to the installation instructions of the fans' manufacturer. After much back-and-forth, in June 2019, Ms. Mohamoud's lawyer informed CCC25's lawyer that Ms. Mohamoud would take no position on the installation other than it should be done immediately. The new fans were installed on July 16, 2019, in accordance with the manufacturer's original instructions.

29 CCC25 replaced the 03 and 04 fans even though its expert, Neil Standen, was of the opinion that these fans were not the cause of the noise in Ms. Mohamoud's unit.

30 After the 03 and 04 fans were replaced, Ms. Mohamoud initially said that the noise and vibration persisted. Her expert, Swallow Acoustic Consultants, then did some testing and reported that the noise in her unit had fallen to acceptable ASHRAE levels.

31 Having reviewed the detailed, if not identical, chronologies of events presented by each of the parties, I am satisfied that CCC25 responded to Ms. Mohamoud's complaint in a reasonable manner by meeting with her, communicating with her orally and in writing, visiting her unit on multiple occasions and retaining contractors and experts to investigate and following their recommendations.

32 I find that although others could not always hear the noise Ms. Mohamoud complained about and although the experts who were asked to quantify the noise level in her unit had some difficulty doing so, CCC25 took Ms. Mohamoud's complaints seriously and accepted that she experienced them.

33 This is not to say that the response to Ms. Mohamoud's complaints was uniformly perfect. For example, although the board discussed her April 2014 complaint at its June 2014 meeting, it did not respond writing to her complaint until July 2014. Further, in October of 2014, after Ms. Mohamoud sent a note to follow up on her noise complaint, two building superintendents entered her unit to investigate. One of them then wrote a memo reporting that they had heard nothing but "marvelous golden silence" and that he considered the complaint to be malicious and a complete waste of time. The memo was sarcastic and dismissive in tone. However, the superintendents' reaction to Ms. Mohamoud's concerns was not shared by the condominium's board. Two

board members visited Ms. Mohamoud's unit later the same day as the superintendents' visit. The board members reported that they noticed a humming noise, not only in Ms. Mohamoud's unit but also in another unit down the hall and at the elevators. The board members suspected that a transformer might need to be replaced. On October 27, 2014, CCC25 retained its electrical contractor. A new transformer was installed on December 3, 2014.²

34 A condominium corporation is not expected to be perfect; it is expected to act reasonably. I consider the initial delay in responding to Ms. Mohamoud's complaint and the inappropriate wording of the superintendents' memo to be isolated incidents which do not taint CCC25's overall response to Ms. Mohamoud's concerns.

35 Further, when repairing and maintaining common elements, a condominium corporation must consider the interests of all unit owners and must strive to achieve the greatest good for the greatest number. (*Yamagata, supra*, at para. 49, citing *Weir v. Strata Plan NW 17, 2010 BCSC 784* (B.C. S.C.) at para. 55 citing *Sterloff v. Strata Plan No. VR 2613 (1994), 38 R.P.R. (2d) 102, [1994] B.C.J. No. 445* (B.C. S.C.) and *Browne v. Strata Plan LMS 582, 2007 BCSC 206* (B.C. S.C. [In Chambers]).) In this case, CCC25 spent approximately \$50,000.00 on its efforts to resolve Ms. Mohamoud's complaint, a not inconsiderable sum, particularly given the difficulties not only CCC25 but also one of Ms. Mohamoud's consultants encountered in their efforts to identify the source of the noise.

36 A unit owner seeking an oppression remedy under the *Condominium Act* must show both that there was a breach of their reasonable expectations and that those reasonable expectations were breached by conduct legitimately characterized as oppressive. (*Weir, supra*, at paras. 10 - 11.) I find that Ms. Mohamoud had a reasonable expectation that CCC25 would comply with its statutory obligations to repair and maintain its common elements. I also find that CCC25 acted reasonably and in compliance with these obligations.

37 I find that CCC25 did not act toward Ms. Mohamoud in a manner that was oppressive or unfairly prejudicial or that unfairly disregarded her interests and that Ms. Mohamoud's request for a remedy under s. 135(2) of the *Condominium Act* fails.

Conclusion

38 For the reasons above, Ms. Mohamoud's application is dismissed.

Costs

39 In the circumstances, which involve an on-going legal and day-to-day relationship between the parties, I urge the parties to negotiate an agreement with respect to the costs of the application.

40 However, if they are unable to do so,

- CCC25 may deliver written submissions of no more than three pages in length within 14 days of the date of this decision;
- Ms. Mohamoud may deliver written submissions in response of no more than three pages in length within 14 days of the date of receipt of CCC25's submissions;
- CCC25 may deliver any reply submissions of no more than three pages in length within seven days of the date of receipt of Ms. Mohamoud's submissions.

41 Any costs submissions may be filed by sending them to me, care of the trial coordinator.

Application dismissed.

Footnotes

1 These fans were located above the "stack" of condominium units with numbers ending in -03 and -04. Ms. Mohamoud's unit was 1503B.

- 2 The transformer replacement did not solve the problem. In January 2015, Ms. Mohamoud complained to her City of Ottawa councilor. In March 2015, an Ottawa by-law enforcement officer measured noise levels in Ms. Mohamoud's unit, concluded there was no noise violation and closed the city's file.

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