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Dance studio drove woman out of condo into court

Condo corporation failed in noise control

One of the most common complaints from condominium residents is noise coming from neighbouring units. In the last 40 years, more than 100 condominium noise cases have gone to trial in Ontario courts.

The latest of these involves an application by Elizabeth Dyke against Metropolitan Toronto Condominium Corporation 972 to require the condominium to enforce its noise bylaws. The building is a 349-unit high-rise on Wellesley St. E. near Yonge St.

Earlier this year, Dyke was living on the 8th floor of the building with her daughter, and used a nearby unit as her law office (she has since retired).

In February, 2010, two new tenants moved into Ste. 911, the unit above the Dyke residence. The wife explained to Dyke that she was a professional dancer and sometimes used her condo as a practice area.

The noise from upstairs escalated over the months and by July, 2011 the tenant was using her unit as a full-time professional dance studio.

In August Dyke reported the nuisance to the police, and began complaining to the property manager.

During the fall of 2011, Dyke made numerous complaints to the management and security desk. Reports from the security personnel described the sound as similar to the constant banging of a hammer.

Despite Dyke's requests and complaints, neither the condominium board nor the property manager ever sent a letter to unit 911 requesting that the noise - stop. There was no follow-up or communication with the tenants or owners of unit 911.

The noise continued and, in late 2011, and Dyke told the condo management that she was experiencing ill health effects and stress due to the constant noise above her.

Following a demand letter from Dyke to the condominium in October, 2011, the board's lawyers responded that they had been unable to verify the intensity of the disturbing noise, despite several written reports to the contrary from their own security personnel.

Dyke finally moved out of the unit in December, 2011 due to the detrimental health effects from the noise and related stress. She had advised the condominium corporation in advance of the reasons she was moving, but no action was taken to reduce the noise so that she could move back in.

Dyke's proceedings against the condominium came before Justice Edward Morgan this past January. The judge noted that the condominium rules prohibit noise transmission from one unit to another if it causes an annoyance or disruption. In the event the noise does not abate following written notice, the board is required to take action.

In his decision, Justice Morgan noted that in his view, the condominium corporation "has not satisfied this duty." The corporation, he wrote, "has acted in a way which unfairly disregards the interests of (Elizabeth Dyke) in failing to take adequate steps to enforce its own rules." Its actions amounted to "unfairly prejudicial conduct."

The judge added that Dyke did not deserve absolute quiet in her condominium but that the board has a responsibility to enforce its rules in a balanced way. "It stands to reason," he added, "that (Dyke) is entitled to live underneath a residential apartment unit, and not underneath a professional dance studio."

The condo corporation was ordered to pay Dyke her out-of-pocket expenses of $40,325, plus a huge costs award of $19,500. Dyke's claim for pain and suffering, mental anguish and distress, plus loss of comfort and quiet enjoyment, was deferred to a later hearing.

The case is a warning to condo residents that persistent noise will not be tolerated. It's also a reminder to condominium boards and managers that failure to actively enforce compliance with their own rules and bylaws will come at a steep price.

Dyke v. Metropolitan Toronto Condo. Corp. No. 972, 2013 ONSC 463 (CanLII)

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Docket:	CV-11-443081
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Legislation cited (available on CanLII)

- Condominium Act, 1998, SO 1998, c 19 — 17(3)

CITATION: Dyke v. Metropolitan Toronto Condo. Corp. No. 972, 2013 ONSC 463

COURT FILE NO.: CV-11-443081

DATE: 20130118

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Elizabeth Dyke, Applicant

– AND –

Metropolitan Toronto Condominium Corporation No. 972, Respondent

BEFORE: Justice E.M. Morgan

COUNSEL: *Carol A. Dirks*, for the Applicant

Greg Marley, for the Respondent

HEARD: January 18, 2013

ENDORSEMENT

[1] The Applicant is the owner of units 806 and 811 within the Respondent condominium located at 24 Wellesley Street East, Toronto. She resides with her teenage daughter in unit 811 and uses unit 806 as a law office. The condominium building is a high rise comprised of 349 units.

[2] The Applicant has lived in unit 811 since 1994. For the first thirteen years, until 2007, there were no issues of noise emanating from the unit above her. In 2007, unit 911 replaced the wall to wall carpeting with hard wood flooring. The new flooring apparently caused noise of furniture moving and footseps to be transmitted to the Applicant's unit 811 below.

[3] The Applicant complained of the noise in 2007, and the Respondent had a sound transmission expert, John Coulter, produce a report. The 2007 Coulter Report confirmed that there was more than average transmission of sound through the floor of unit 911, and recommended that area rugs be placed in the unit to cover 65% of the floor space.

[4] It is unclear what the owner of unit 911 did in 2007 upon receiving the Coulter Report, but the Applicant states that whatever was done was satisfactory. Although she testified that she occasionally heard modest noises after that, it was not loud enough to interfere with her quiet enjoyment of her unit below.

[5] Matters changed in February 2010, when new tenants moved into unit 911. The new tenants were a husband a wife. The wife introduced herself to the Applicant as a professional dancer, and explained that she sometimes uses her residence as a dance practice area. She invited the Applicant to call and let her know if the noise of the dancing was too loud.

[6] The Applicant called a number of times to ask for the dancing to quiet down, but the noise escalated over the ensuing months. In July 2011, the Applicant told the tenants in unit 911 that the noise was consistently too loud, at which point the tenant explained that she no longer had an outside dance studio and was using her condominium as a full time studio.

[7] In August 2011 the noise was so loud that the Applicant called the police to report a nuisance. At the same time she began complaining about the excessive noise to the Respondent's property management office. The Respondent took no action on the Applicant's complaints at the time, and referred the matter to its board of directors' meeting the following month. In the meantime, they instructed the Applicant to make no more complaints to the tenants in unit 911 but rather to direct all communication to the property management office.

[8] On numerous occasions during the fall of 2011, the Applicant complained about the noise to the management or security desk in the condominium building. The record shows a number of security reports in which the Respondent's security personnel confirms the excessive noise coming from unit 911. These reports describe the sound as similar to the constant banging of a hammer.

[9] In one such instance, on September 22, 2011, the security officer verified the noise and attended at unit 911 in order to ask them to stop their activities. The security report of that date indicates that the tenants in 911 refused to accede with this request, with the female tenant stating that "she will continue her dance lessons." Although the Respondent claims it is unsure of what was going on in unit 911, it would appear that by September 2011 the tenants in that unit had converted a residential condominium in a high rise building to a professional dance studio.

[10] Despite the Applicant's many requests, the Respondent and its property manager never sent a letter to unit 911 requesting that the noise-making cease. The property manager did send a note to unit 911 asking whether area rugs were being used as required by the 2007 Coulter Report, and the tenants confirmed that no rugs were being used. Beyond that, the Respondent did not follow-up or communicate with the tenants or the owners of unit 911 at the time.

[11] The dancing activity continued unabated through October and November 2011. During this time the Applicant frequently complained to the Respondent, but to no avail. She indicated to them that she could not work or make proper use of her unit and that she was starting to suffer ill health effects from the noise and the stress of having to live constantly with the noise of a dance studio above her.

[12] At the end of October, the Applicant wrote to the Respondent indicating that if they did not take some action to enforce the rules requiring the owners' quiet enjoyment to be respected, she would hold the Respondent legally responsible. Much to her surprise, she received a letter in response from the lawyers for the Respondent indicating that the Respondent "has been unable to independently verify the intensity of the disturbing noise (apparently the operation of a private dance studio).

[13] The Respondent's solicitor's response was issued under instructions of the Respondent's property manager, Lisa Malo. These instructions, and the letter that followed on these instructions, ignored the fact that the Respondent's own security personnel had on several occasions verified the excessive noise from unit 911. Ms. Malo's instructions were given in disregard of the interests of the Applicant.

[14] The Applicant contends that at the same time the Respondent started a campaign of harassment against her. The Applicant requested a copy of the by-laws and rules of the Respondent and the property manager charged her $50.00 for the copy. Notices distributed to the owners indicated that copies of the by-laws and rules would cost only $5.00 for anyone in the building.

[15] Likewise, during the fall of 2011 the Applicant received a notice from the property management advising her that she must remove her two small dogs from the building as one had bit a visitor in the elevator. The visitor's email to the property manager clearly indicates that the visitor had unexpectedly reached out to pet the dog and that as a result the dog had nipped the person on the finger. The visitor specifically said that the incident was not serious enough to warrant a complaint.

[16] In early December 2011, the Applicant received a letter from the Respondent indicating that it had come to the attention of property management that she was conducting a law practice out of one of her units and that she must cease that activity as this is a residential building. The evidence is that the Applicant has been doing her legal work out of the unit for the past 17 years, and that she does not see clients there and interferes with no one else's premises in so engaging in her legal work. The Applicant perceives this letter as a vindictive step by the Respondent in light of the fact that no equivalent letter has ever been issued to the tenants or owners of unit 911, where a professional dance studio is operating.

[17] Finally, the Applicant came home to her condominium one day to find a note on her door complaining that her dogs had been making noise and disturbing the neighbours. The note was unsigned. The Applicant proceeded to make inquiries of all of the residents of her hallway. None of them indicated that they had heard anything or been disturbed until she got to the end of the hall where a member of the Respondent's board of directors, Bruce Darlington, resided. Mr. Darlington indicated that he had written the note, and, according to the sworn evidence of the Applicant, became very abusive of the Applicant and her daughter.

[18] Counsel for the Respondent submits that the encounter with Mr. Darlington was in his guise as a neighbor rather than as a board member. He further submits that the Respondent cannot be held responsible for the misconduct of each of its board members in their personal capacities. While I would generally agree, the genesis of this incident is suspicious; the anonymous note came from a board member and complained (apparently falsely) that the Applicant, of all people, was causing a noise disturbance. The scenario suggests that Mr. Darlington, as a board member, knew of the Applicant's own complaints to the board about excessive noise, and then bated the Applicant into this confrontation.

[19] The Applicant testifies that since she was suffering detrimental health effects from the noise and related stress, she moved out of her condominium in December 2011. In the meantime, a mediation session that the Respondent was suggesting in late November was cancelled because the tenant in unit 911 was finally charged with a criminal offense. That criminal charge is still pending.

[20] The Applicant seeks an order that the Respondent enforce its own by-laws and rules. She also seeks special damages in compensation for the specific costs she has

incurred in moving out of her condominium and renting alternative accommodation for herself and her daughter since December 2011. Before moving out of her unit in December 2011 she advised the Respondent of the reasons that she had to move out, but the Respondent has done nothing during that time to abate the noise and ensure that she could move back in.

[21] The Rule 8(a) of the Rules of the Respondent provides:

> No noise shall be permitted to be transmitted from one unit to another. If the Board reasonably determines that any noise is being transmitted to another unit and that such noise is an annoyance or disruption, then following the delivery of written notice to said unit, necessary steps shall be taken to abate such noise to the reasonable satisfaction of the Board.
>
> If the owner(s) of such unit fail to abate the noise, the Board shall take such steps as it deems necessary and the owner(s) shall be liable to the Corporation for al e expenses thereby incurred including reasonable solicitor's fees.

[22] Section 17(3) of the Condominium Act, 1998 makes it clear that the Respondent has a duty to ensure compliance with its own by-laws and rules. In my view, the Respondent has not satisfied this duty.

[23] Further, section 135 creates an oppression remedy where the conduct of a condominium corporation is "oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant." In my view, the Respondent, acting through Ms. Malo and the board, has acted in a way which unfairly disregards the interests of the Applicant in failing to take adequate steps to enforce its own rules. The small harassments by the Respondent also add up to unfairly prejudicial conduct.

[24] I hasten to say that the Applicant does not, as she has occasionally suggested in her correspondence and her cross-examination, deserve absolute quiet in her condominium units. The Respondent has a responsibility to enforce its rules in a balanced way so as to ensure that all of the owners and tenants can enjoy their respective units. *McKinstry v York Condominium Corporation No. 472*, [2003] OJ No 5006, at para 33 (SCJ). However, it stands to reason that the Applicant is entitled to live underneath a residential apartment unit, and not underneath a professional dance studio. That level of quiet enjoyment is certainly within the Applicant's reasonable expectation. *Hakim v Toronto Standard Condominium Corporation No. 1737*, [2012] OJ No. 211, at paras 38, 40 (SCJ).

[25] The Respondent and the Applicant have in the past week commissioned and received a new report by John Coulter confirming that the noise levels from the dancing in unit 911 are excessive. The Respondent has now changed property managers, and the new manager has agreed to take steps to rectify the situation. That is to the Respondent's and its new property manager's credit. The Respondent is to take all reasonable steps to ensure that its by-laws and rules, in particular Rule 8, are complied with, and that the Applicant regain quiet enjoyment of her units. More specifically, the Respondent must notify the owners and/or tenants of unit 911 that adequate additional floor covering must be installed in the unit to prevent noise from reasonably disturbing the comfort or quiet enjoyment of the Applicant.

[26] Given my finding that the Respondent has acted in unfair disregard of the Applicant's interests, the Respondent is to pay compensation to the Applicant for the special damages she has incurred in moving out of her unit. The Applicant has detailed these expenses in her affidavit. For the most part, they reflect the ordinary household expenses that one would expect to incur if one moves to a new apartment (rent, hydro, Bell Canada, furniture, movers). The one expense she has claimed that I would disallow is the cost of a Bose sound system for her apartment.

[27] In total, the Respondent is to pay special damages to the Applicant in the amount of $40,325.78. I am hopeful that once the Respondent takes steps to ensure that the owners/tenants of unit 911 abate the noise, the Applicant will be able to quickly move back into her unit.

[28] I make no finding with respect to the Applicant's claim for further compensation for pain and suffering, mental anguish and distress, loss of income and loss of comfort and quiet enjoyment. Those issues are deferred to a further hearing on a date to be scheduled with the court.

[29] Counsel for the Applicant has indicated that the parties have split the cost of the most recent Coulter report. I view that as an appropriate way to have borne that expense. The commissioning of an expert report is somewhat beyond what one expects of a condominium corporation in its management function, and it seems appropriate that the Applicant bear half of that cost.

[30] The Applicant shall have costs of this Application in the amount of $19,500.00, inclusive of disbursements and HST.

Morgan J.

Date: January 18, 2013

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