CITATION: Amlani v. York Condominium Corporation No. 473, 2020 ONSC 1190
COURT FILE NO.: CV-18-598709
DATE: 20200225

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: NASIRALLI AMLANI and NASIMBANOO AMLANI

AND:

YORK CONDOMINIUM CORPORATION NO. 473**BEFORE:** .

COUNSEL: *Rodrique Escayola, David Plotkin,* for the applicants

Jonathan Fine for the respondent

COSTS ENDORSEMENT

[1] The applicants seek costs of $91,250 including disbursements and HST arising out of my reasons in *Amlani v. York Condominium Corporation No. 473*, 2020 ONSC 194. They calculate their costs on a partial indemnity scale to the date of their first offer to settle on February 23, 2018 ($3,375) and on a substantial indemnity scale thereafter ($68,901), plus disbursements ($9,578) and HST ($9,396).

[2] The applicants point out that they were entirely successful in the dispute, that I made findings of oppression against the respondents, that the Corporation would have claimed full indemnification pursuant to s. 134 (5) of the *Condominium Act* and that the applicants' costs are in line with the respondent's costs.

[3] The respondent objects and submits that the appropriate level of cost should be $44,134.20 on a partial indemnity scale plus disbursements of $6,765.97.

[4] The respondent's first proposed reduction in costs reflects $7,000 on account of costs incurred before the litigation was commenced. I agree with the respondent in this regard. I do not have authority to award costs for fees incurred before litigation was commenced: *Galler v. Ecom*

Corp., 2007 CarswellOnt 8056 at paras. 12-13. As a result, the applicants cost request should be reduced by a total of $7,910 to reflect pre-litigation costs plus HST which are not recoverable in this proceeding.

[5] Second, the respondent submits that it should not be required to reimburse the applicants for the cost of their lawyers travel to and from Ottawa or their accommodation costs in Toronto. These disbursements total $2,812.47. I disagree.

[6] The applicants are entitled to make reasonable choices about their counsel. The counsel they chose were specialists in condominium law. They practice out of Ottawa. As a general rule, lawyers' fees in Ottawa are lower than those in Toronto. Once I subtract the $7,000 in pre-litigation fees from the cost request of the applicants, their costs come to $65,276. The travel and accommodation costs come to approximately 4.3% of those legal fees. I am comfortable that had the applicants chosen equally experienced Toronto counsel, from a similarly situated firm, their legal costs would have been more than 4.3% higher than they actually were.

[7] The respondent objects to substantial indemnity costs on the basis that the settlement offers that the applicants use to trigger the claim for a higher scale of costs were pre-litigation offers to settle. The respondent submits that an offer that is not technically compliant with the Rule 49 does not attract the favourable cost consequences of the rule: *Craig v CEO Global Network Inc.*, 2019 ONSC 4509 at paras. 7, 9 and 10.

[8] While I agree with that submission, it does not end the analysis. Pre-litigation settlement offers continue to be relevant to the consideration of a cost award at the end of litigation because they can demonstrate whether a party was acting reasonably from the outset: *Newlands Estate*, 2018 ONSC 2952 at para. 24.

[9] In addition, elevated cost awards are appropriate where the unsuccessful party has engaged in conduct that is worthy of sanction through an elevated cost award: *Craig* at para. at 10 citing *Davies v. Clarington (Municipality)*, 2009 (ONCA) at paras 28, 31, 40.

[10] In my view, the respondent's conduct in this matter is worthy of sanction through an elevated cost award. The sanction worthy conduct of the respondent is discussed throughout my reasons. I cite only a few examples here. There were practical and economical solutions to the problems at hand. Those solutions had been used in the past and had worked. They are, however, solutions that may require maintenance from time to time. Instead of exploring those solutions and perhaps enhancing those that had been used in the past, the respondent embarked on costly aggressive litigation. In doing so not only did it act unreasonably; it also breached its own constating documents which require negotiation and mediation. The respondent refused to meet with the applicant to discuss the issue. When the applicant formally demanded mediation, the respondent unilaterally appointed a mediator and a mediation date only to leave the mediation early for another appointment. In a nutshell, the entire proceeding could have been avoided had the respondent acted reasonably.

[11] In my view, it is worthwhile to send a message to both condominium corporations and condominium residents that there are often easy, cost-effective solutions that are far preferable to

litigation. Parties who ignore cost-effective solutions in favour of litigation must pay the price if they fail in the litigation.

[12] In light of the foregoing, I award the applicants costs which I fix in the amount of $83,340 after taking into account the adjustment referred to in paragraph 4 above.

Koehnen J.

Date: February 25, 2020