thestar.com

Bob Aaron *bob@aaron.ca*

March 20, 2010

Developer-imposed purchase agreements challenged

It has become common practice in Toronto for some developers to require condominium purchasers in each building to contribute to the costs of guest suites, superintendent s units, carwash bays, car share units and similar amenities.

Typically, the total price for these units is between $250,000 and $500,000 per project, and the cost is amortized over 10 or 15 years with interest at 4 per cent above the 10-year Canada Bond rate.

Instead of the charges for these facilities being buried in the purchase price of each condominium unit, they are added to the monthly common expenses for a decade or more after closing. As a result, over a period of years, each condominium buyer can expect to pay a total of perhaps $1,000 to $1,500 in addition to the purchase price. The cost varies with the price of the units and the applicable interest rate.

Although the added charges are set out in the small print of the condominium disclosure statements, they are not referred to in the purchase agreements, and in my experience, never mentioned in sales offices.

This practice may soon end in the wake of a decision of Justice Julie A. Thorburn last year, in a case involving condominium developer Lexington on the Green Inc., and the unit owners of Toronto Standard Condominium Corp. 1930.

Lexington on the Green is a project on Lawrence Ave. W., in the Weston Village area. The registered condominium declaration required the condominium corporation (consisting of the new unit owners) to purchase from the developer a management unit, plus one parking space and a locker for $240,000.

This purchase obligation was also set out in the disclosure statement given to each buyer.

Acting under this requirement in May 2008, the developer-controlled board of directors passed a bylaw requiring the condominium corporation to buy the units, and the board signed a purchase and sale agreement with the developer.

Seven months later, a turnover meeting was held, and the new owners elected a board of directors to replace the developer s board.

In March of last year, the new board passed a resolution to terminate the purchase and sale agreement and end its obligation to buy the management unit. When the developer was notified, it applied to the Superior Court to determine whether the purchase agreement was binding.

Section 112 of the Condominium Act states that a condominium board may terminate an agreement for the provision of facilities to the corporation on other than a non-profit basis if the agreement was entered into before the turnover meeting and the election of the new board.

The Act also says that if any provision in a condominium declaration is inconsistent with the legislation, the Act prevails and the declaration is deemed to be amended accordingly.

Justice Thorburn heard the arguments of both sides and dismissed the developer s application. She ruled that the unit owners did not have to buy the resident manager s unit.

The judge concluded that the Ontario legislature intended to allow a board of directors to terminate an agreement for the provision of facilities or units in cases like this one if the termination is made within 12 months of the turnover meeting to the new board.

The parties were back in court in December. They agreed on an order to amend the condominium declaration to delete parts of the declaration requiring the corporation to buy the management unit, and to allow the unit owners to use the suite for the purposes permitted by the legislation. The unit owners were awarded costs of $7,250.

Thousands of condominium units are now under construction in the GTA, and the disclosure statements in a great many of them contain similar requirements to buy various units with payments spread out over many years.

Based on the Lexington on the Green case, it can be expected that incoming condominium boards across the GTA, and those elected within the past year, will be terminating these developer-imposed purchase requirements.

The cost savings to unit owners will be in the millions of dollars.

Clarification - April 3, 2010

In this column on March 20 (above), I discussed the case of Lexington on the Green, in which a new condominium corporation in its first year of existence was able to back out of a $240,000 purchase agreement to buy a management unit, parking space and locker from the project developer.

In many cases, however, title transfer to those units take place before the developer turns over control of the condominium board of directors to the new unit owners, and is not completed under a Lexington-type agreement. If the transfer of title has already taken place and a mortgage is registered in favour of the developer for the price of those units, then there is no agreement to terminate and the purchaser-controlled board is unable to unwind the transaction.

Lexington on the Green Inc. v. Toronto Standard Condominium Corporation No. 1930 - unpublished endorsement - http://aaron.ca/columns/Lexington Summary and Order.pdf

Costs endorsement:

http://canlii.org/en/on/onsc/doc/2009/2009canlii72036/2009canlii72036.html

Lexington on the Green, Inc. v. Toronto Standard Condominium Corporation No. 1930, 2009 CanLII 72036 (ON S.C.)

Print: PDF Format

Date: 2009-12-23

Related decisions

- **Superior Court of Justice**

  Wong v. Toronto Police Services Board, 2009 CanLII 66385 (ON S.C.) - 2009-11-26

Legislation cited (available on CanLII)

- Condominium Act, 1998, S.O., 1998, c. 19
- Courts of Justice Act, R.S.O., 1990, c. C.43

Decisions cited

- Boucher v. Public Accountants Council for the Province of Ontario, 2004 CanLII 14579 (ON C.A.) 71 O.R. (3d) 291 188 O.A.C. 201
- Enron Canada Corp. v. National-Oilwell Canada Ltd., 2001 ABCA 177 (CanLII) 281 A.R. 351 202 D.L.R. (4th) 523 [2001] 10 W.W.R. 406 93 Alta. L.R. (3d) 236
- Zesta Engineering Ltd. v. Cloutier, 2002 CanLII 25577 (ON C.A.) 21 C.C.E.L. (3d) 161

COURT FILE NO.: 05-CV-282926 PD3

DATE: 20091223

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: LEXINGTON ON THE GREEN, INC., Applicant

- and -

TORONTO STANDARD CONDOMINIUM CORPORATION NO. 1930, Respondent

BEFORE: Justice J.A. Thorburn

COUNSEL: Carol Dirks, for the Applicant, Lexington on the Green

Michael Gwynne, for the Respondent Toronto Standard Condominium Corporation No. 1930

COSTS ENDORSEMENT

[1] This Application was heard and an Order made dismissing the Application, on June 29, 2009. The central issue on the Application was whether the Respondent was required to purchase from Lexington, the ownership interest in the Residence Manager Unit along with one parking and one locker unit. In the Order, the Toronto Standard Condominium Corporation was not required to purchase the ownership interest in the Residence Manager Unit along with one parking and one locker unit. Lexington was, however, entitled to damages in respect of occupation of the unit. The quantum of damages was resolved by the parties on September 16, 2009.

[2] Thereafter, on October 9, 2009, the parties filed a Joint Submission in which they proposed amendments to the Declaration of the Toronto Standard Condominium Corporation. The parties suggest that paragraphs 1(u) and 28 of the Toronto Standard Condominium Corporation Declaration be deleted in their entirety, to take into account the Respondent s right to use the unit in question in any manner consistent with the *Condominium Act* S.O. 1998, c. 19, and without the additional restrictions contained in those sections. I accept that Joint Submission.

[3] The parties filed costs submissions in writing to address costs of the Application. For the reasons set out below, I order partial indemnity costs payable to the Respondent, Toronto Standard Condominium Corporation in the amount of $7,250.00.

[4] Section 131(1) of the *Courts of Justice Act* R.S.O. 1990, c. C.43 sets out the Court s general discretion to award costs as between parties to litigation. Rule 57.01(1) of the *Rules of Civil Procedure* sets a non-exhaustive list of factors to be taken into account in awarding costs including the time spent, the result achieved, the complexity of the issues raised, the conduct of the parties, and any other matter relevant to the question of costs. The case law has developed such that the expectations of the parties concerning the quantum of costs, is also a factor. (*Zesta Engineering Ltd. v. Cloutier*, 2002 CanLII 25577 (ON C.A.), 2002 CanLII 25577 (C.A.) at para. 4; *Boucher v. Public Accountants Council for the Province of Ontario*, 2004 CanLII 14579 (ON C.A.), (2004), 71 O.R. (3d) 291 at para. 38.

[5] The overall objective is to fix an amount that is fair and reasonable for the unsuccessful party in the circumstances. (*Boucher, v. Public Accountants Council for the Province of Ontario*, 2004 CanLII 14579 (ON C.A.), (2004), 71 O.R. (3d) 291 at para. 26.) The general rule is that a successful party is entitled to his or her costs on a motion. (*Blue Range Resource Corp. (Re)*, 2001 ABCA 177 (CanLII), (2001), 202 D.L.R. (4th) 523 (Alta. C.A.), *Ryan v. McGregor* (1925), 58 O.L.R. 213 (App. Div).)

[6] The Respondent claims partial indemnity costs in the amount of $11,456.25 plus disbursements and G.S.T. for a total of $12,659.76. This includes fees for three junior counsel, a clerk, several articling students and Mr. Gwynne.

[7] The Applicant s partial indemnity costs plus disbursements and G.S.T. are $7,226.96. The Applicant submits that the Respondent s costs are excessive as they contain considerable duplication of time among counsel and the disbursements include fees relating to the issuance of a counter-application that the Respondent did not proceed with.

[8] This Application was heard and determined in a few hours and was of moderate complexity. The parties agree that the key issue was the interpretation of section 112 of the *Condominium Act*. The Respondent claims however that this issue had not been addressed by the Court before, thereby requiring an analysis of other sections of the Act as well as the Applicant s documents.

[9] The Applicant submitted two affidavits in support of the Application, a factum and a revised factum that contained four additional cases. The Respondent submitted one affidavit. There were no cross-examinations. The issue was of importance to both parties.

[10] The Respondent claims that the Applicant could have reduced its damages if it had agreed to terms in the Respondent s letter of March 23, 2009. The Applicant claims the terms were not the same as those ultimately agreed to by the parties and in any event, this issue accounted for only a small portion of the time expended on this Application. I agree that this issue accounted for only a small portion of the time spent on this Application.

[11] Given the agreement by the parties that partial indemnity costs are appropriate in this case, the moderate complexity of the Application, the short time spent to argue the Application, the fact that there were no cross-examinations, that there seems to be some duplication among the many junior counsel and students working on the Respondent s material, and the Respondent s partial indemnity costs, I order costs in the amount of $7,250.00 to be paid by the Applicant to the Respondent forthwith.

Thorburn J.

DATE: December 23, 2009