CITATION: Middlesex Condo. Corp. v. Middlesex Condo. Corp., 2013 ONSC 736
COURT FILE NO.: 6738-12 (London)
DATE: 20130211

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Middlesex Condominium Corporation No. 232	Robert W. Dowhan, for the Applicant
Applicant	
– and –	Joe Hoffer, for the Respondents
Middlesex Condominium Corporation No. 232 (Owners and Mortgagees of)	
Respondents	

COSTS RULING

CAREY J.:

[1] Subsequent to the hearing of this application a second requisition vote was held pertaining to the Board of Directors (the "Board") of this London condominium. The result of this vote held September 18, 2012 was the same as the August 8, 2012 meeting. The previous Board that had initiated this application and a second application to restrain the August 8th vote from taking place was replaced in both votes by members of the former respondent group who are now the operating Board of MCC No. 232. Thus, the submissions as to costs have been made jointly by the applicant and respondents both represented by the same counsel, Cohen Highley. The joint submission on behalf of the applicant and respondents is that the individual former Board members be required to pay costs.

[2] They have filed no new material but rely on the affidavits of Jennifer Anne Zammit and Sean Brant Michael Eglinton, both sworn May 15, 2012. I have expressed my view of those affidavits in my Ruling. The court did not receive this material directly despite several requests but only through the offices of the respondents, who provided a copy from their file.

[3] In considering the issue of costs I have relied on the following findings of fact:

1. The former Board asked only one contractor to quote on the work that they wished to have done. While that quote was adjusted by the contractors, it remained as just one company's opinion. The request for a second quote from the group representing a large number of residents was met with condescension and dismissiveness.

2. The Board all participated in what I find was a pre-orchestrated termination of the Annual General Meeting ("AGM") when the vote on financing the repairs went contrary to their wishes and they were facing a removal vote.

3. The former Board members, rather than agreeing to postpone the decision and seek another opinion as to remedying the building's issues, brought an action to appoint an administrator and suspend the operation of democracy in the building based on what I found to be wildly exaggerated claims lumped together in their material under the heading "Uncertainty Chaos and Anarchy".

4. The former Board members had their counsel advise residents not to attend the meeting called for August 8, 2012 when they should have known that the facts claimed in that letter were not correct as there was no order prohibiting the meeting from going ahead.

5. The former Board members instructed their counsel to proceed with the application for the appointment of an administrator even though they had been voted out at the August 8th meeting. The former Board members continued to use the MC 232 designation and declined to participate in their personal capacity. This appears designed to avoid cost liability.

6. The former Board members tried to use their refusal to recognize the August 8th vote as further reason for the court to appoint an administrator and further evidence of chaos at the condominium as two groups were claiming to be the Board. They in effect tried to use their refusal to accept the democratic will of the majority of residents, as a reason to suspend its operation.

[4] As a result of these findings I conclude that the Board was not acting in good faith in pushing ahead with this unnecessary litigation. It would be unfair to have the majority of residents who opposed the arbitrary measures of the former Board pay for their actions out of the condominium's reserve fund. The former Board members were in effect the true litigating parties.

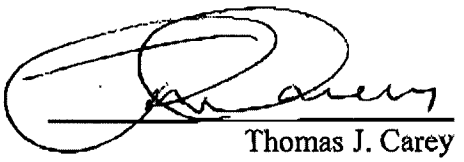
[5] I have no evidence that the Board relied on legal advice in their actions. I can only conclude that their legal counsel were instructed to take the steps they did.

[6] As to the advice of professional engineers, I concluded in my reasons for denying the requested order that the Enerplan Report did not state that significant damage will occur if work is not completed in a timely fashion (para. 40, Reasons for Judgment). I found much of the former Board's material "in turn hyperbolic, exaggerated and alarmist". The Board ultimately is responsible for their own decisions and cannot on these facts hide behind either their counsel or the Enerplan report.

[7] The Board's property manager was employed by the Board and reported to that Board. He was answerable to the Board and not in my view independent of them. The fact that his affidavit supported the actions of the Board cannot relieve the Board of responsibility for their actions.

[8] My conclusion that the former Board members were not acting in good faith precludes their indemnification pursuant to s. 38(2) of the *Condominium Act, 1998*, S.O. 19.

[9] I have concluded that the facts here support an award of costs against the former Board members personally. Their behaviour was deliberate, egregious and requires sanction. Anything short of full indemnity costs would penalize the residents unfairly. The costs requested by the new Board are reasonable and will be fixed at $21,300.52 on a joint and several basis between the five former Board members namely Neil McQuarrie, Dwain Bodkin, Lynda Kirkham, Norm Walker and Jennifer Zammit.



Thomas J. Carey
Justice

Released: February 11, 2013

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COSTS RULING

Carey J.

Released: February 11, 2013