CITATION: Falsetto v City of Ottawa and CCC 339, 2022 ONSC 3296
COURT FILE NO.: CV 22-89047 (Ottawa)
DATE: June 9, 2022

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: M & F FALSETTO AND SONS LIMITED, Plaintiff

AND:

THE CITY OF OTTAWA AND CARLETON CONDOMINIUM CORPORATION 339, Defendants

BEFORE: Mr. Justice Gary W. Tranmer

COUNSEL: *S Schwisberg and D Rizk*, for the plaintiff, M & F Falsetto and Sons Limited

A Severson, for the defendant, The City of Ottawa

R Escayola and D Plotkin, for Carleton Condominium Corporation 339

HEARD: Thursday, May 26, 2022, at Kingston

ENDORSEMENT RE PLAINTIFF APPLICATION FOR AN INTERLOCUTORY INJUNCTION

[1] At the outset of his submissions, counsel for the plaintiff stated that he was seeking an interlocutory injunction restraining the City of Ottawa from issuing a right of entry permit under City of Ottawa By Law number 2005-326 to CCC 339 to enter upon and use the plaintiff's lands at 216 Cooper Street for the purposes of effecting repairs to the property of CCC 339's property located at 205 Somerset St. W. pending receipt of a report from an independent third-party regarding alternate procedures to effect the necessary repairs.

[2] The plaintiff owns a four unit building at 216 Cooper St. There are 16 tenants occupying the building. There is a gravel and dirt parking lot at the rear of the plaintiff's building accessed by a driveway from the street. At dumpster sits in the rear corner of the parking lot and it is emptied by a city garbage truck weekly.

[3] The defendant's condominium podium which requires repair is located behind the plaintiff's parking lot. There is what appears to be a 6 to 8 foot high brick wall on the defendant's property between the parking lot and the podium.

[4] The materials in the record satisfy me that the waterproofing membrane protecting the podium had reached its life expectancy in June 2021. The engineering reports filed satisfy me that it is in need of replacement. In submissions, the plaintiff conceded that the repair work to the

podium is necessary. The work required to do the repairs includes removal of the landscaping which sits on top of the membrane, removal of the current membrane and inspection of the underlying concrete and rebar, installing a new waterproof membrane and installing new landscaping on top. It is estimated the work will take 4 to 6 weeks. Apart from materials, the evidence is that the work will require a telehandler and a dump truck. The defendant seeks to use five parking spaces at the rear of the plaintiff's parking lot to access the podium.

[5] Initially, the plaintiff requested the sum of $30,000 from the defendant for the use of its land. The defendant proposed the sum of $10,000.

[6] The defendant then explored applying for a right of entry permit pursuant to the City of Ottawa By-Law. I find that the defendant was entitled to do so. I find nothing sinister or in bad faith as urged by the plaintiff in that regard. The defendant made that application and the City conducted an inspection and investigation in accordance with the By Law. As part of the right of entry permit application, the defendant is required to deposit the sum of $126,500 with the City which the City determined to be sufficient to pay for the cost of restoring the plaintiff's land or building to the condition it was prior to entry, in the event that the defendant does not do so. In the event that the restoration is not carried out to the satisfaction of the City, the deposit for the specific damages is forfeited and paid by the City to the plaintiff. The defendant has proposed to pay for five alternate parking spaces for the duration of its work.

[7] The plaintiff subsequently proposed that the defendant pay to it the sum of $20,000 for the right to use its property.

[8] I find that the plaintiff was involved by the City in the permit application in that the City consulted with the plaintiff and considered alternative methods of effecting the repairs that were proposed by the plaintiff.

[9] On the evidence before me, I find that the alternatives were considered and were rejected for good reasons which were communicated to the plaintiff. Indeed the plaintiff concedes, that the alternative of placing a crane on top of a podium at the front of the defendant's building is not viable.

[10] I cannot find, as asserted by the plaintiff, that CCC 339 resorted to the permit application to avoid good-faith negotiations with the plaintiff. It appears that the parties were only $10,000 apart, yet the defendant undertook the permit application which required detailed filings on its part, and the significant damage deposit that I have noted, $126,500. The permit has not yet been issued pending the result of this case but subjects the defendant to detailed requirements and restrictions including days of the week and hours, and the nature of the equipment to be used which are quite likely beyond what would've been agreed to by the plaintiff and the defendant.

[11] I cannot find, as asserted by the plaintiff, that the City sought to intervene in the negotiations between the parties or that the City is prepared to grant the right of entry permit because it faces some risk of liability for the initial approval of construction of the defendant's building. There is no evidence to support these assertions and they are no more than unfounded speculation.

[12] I find that the City is independent and not sided with one party or the other. The By Law is authorized by s. 132 of the Municipal Act. The plaintiff does not challenge the validity of the By Law. I find that the City acted in accordance with the By Law.

Legal principles

[13] The parties agree, as do I, that on the basis of the legal authorities the private property rights of individuals are sancrosanct.

[14] The parties agree, as do I, that the applicable test for the injunction being sought is set out in RJR MacDonald v. Canada (Attorney General) [1994] 1 SCR 311, and s. 101 Courts of Justice Act.

[15] The plaintiff also makes an alternate argument engaging s. 440 of the Municipal Act, in which it submits that the injunction should be issued based on the modified RJR test.

The RJR test

Serious issue to be tried

[16] It has been held that, "where an interlocutory injunction is sought and there are conflicting affidavits, the moving party must first demonstrate that its case is not frivolous or vexatious and that there is a substantial issue to be tried. The determination of whether that threshold is met is based on common sense and an extremely limited view of the case on its merits". Markham v. Chisholm [2000] OJ No. 372 { SCJ).

[17] Justice Hurley has stated that that threshold is a low one. Gobalian v. Poxton 2020 ONSC 6750.

[18] The plaintiff submits that it is a serious issue to be tried in that CCC339 does not require a right of entry permit in order to affect its necessary repairs. The plaintiff maintains, despite the City's determination to the contrary, that there are alternatives to entry onto the plaintiff's lands.

[19] The plaintiff also submits that in making its determination, the City has wrongfully interpreted the requirement of "necessary" in the By Law, and has also wrongfully expanded the right of entry to permitting use of the plaintiff's property.

[20] While I acknowledge that the threshold on this prong of the test is a low one, and that I cannot say that the plaintiff's action is frivolous and vexatious, I note that the wording under section 132 is "only to the extent necessary to carry out the repairs or alterations", and s. 8 of the By Law, requires that the City has been satisfied that entry upon the adjoining land is necessary for the purposes of making repairs or alterations. On the record before me, that degree of "necessary" is made out.

[21] I would also note that s. 132(2) 5 of the Municipal Act, the requirement of the damage deposit and the decisions in Parla v. Pleasants 2006 CanLll 32061 (Ont. SCJ) and Marks v. Ottawa 2007 CanLll23354 (Ont. SCJ) are strong authority for finding that some use of the plaintiff's lands is contemplated and authorized by the legislation.

[22] It is only because of the low threshold for serious issue to be tried can I find that the plaintiff has met this test although minimally.

Irreparable harm

[23] The onus is on the plaintiff to convince the court that irreparable harm "will" result not "may" result if the injunction is not granted. Evidence to support that claim must be "clear and not speculative". *Airport Limousine Drivers v Greater Toronto Airports* 2005 OJ No.3509 (SCJ), para 132.

[24] On this point, the plaintiff points to the 2 letters presented by 8 of its 16 tenants that entry onto the plaintiff's property will bother them, interfere with their studies and in one case cause upset and severe migraine headaches. The plaintiff submits that this could lead to claims for abatement of rent or loss of the tenants. I find that this is not strong evidence or clear evidence of harm but only speculation. In any event, the repair work must be done whether from the back parking lot or otherwise and the tenants will be subjected to the noise, bother and inconvenience.

[25] In the Marks case, the court held that the necessary repair work trumped the upset and bother that the applicant's pregnant wife would be subjected to.

[26] The plaintiff also submits that property including its building might be damaged. This too is speculation but in any event as in the cases cited the damage deposit is available for just such a purpose. I also note that the defendant is prepared to conduct a pre-and post property inspection so that any resulting damage as identified. The plaintiff is free to also conduct such an inspection.

[27] As in Gobalian, I am influenced by the independent position of the City officials. There is no evidence that they have improperly favoured one taxpayer over another. The evidence satisfies me that the City officials have acted in accordance with the statutory obligations.

[28] The plaintiff has made no compelling argument that irreparable harm will result from the daytime loss of five parking spaces and in any event the defendant has offered five alternative parking spaces. The defendant's equipment will not remain on the plaintiff's property outside of the permit hours.

[29] The plaintiff fails on this prong of the test.

Balance of convenience

[30] In *Shell v Vancouver* [1994] 1 SCR 231, the court quoted, "recent commentary suggests an emerging consensus that courts must respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens for those of municipal councils. Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold.... Whatever rules of construction are applied, they must not be used to usurp the legitimate role of municipal bodies as community representatives.".

[31] In *Dhillon v Cambridge* 2921 ONSC 7385 the court stated that the jurisprudence establishes that the city has a broad discretion to determine how it will enforce its own bylaws and the manner of enforcement is not to be left to the whims or dictates of the citizens.

[32] As I have stated, I am satisfied that the repair work is necessary.

[33] Apart from what I have identified above, the plaintiff has not advanced any other inconvenience. As Marks held, necessary repair work on buildings overcomes short-term bother and upset.

[34] On the evidence before me, the balance of convenience clearly favours CCC 339.

[35] On this third prong of the RJR test, the plaintiff fails.

Decision on RJR test

[36] For these reasons, I find that the plaintiff has not met the requirements of the RJR test for the injunction it seeks.

The s. 440 argument

[37] The plaintiff submits that the City has breached its own By Law in unlawfully interpreting or applying the "necessary" standard and in unlawfully expanding right of entry to include "use" of the plaintiff's lands.

[38] For the reasons that I have indicated above, on the record before me on this motion, I do not agree. (S. 132(2), the damage deposit, Parla, Marks, Shell and Dhillon).

[39] In any event, I would hold that the modified RJR test only applies if it is a municipality that is seeking to enjoin a breach of a By Law. *HMQ v Adamson* 2020 ONSC 7679; *Abdullah v. Maziri* 2016 ONSC 2168; *Gobalian; Auto Parts v. Boak* 2022 ONSC 1001.

[40] Furthermore, in any event, even if the plaintiff is entitled to invoke the modified RJR test, the plaintiff must demonstrate a clear breach of the By Law. Adamson.

[41] A strong prima facie case must be established. Auto Parts v Boak.

[42] For the reasons that I've given, the plaintiff has not demonstrated a clear breach and it has not established a strong prima facie case.

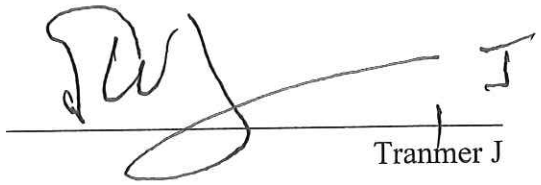
Decision

[43] For these reasons this application is dismissed.

Costs

[44] If, after reasonable and bona fide efforts to resolve the issue of costs, the parties are unable to do so, the defendants may file written submissions limited to 2 pages plus, a costs outline to be delivered within 10 days. The plaintiff may respond in like fashion within 5 days thereafter.

[45] If submissions are not received by the court in accordance with that timeline, there will be no order as to costs.



Tranmer J

Date: 09 June 2022