



HUMAN RIGHTS TRIBUNAL OF ONTARIO

BETWEEN:

Marilyn McMillan

Applicant

-and-

Bruce Condominium Corporation No. 6

Respondent

CASE RESOLUTION CONFERENCE DECISION

Adjudicator: Dale Hewat
Date: June 18, 2009
File Number: T-0335-08
Citation: 2009 HRTO 878
Indexed As: **McMillan v. Bruce Condominium Corporation No. 6**

APPEARANCES BY

Marilyn McMillan, Applicant)	John A. Tamming,
)	Counsel
)	
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)	
Bruce Condominium Corporation No. 6,)	Carol A. Dirks,
Respondent)	Counsel
)	
)	

[1] This is an Application filed August 8, 2008 under section 53(3) of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the “Code”). The underlying human rights complaint was filed with the Ontario Human Rights Commission on July 22, 2006 and abandoned upon filing this Application with the Tribunal.

[2] The Case Resolution Conference (“CRC”) was conducted on March 30, 2009 in accordance with the expectation, expressed in the *Code* and the Tribunal’s Rules, that section 53(3) applications proceed in a highly expeditious manner. At the hearing it was agreed that the parties would be permitted to exchange and file written closing submissions by April 23, 2009 and that this Decision would follow receipt of the submissions.

Preliminary Issues

[3] The original human rights complaint claimed discrimination in accommodation on the ground of disability alleging a violation of sections 2(1) and 9 of the *Code* specifically related to a request for the installation of hand railings on the front and back steps of the applicant’s condominium freehold residence. By letter dated January 12, 2009, the applicant filed additional documents and a statement of remedies sought including the cost of railings, the installation of wheelchair ramps and wheelchair accessible electronic doors. The respondent argues that the additional remedies sought should not be considered under this Application since they do not form part of the original complaint.

[4] Section 53(3) of the *Code* provides that, at any time during the six-month period commencing June 30, 2008, a person with a continued complaint at the Ontario Human Rights Commission could abandon that complaint and file an application with the Tribunal in *respect of the subject matter of the abandoned complaint* (emphasis added). Rule 6.3 of the Tribunal’s Rules of Procedure for Transitional Applications under Sections 53(3) and 53(5) of the *Code* also provides:

Applications made in accordance with these Rules must be based on the subject matter of the complaint or amended complaint filed at the Commission and the Tribunal will not entertain preliminary requests to add grounds, expand the subject matter of the complaint or add parties to the Application.

[5] The abandoned Complaint in this matter specifically refers only to a request for the installation of railings on the front and rear steps of the dwelling. To allow an expansion of the case in terms of remedy would be unfair to the respondent given the passage of time, the change in the applicant's condition and the last minute notification about the remedial requests for ramps and electric doors and the potential cost to the respondent in the event a finding of discrimination is made. More importantly allowing the change and expansion of remedies defeats the purpose of the Transitional Applications provision of the *Code* as stipulated in the language of Section 53(3). Accordingly, this Decision will only consider whether there was any discrimination based on the applicant's original request to install hand railings. The respondent does not dispute that the Applicant suffers from a degree of physical disability constituting a "disability" as defined in the *Code*.

[6] At the beginning of the CRC, the respondent requested that I dismiss this matter on the basis that the applicant had not made out a *prima facie* case of discrimination. Alternatively, the respondent requested dismissal on the basis that this Application constituted an abuse of process because the applicant's husband has commenced nine separate legal actions against the respondent corporation and its directors. The respondent argued that, although initiated by the applicant, the filing and pursuit of the Application has been directed by her spouse and demonstrates a course of conduct that shows a vindictive or improper motive that would establish an abuse of process. At the hearing I advised the parties that I would hear the entire claim on the merits before deciding. Given my findings below, I do not need to deal with either of the preliminary arguments.

Decision

[7] The Application is dismissed. My reasons follow.

Background

[8] The applicant resides in a condominium unit owned jointly with her husband (the "Unit"). The Unit is one of 32 free-standing homes that are managed by the respondent, Bruce Condominium Corporation No. 6, ("BCC"), a non-profit corporation created pursuant to the *Condominium Act*, R.S.O. 1998, c.19, as amended (the "Act"). Pursuant to the *Act*, the respondent has filed a Declaration which is one of two documents required to be filed in the Ontario Land Registry Office. The Declaration is the equivalent of a constitution of a condominium corporation.

[9] The Unit is a one-storey home detached home on an individual parcel of land consisting of a front and back-yard, driveway and entrance walkway. Like all other units of similar design, it was built with two exterior wooden steps extending from the landings at the front and rear of the house. The landings were built with railings but the steps were not.

[10] Both the front and rear entrances to the Unit are designated by the respondent's Declaration as being "exclusive use" common elements to the applicant's Unit. The full area of exclusive use extends to the boundary lines for each unit.

[11] The *Act* defines "common elements" as all the property except the units. Exclusive use common elements are those portions of the common elements which may only be used by a unit owner. For example, exclusive use common elements may include such areas as balconies, front and back yards, parking spaces and storage facilities. The *Act* also protects an owner's right to the exclusive use common elements in Section 19 by restricting a condominium corporation's right to enter in or upon a unit or exclusive use common elements of that unit only after giving reasonable notice to the owner.

[12] When the original human rights complaint was filed in 2006, the respondent's Declaration required that any request to alter or change the exclusive use common elements required prior approval of the respondent's Board of Directors. This was amended in November 2008. However, for the purpose of this Decision, consideration must be given to Article IV(4)(b) of the Declaration that was in existence at the time the Complaint was filed. That Article provided that:

No alteration, work, repairs, decoration, painting, maintenance, structure, fence, screen, hedge or erection of any kind whatsoever (the work) shall be performed, done, erected or planted within or in relation to the common elements (including any part thereof over which any owner has the exclusive use) except by the corporation or with its prior written consent or as permitted by the by-laws or rules.

[13] Consideration of requests by owners to make changes to exclusive use common elements is also governed by Section 98 of the *Act* which sets out procedures under which a Board of Directors may consider such requests. Section 98(2) pertains to changes made by owners where the change or alteration relates to a common element over which the owner has exclusive use. This section permits such changes if a Board is satisfied that the proposed addition, alteration or improvement:

- a) will not have an adverse effect on units owned by other owners;
- b) will not give rise to any expense of the corporation;
- c) will not detract from the appearance of buildings on the property;
- d) will not affect the structural integrity of buildings on the property according to a certificate of an engineer, if the proposed addition, alteration or improvement involves a change to the structure of the building; and
- e) will not contravene the declaration or any prescribed requirements.

The Request to Install Railings

[14] By July 2006 the applicant's mobility had decreased to the point where she could no longer safely leave the Unit without assistance. Mr. McMillan testified the

installation of the handrails was a simple matter which would prevent putting his wife's life in jeopardy. On July 12, 2006 he wrote to the Board of Directors (the "Board") requesting that the BCC install railings on both the front and rear steps to the Unit and gave the Board 14 days to respond.

[15] The human rights complaint was filed on July 22, 2006. The complaint emphasized the applicant's physical requirement for railings and noted that railings had been installed on two other units. The complaint cited the respondent's lack of response as constituting discrimination on the basis of disability.

[16] On July 24, 2006, the President of the Board wrote to Mr. McMillan confirming that approval of the installation of railings was granted at the Board's monthly meeting held on July 19, 2006. He advised that the installation would be at the McMillans' expense and confirmed that railings installed by owners at other units had been installed at the expense of those owners.

[17] Mr. John Ferguson, a director and long-time resident and owner of another unit in BCC testified that requests for railings for similar reasons had been approved by the Board. However, the owners were required to pay for the cost of such installations.

[18] Despite the Board's approval of the request, Mr. McMillan believed that he should not bear the cost of the railings and that the respondents' had a duty to accommodate the applicant. The applicant testified that in 2006 she was aware that the Board had approved the installation of the railings but that nothing was done because she and her husband would have to pay for the installation. During the hearing Mr. McMillan stated that he had received a quote for the railings and that he intended to have the work completed in the spring of 2009.

[19] Mr. McMillan also testified that another reason he did not have the railings installed at his cost was due to his concern that the Board might not be satisfied with the work and require it to be re-done at his expense. Mr. McMillan recounted previous incidents he had encountered with the Board when he installed a shed on the property

in 2002 and a hot tub in 2005. Although these improvements fell within the Unit's exclusive use common elements and required Board approval, Mr. McMillan recounted that prior to installing the hot tub, for example, the Board became insistent about the approval process and requirements for meeting certain specifications about landscaping that resulted in increased personal cost.

Analysis

[20] The issue before me is whether the respondent has a duty to accommodate the applicant's disability and if so whether the applicant's disability can be accommodated without causing undue hardship to the respondents.

[21] This is not a case where a condominium corporation refused to allow railings where their installation is clearly required to accommodate a physical disability. Rather, in this case the Board allowed the request, as it had done in past similar circumstances, but confirmed that such additions or improvements are at the owner's expense.

[22] Based on the language of BCC's Declaration, the provisions noted in the *Condominium Act* and the approval process followed by the Board, I find that the respondent has not contravened the *Code*. The exterior front and back steps of the Unit are part of the property which falls within the owner's exclusive use and responsibility. The reason for defining the exterior areas of the unit as exclusive use common element is to ensure that a condominium development remains aesthetically consistent from property to property. However, the owners are responsible for maintaining the exclusive use common element area and, in this case at the time of the original human rights complaint, to seek Board approval if they wish to alter any part of it. Other than the fact that the railings are needed for access, the applicant's request to install them is no different than the McMillans' previous requests to install a hot tub or shed on the exclusive use common elements of their property at their own cost. The fact that Mr. McMillan expressed concern that the Board might not have been satisfied with railings that he would have installed does not change his or the applicant's

responsibilities for property that is within their exclusive use. The Declaration provided that the Board must approve changes to any areas of the exclusive use common elements.

[23] I find that the applicant in this case has not experienced discrimination on the basis of disability and that BCC did not contravene the *Code* when the Board refused to pay for the installation of hand railings on the front and back steps of the Unit. The circumstances of this case are distinct from a condominium corporation's obligation to make common areas accessible. BCC approved the request to install hand railings within its authority but it is not responsible for areas defined as common elements that fall within a unit owner's exclusive use.

[24] The Application is dismissed.

Dated at Toronto, this 18th day of June, 2009.

"Signed by"

Dale Hewat
Member