Court of Queen's Bench of Alberta

Citation: Condominium Corporation No 0723447 v Anders, 2016 ABQB 656

Date: 20161122
Docket: 1503 14056, 1503 14057, 1603 05023, 1603 07449
Registry: Edmonton

Between:

Docket: 1503 14056, 1503 14057, 1603 07449

Condominium Corporation No. 0723447

Plaintiff

- and –

Matthew Anders and Annemarieke Hoekstra

Defendants

And Between:

Docket: 1603 05023

Matthew Anders and Annemarieke Hoekstra

Plaintiffs

- and –

Condominium Corporation No. 0723447

Defendant

Reasons for Decision
of
S.L. Schulz, Master in Chambers

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[1] The Plaintiff, Condominium Corporation ("Condo Corp"), bring summary judgment applications in Action Numbers 1503 14056,1503 14057 and 1603 07449 for the removal of laundry machines from two of the condominium units owned by the Defendants (the "Owners") and for judgment for the fines levied for their failure to remove the laundry machines.

[2] The Owners bring cross-applications in Action Numbers 1503 14056 and 1503 14057 to strike the Amended Statement of Claim pursuant to Rule 3.68 on the basis that it does not disclose a reasonable claim, alternatively, for summary dismissal of the claims of the Condo Corp on the basis that actions are without merit. In Action 1603 05023, the Owners allege

oppressive or unfairly prejudicial conduct by the Condo Corp. Finally, the Owners claim a penalty for the late filing of the Affidavit of Records by the Condo Corp in Action Numbers 1503 14056 and 1503 14057.

[3] For the reasons that follow, the applications of the Condo Corp are granted and the applications of these Owners are dismissed.

I. Facts

[4] An apartment block in Edmonton was converted to a condominium. The Owners purchased three condominium units in that building. Two of those units have in-suite laundry machines installed by one of the Owners.

[5] In 2007, the Board of Directors of the Condo Corp (the "Condo Board") enacted and registered Bylaws which contained the following provisions:

> 2(f): [An Owner shall] not use his Unit or permit it to be used in any manner or for any purpose which may be illegal or injurious, or that will cause any insurance maintained by the Corporation to be cancelled or declined or its premium rates increased or that will cause nuisance or hazard to any occupier of a Unit (whether an Owner or not) or the family of such an occupier;
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> 10(m): [The Corporation may] make such rules and regulations as it may deem necessary or desirable from time to time in relation to the use, enjoyment and safety of the Common Property and do all things reasonably necessary for the enforcement of these Bylaws and for the control, management and administration of the Common property generally including the commencement of an action under Section 36 of the Act and all subsequent proceedings relating thereto.
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> 49(b): Any and all alterations or improvements at any time developed, constructed or placed in or on Units shall meet the requirements of the municipal and provincial building codes and bylaws applicable to the Parcel and the Unit at the time of registration of the Condominium Plan.
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> 49(c): No alterations or improvements shall be done or made that adversely affect the structure or integrity of the Building, the plumbing, heating, air conditioning, electrical or other facilities shared in common with other Units or Common Property (or both) or the soundproofing of insulation of the Unit boundary walls, floors or ceilings;
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> 51: Toilets, sinks, drains, sumps or other water apparatus shall not be used for any purpose other than those for which they are constructed, and no sweeping, garbage, rubbish, rags, ashes, or other substances shall be thrown therein.

[6] In 2013, plumbing backups occurred in the condominium building. After retaining a plumber, the Condo Board learned that the backups were likely caused by in-suite laundry machines and advised that the plumbing in the complex was not suitable for in-suite laundry machines. An investigation disclosed six units which contained in-suite laundry machines. Two of the units affected belonged to the Owners and are the subject of this action.

[7] After consulting with a plumbing expert, two other mechanical companies, the Condo Corp's reserve fund supplier, its laundry contractor, the condo insurance company and the engineer who provided the most recent reserve fund study, the Condo Board passed a resolution prohibiting laundry machines within the units.

[8] The residents of the Condo Corp were notified of the plumbing problems and were notified of the resolution prohibiting in-suite laundry machines in the individual condo units. Sections 49(c) and 51 of the By-laws were cited as support for this decision.

[9] Despite repeated requests, the Owners are the only condominium unit holders who did not remove their in-suite laundry machines.

[10] On February 6, 2014, the Condo Corp sent a notice to all unit holders, including the Owners, that the Condo Corp would levy fines against them if the in-suite laundry machines were not removed.

[11] On or about March 24, 2014, an email was sent by the Owners to the Condo Corp Property Manager advising the Condo Corp of a change of mailing address for the Owners.

[12] A final notice was sent to the Owners on February 2, 2015.

[13] Fines of $250 per unit per month for a total of $500 per month were levied against the Owners for their failure to remove the laundry machines. Monthly notices were sent to the Owners to advise them of the fines as they were levied.

[14] Additional expert reports were solicited and on September 14, 2016, the Condo Board confirmed the January 15, 2014, resolution to prohibit in-suite laundry machines as a Rule and Regulation of the Condo Corp.

II. Rule 3.68 Applications to Strike the Amended Statements of Claim

[15] The test for the striking of a Statement of Claim or an Amended Statement of Claim is set out by the Supreme Court of Canada as follows:

> [17]...A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action...another way of putting the test is that the claim has no reasonable prospect of success...
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> [22] A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven...
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> ***R v Imperial Tobacco***, 2011 SCC 42 at para 17 and 22; *Citations omitted*

[16] The pleadings in Action Numbers 1503 14056 and 1503 14057 disclose all of the necessary elements to establish a reasonable cause of action. Assuming the allegations raised are true, the Amended Statements of Claim have a reasonable prospect of success. The applications to strike the Amended Statements of Claim are dismissed.

III. Summary Judgment Applications

[17] The Owners submit that they are entitled to the summary dismissal of Actions 1503 14056 and 1503 14057 on the basis that the actions are without merit. The Condo Corp claims summary judgment for removal of the laundry machines and a judgment for the fines levied which they have voluntarily capped at $6,000.

Authority to Make Bylaws and Rules and Regulations

[18] There is no question that the Condo Corp had the authority pursuant to section 37 of the *Act* to make rules and regulations to preserve and maintain the common property. This section is enhanced by Bylaw 10(m) which specifically empowers the Condo Corp to do all things necessary for the control, management and administration of the Common property.

[19] Master Schlosser considered this duty in ***Hnatiuk v Condominium Corporation No. 032 2411,*** 2014 ABQB 22 ***("Hnatiuk")***:

> [9] Section 37(1) of the *Condominium Property Act*, and, in this case, by-law No. 4, gives the [Condo Corp] responsibility for the control and management of the common property. The statue and the by-law impose a specific obligation to maintain and keep the common property in a state of good and serviceable repair. In my view, section 37 and the corresponding by-law cannot be read to require the [Condo Corp] only to preserve a state that may prove to be deficient, or to maintain the status quo, particularly if this might create a danger to the health and safety of the occupants. The statute and the by-law impose not only a duty to maintain, but an obligation to correct deficiencies or, at the very least, to investigate and bring conclusion to a meeting of the owners.
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> ***Hnatiuk*** at para 9

[20] The Condo Corp properly investigated and brought the findings to the meeting of the Condo Board on January 15, 2014 and again on September 14, 2016. The January resolution and the September Rule and Regulation were reasonable in light of the evidence before the Condo Board. There is no evidence that the positions and arguments of the Owners were not considered or were ignored.

[21] There is a lengthy history of objections and disagreement on this issue between the Owners and the Condo Board. It is clear that the Owners do not like the decision made by the Condo Board and have chosen these lawsuits as a mechanism to continue their objections. Unfortunately for the Owners, the weight of the evidence is against them. The evidence establishes that the Condo Board acted within its authority and conducted its due diligence in making its decision to prohibit the in-suite laundry machines.

[22] The non-compliance by the Owners with the Bylaws and the Rules and Regulations amounts to improper conduct under section 67(1)(a) of the *Condominium Property Act*, RSA 2000, c. C-22 (the "*Act*").

[23] Section 35 of the *Act* permits the Condo Corp to impose monetary sanctions on those owners who fail to comply with the Bylaws, and section 10(h) of the Bylaws allows the Condo Board to impose sanctions for failure to comply with the Bylaws in amounts up to $500 per occurrence. Section 36 allows the Condo Corp to apply to the Court to recover the fines as a judgment of the Court.

Defences Raised by the Owners

[24] The Owners dispute that they were given proper notice of the fines, despite it being clear from the evidence that the Defendant/Owner Anders was a member of the Board and present at the Condo Board meeting on January 15, 2014 at which time a motion was passed to prohibit in-suite laundry machines. Further, the Owners admit receiving a letter dated August 26, 2013 from the Condo Board advising the Owners that the Condo Corp would be levying fines if the laundry machines were not removed, and in any event, the Owners admit knowledge of the fines by virtue of the August 25, 2015 letter from the solicitors for the Condo Corp. At a minimum, the Owners are responsible for the fines from August 25, 2015 forward. The Condo Corp has voluntarily capped the fines at $6,000. Although in the perfect world, notice would have been sent to the new mailing address, the Owners were well aware of the implementation of the fines. In light of the circumstances, it is disingenuous of the Owners to suggest that they had no knowledge of the implementation of the fines.

[25] The Owners argue that the exemptions set out in the *Civil Enforcement Act* are a bar to the Condo Corporation obtaining judgment. However, the exemptions apply to post-judgment remedies available to creditors, not to the process of obtaining a judgment. This argument does not give the Owners the relief they seek.

[26] The Owners also argue that the Condo Corp waived its rights by virtue of alleged delay in bringing these actions. There is no evidence of delay before the Court. The Condo Corp did not acquiesce in the use of the laundry machines, and in fact the evidence is that they used best efforts to investigate and notify the unit holders of the progress of the investigation and the requirement for the removal of the laundry machines.

[27] The rights and freedoms of the Owners are not being unnecessarily restricted by the Condo Corp. It is a fact of living in a condominium complex that ownership rights are restricted according to the legislation and the Bylaws (See: ***The Owners Strata Plan LMS 2768 v Jordison,*** 2013 BCCA 484 at para 25).

[28] The Owners take the position that the enforcement or collection of the fines levied can only be done as against the condominium property and not against them personally. The *Act* sets out a statutory scheme for dealing with those charges that are dealt with as an *in rem* remedy and those that can be dealt with as an *in personam* remedy. That scheme was discussed and analyzed by me in the case of ***Bank of Montreal v Bala***, 2015 ABQB 166 and I refer the Parties to that decision. However, I understand from the representations that were made by Counsel for the Condo Corp at the special chambers hearing, the Condo Board is satisfied with an *in personam* remedy. Accordingly I do not treat this as a foreclosure proceeding but as an application for personal judgment against the individual Defendants. If I misunderstood Counsel in that regard, then I invite the Parties to return to me to re-address that issue.

[29] In summary, the claims of the Condo Corp have merit and have been proven according to the standards set by the Supreme Court of Canada in ***Hryniak v Mauldin***, 2014 SCC 7, [2014] 1 SCR 87 and the cases that have interpreted that case. It is fair and just in the circumstances on the evidence before the Court that the summary judgment applications be granted.

IV. Summary Dismissal Applications

[30] Given that I have granted Summary Judgment to the Condo Corporation, it follows that I dismiss the applications for summary dismissal. These applications have no merit and it is fair and just in the circumstances on the evidence before the Court that summary dismissal be denied.

V. Oppressive Behaviour by the Condo Corp

[31] As noted in the foregoing section on summary judgment, the Condo Corp acted within its authority and practiced due diligence in making the decisions of which the Owners complain. The Courts grant significant deference to the decisions of condominium boards because of their status as duly elected bodies. I find there is no evidence to support the assertion by the Owners that the Condo Board acted in a manner that was "clearly oppressive, unreasonable and contrary to legislation" (***934859 Alberta Inc v Condominium Corporation No 0312180***, 2007 ABQB 640 at para 54-55; ***Anderson v Owners: Condominium Plan No 99SA34021***, 2010 SKQB 53 at para 33; ***Maverick Equities Inc v Condominium Plan No 942 2336***, 2010 ABQB 179 at para 44-46; *See also* the test for oppressive conduct as discussed by Justice Ackerl in ***Condominium Corporation No 0312235 v Scott***, 2015 ABQB 171 at para 44 *et seq*).

VI. Penalty for Late Filing of Affidavit of Records

[32] This is the third time that the Defendants have asked for this remedy. It is *res judicata* as having been previously decided and refused by the Court on February 11, 2016 and again on July 22, 2016. To bring the application back before the Court for a third time is an abuse of process. The Defendants are self-represented but clearly intelligent people. They should be able to understand that they cannot repeatedly bring the same application, hoping for a different adjudicator or a different result. Self-represented litigants must play by the same rules as everyone else. If they do not like the decision of the Court, they must appeal it and do so within the time limits set by the *Rules of Court*. In any event, this is not a situation where I would have ordered a penalty. I am satisfied that Counsel for the Condo Board acted quickly once it became obvious to him that the self-represented Owners were going to pursue their applications.

VII. Conclusion

[33] The Defendants are directed to remove or at a minimum, provide proof of disconnection of the laundry machines to the Condo Corp on or before December 12, 2016. Should the Owners fail to comply with this direction, the Condo Corp may, without further Order, utilize the services of a civil enforcement agency to enter onto the premises, disconnect, and remove and dispose of the laundry machines, all at the expense of the Owners. If the Owners choose to provide evidence of disconnection but subsequently re-connect the laundry machines, the Condo Corp has leave to apply to a Justice of the Court of Queen's Bench for an order of contempt.

[34] The Owners are directed to pay, on or before December 12, 2016, the sum of $6000 for their failure to comply with the Bylaws.

[35] As per section 84(a) of the Bylaws, the Owners are directed to pay to the Condo Corp the solicitor and own client full indemnity costs of these actions as assessed on notice or as agreed upon between the parties.

[36] The applications of the Owners, including the Originating Application filed in Action Number 1603 05023, are denied with costs payable to the Condo Corp as per section 84(a) of the Bylaws on a solicitor and own client full indemnity basis as assessed on notice or as agreed upon between the parties,

Dated at the City of Edmonton, Alberta this 22nd day of November, 2016.

S.L. Schulz
M.C.C.Q.B.A.

Appearances:

Jerritt Pawlyk
Bishop & McKenzie LLP
for the Plaintiff

Matthew Anders and Annemarieke Hoekstra
Self-Represented