LAW360™ Canada

Law360 Canada | 111 Gordon Baker Road, Suite 900 | Toronto, ON, M2H 3R1 Canada | www.law360.ca
Phone: (800) 668-6481 | customerservice@lexisnexis.ca

Ontario Court of Appeal upholds dismissal of $300,000 action over condo noise complaints

By **Karunjit Singh**

Law360 Canada (January 19, 2024, 2:32 PM EST) -- The Ontario Court of Appeal has upheld the dismissal of an application seeking $300,000 in damages in relation to a noise complaint, finding that a condominium corporation's actions in dealing with the complaint were reasonable.

In *Kikites v. York Condominium Corporation No. 382*, 2024 ONCA 34, released on Jan. 18, Justice Gary Trotter upheld an application judge's finding that the condominium corporation had taken all reasonable steps to deal with the appellant's complaint.

The appellant, Andreas Kikites, owns a unit in a 45-storey building in Toronto. His unit is directly below a unit occupied by Nives Ceronja and her children. Ceronja's son needs around-the-clock medical care as he is quadriplegic, and suffers from seizure disorders and neuropathic pain.

This care requires the use of extensive medical equipment and includes visits by a nurse who stays during the night and cares for Ceronja's son.

Kikites claimed that the noise emanating from Ceronja's unit was bothersome during his sleeping hours at night and made over 200 noise complaints to the respondent, York Condominium Corporation No. 382.

A study on the noise commissioned by the corporation in October 2021 concluded that the building was constructed in accordance with the Ontario Building Code, and that no noise and vibration controls were warranted.

Subsequently, the appellant commissioned a noise test in November 2021. The test report indicated that "significant" sound intrusions were detected in the appellant's unit with an average of 41 intrusions per night. The source of the sounds was not independently verified.

The appellant brought an application to the Ontario Superior Court seeking various forms of relief under the *Condominium Act* including $300,000 in damages. The appellant also submitted that the appropriate remedial order would be to compel the corporation to install a raised and padded floor in Ceronja's unit. Ceronja was not made a party to the application even though she was examined as a non-party.

An application judge found that the condo corporation's response to the appellant's complaints was appropriate, noting that the respondent had sent its employees to the appellant's and Ceronja's units on multiple occasions.

The application judge held that the respondent could not be said to have done nothing when it invested in two different experts who produced reports that the applicant did not agree with.

The application judge rejected the appellant's submission that the appropriate remedial order would be to compel the corporation to install a raised and padded floor in Ceronja's unit, finding that the respondent had no legal authority to renovate the unit.

The judge noted that Ceronja would have to be a party to the application for that to be a potential remedy.

Kikites appealed the decision, arguing that it was the duty of the corporation to take all reasonable steps to ensure that the owners of the units comply with the corporation's by-laws and rules. The appellant further submitted that s. 119(3) of the Act created a right in the corporation to ensure compliance.

Kikites relied on s. 117(2) of the Act, which prohibits any person from carrying on an activity which results in the creation of unreasonable noise that is a nuisance, annoyance or disruption to an individual in a unit.

The appellant submitted that these provisions should have led the application judge to issue a compliance order under s. 134 requiring the respondent to take all reasonable steps to address the nuisance he identified.

Justice Trotter noted that while Kikites had requested relief under a number of provisions of the Act, including s. 134 in the amended notice of application, the appellant's factum in the superior court barely mentioned s. 134 and instead focused on oppression under s. 135.

The judge found that the application judge had stopped short of finding that there was a nuisance, as he had only stated that the experience of the appellant "might well be experienced as a nuisance by most people."

"He stopped short of reaching a formal, legal conclusion on the existence of a nuisance because he was not tasked with doing so; he was asked to find oppression," wrote Justice Trotter.

The court held that the appellant should not be permitted to re-cast his application and that his application was all about the lack of steps taken by the corporation in responding to the noise situations.

The judge cited *York Condominium Corp. No. 221 v. Mazur*, [2024] O.J. No. 47, in which the Ontario Court of Appeal refused to entertain the submissions by a party seeking a remedy under s. 135 as it had failed to seek the remedy before an application judge.

"In this case, although the appellant made some references to s. 134 in his Amended Notice of Application, and in his written submissions to the application judge, the application judge was not asked to undertake the analysis that we are being asked to 'review' on appeal," wrote the judge.

The court concluded that permitting the appellant to change direction in this manner would require the court to engage in a fact-finding exercise which was not the role of an appellate court.

The appellant had also submitted that the application judge erred by failing to apply the two-part test for oppression recognized in case law and that he further failed to consider the full range of remedial options available to him under s. 135(3) of the Act.

In *Mohamoud v. Carleton Condominium Corp. No. 25*, [2021] O.J. No. 1627, the Ontario Court of Appeal stated that the test for oppression requires a court to first assess whether there has been a breach of a claimant's reasonable expectations and then consider whether the conduct amounts to oppression.

The court held that in the case at bar, the appellant's expectation of quiet enjoyment of his unit was not the focus of the analysis but rather what the appellant could have reasonably expected the respondent to do about the noise complaint.

The court held that while the application judge had agreed that ongoing noise at late hours could be bothersome, he dismissed the application because the condominium corporation acted reasonably in the circumstances.

"The application judge found that, in fact, the Corporation had gone above and beyond what was expected of it in the circumstances by retaining acoustic engineers and conducting noise-testing," wrote Justice Trotter.

The court held that the application judge had merged the analysis of the two-step analysis and found

neither a breach of reasonable expectations nor conduct that was unfairly prejudicial or that unfairly disregarded the interests of the appellant.

The appellant also argued that the application judge erred in concluding that he could not make an order for the renovation or remediation of Ceronja's unit as she had not been made a party to the proceedings.

The court rejected this argument, upholding the judge's reasoning that the court would not be in a position to order such a remedy without fulsome participation and legal submissions from Ceronja.

Justices Eileen Gillese and Steve Coroza concurred in the decision.

"The Court of Appeal's decision shows that a condominium corporation taking reasonable steps to respond to a unit owner's complaints should not be found liable for oppression, even if that unit owner is not completely satisfied with the result," said Avi Sharabi and Leigh Clark of Stieber Berlach LLP, counsel for the respondent.

Counsel for the appellant were Scott Lemke, Emma Chapple, and Alexa Cheung of Massey LLP. They were not immediately available for comment.

If you have any information, story ideas, or news tips for Law360 Canada on business-related law and litigation, including class actions, please contact Karunjit Singh at karunjit.singh@lexisnexis.ca or 905-415-5859.

All Content © 2003-2024, Law360 Canada