

CITATION: Wu v. PSCC 826, 2018 ONSC 2027
COURT FILE NO.: CV-12-0049-SR
DATE: 2018 03 28

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: PAUL WU, Plaintiff

AND:

PEEL STANDARD CONDOMINIUM CORPORATION NO. 826,
RAJIVE MEHROTRA and SAROSH IQBAL, Defendants

BEFORE: Sproat J.

COUNSEL: Erik Savas, for the Plaintiff

Spencer Toole, for the Defendants

HEARD: March 19, 2018

ENDORSEMENT

[1] This is a motion by the Plaintiff to discontinue this action without costs or with minimal costs.

[2] This action arises out of the September 8, 2011 AGM of the Defendant corporation (the "Condominium"). The Plaintiff, who at one time served on the board, had concerns about the propriety of the election of a director to fill a position reserved for owner/occupant candidates. The Plaintiff had a preferred candidate for the board who lost to the Defendant, Mr. Mehrotra, by 103 to 90 votes.

[3] On January 20, 2012 the Plaintiff was successful in obtaining a court order to produce and preserve the proxies. There were certainly some irregularities and

concerns about the vote, although it may well be that they could not justify setting aside the election. For example:

- (a) a number of proxies were dated before the notice of the AGM was given, which Mr. Toole acknowledged was improper;
- (b) one proxy was dated the day after the AGM;
- (c) one proxy was undated;
- (d) one unit owner who was recorded as voting for Mr. Mehrotra denied having signed a proxy;
- (e) one proxy in favour of Mr. Mehrotra had the signature of a unit holder which bore no resemblance to the signature of the unit holder on a cheque to the Condominium;
- (f) the Plaintiff received information, from individuals who canvassed owners on his behalf, that a number of them had not given a proxy for Mr. Mehrotra (it turned out later on review that a number of these proxies had been used to vote for the Plaintiff's preferred candidate so there was in fact no impropriety with a number of these proxies).

[4] The Plaintiff did a service to the Condominium in pointing out irregularities. One would think that the Condominium would want to look into these. Even if they did not amount to grounds for setting aside the election, the Condominium clearly

had an interest in preventing irregularities in the future and attempting to determine responsibility for any forged proxies. On the evidence I have, the Condominium did nothing to address the concerns raised by the Plaintiff.

[5] The Condominium did take what I think was a high-handed approach to dealing with the Plaintiff. The Plaintiff and like-minded owners canvassed other owners seeking to obtain evidence relevant to the action. The Condominium took the position that this breached its declaration as it amounted to conduct which obstructed, interfered with, injured or annoyed other owners. The Plaintiff was warned that if he did not agree in writing to desist, the matter would be referred to the solicitors for the Condominium. Effectively, the Plaintiff was threatened with legal action. Time spent in this regard is not reasonable as costs of the action.

[6] The litigation itself was modest in scope in terms of pleadings and document production. There was one motion that in my view the Condominium should not have opposed. Examination for discovery of all parties took less than one day.

[7] The Defendants' costs outline claims \$77,497 for fees, disbursements and HST on a substantial indemnity basis. Mr. Toole's firm is the third firm on the record for the Defendants.

[8] The costs outline includes:

- (a) a small amount of time before the litigation commenced;

- (b) almost \$20,000 in fees, disbursements and HST related to the Plaintiff's motion to produce and preserve the proxies; and
- (c) some time unrelated to the action.

[9] I take no issue with the caselaw holding that a condominium corporation should ordinarily be awarded substantial indemnity costs when it brings enforcement applications as to order otherwise would burden the innocent unit owners who comply with their obligations. I do agree with Mr. Savas that this rationale loses much of its force when the litigation involves unit owners attempting to ensure the integrity of the electoral process of the Condominium.

[10] I also take no issue with the caselaw that substantial indemnity costs are typically awarded when there are unfounded allegations of fraud or dishonesty. At least part of the rationale is that otherwise individuals against whom such allegations are made would be unduly burdened with the costs of defending themselves. This rationale does not fully apply to the individual Defendants given that the Condominium has assumed their defence, and there is no reason to think that the Condominium's costs are significantly greater by virtue of two individuals being joined in the action.

[11] For these reasons, and because I think the Plaintiff has rendered some service to the Condominium and the other owners by raising issues as to the electoral process, I would not award substantial indemnity costs.

[12] I also believe that there must have been some duplication of effort in the Defendants having three different law firms representing them in this litigation.

[13] So working from the Defendant's costs outline I would deduct \$20,000 related to the motion to preserve the proxies. I would then reduce the approximately \$57,500 balance, which was calculated at 90 per cent of full recovery, by another 25 per cent to reflect partial indemnity costs. This brings the total claim to approximately \$43,000. To account for duplication of effort and time not properly related to the litigation, I would reduce the claim by a further 20 per cent to approximately \$34,500.

[14] Stepping back to consider the quantum of the costs claim, \$34,500 is excessive given the nature and extent of the pleadings, document production and the one day spent at examinations for discovery. I would regard \$12,500 as a reasonable amount for this case. This is not far off from the \$12,385, plus an estimated \$2,500 in costs from prior counsel related to the pleadings and examination for discovery of the Plaintiff, that Mr. Savas has calculated as the Plaintiff's partial indemnity costs of the action.

[15] I also note that in 2014 and 2015 the Condominium was prepared to settle the action on a without costs basis. Settlement was not reached because the parties could not agree on other terms having to do with whether the directors

elected at the meeting would step down and whether they would be permitted to stand for election at the next AGM.

[16] I would, however, reduce the Defendants' entitlement by one-third to \$8,325 because I think the dismissive attitude of the Corporation, and the high-handed conduct I mentioned, at least partially led to the action being instituted and continued (See *Rule 57.01(e)*). Put differently the Condominium should have taken the Plaintiff's complaints seriously and to the extent possible addressed them. I would then set off against that amount of \$2,000 as partial indemnity costs related to the proxy motion that the Defendants should pay the Plaintiff. The result is costs of the action to the Defendants in the amount of \$6,325.

[17] The Plaintiff offered to pay the Defendants \$7,500 to settle back on March 29, 2017. The Plaintiff should, therefore, have costs of the motion to discontinue on a partial indemnity basis. Mr. Savas claimed costs of \$7,100 for the motion to discontinue on a partial indemnity basis. While I am confident Mr. Savas spent the time, and both he and Mr. Toole made helpful submissions, I think the amount claimed is a bit high given the nature of the motion.

[18] Costs cannot be calculated to the penny. A modest reduction in the Plaintiff's costs of the motion is such that the amount each side owes to the other are very close. I, therefore, fix the costs of the motion at \$6,325 payable by the Defendants to the Plaintiff.

[19] The costs of the action payable by the Plaintiff are equal to and offset by the amount payable by the Defendants to the Plaintiff. As such the Plaintiff is granted leave to discontinue with no payment of costs.



Sproat J.

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ENDORSEMENT

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Released: March 28, 2018