Court of Queen's Bench of Alberta

Citation: Condominium Corporation No. 0524877 v Bonner, 2015 ABQB 263

Date: 20150429
Docket: 1303 07209
Registry: Edmonton

Between:

Condominium Corporation No. 0524877

Plaintiff
Defendant by Counterclaim

- and -

Jordan Bonner

Defendant
Plaintiff by Counterclaim

Reasons for Judgment
of
W. S. Schlosser, Master in Chambers

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[1] These cross applications give rise to five overlapping issues:

1. Whether the Condominium Corporation is entitled to summary judgment for unpaid condominium fees;
2. Whether the fees should be held pending a decision on the Counterclaim;
3. Whether declaratory relief ought to be given in the Counterclaim, with the balance of the Counterclaim proceeding to Assessment;

4. Whether the claims for damages or monetary relief in the Counterclaim are out of time, and, finally;

5. Who is entitled to costs, and on what scale.

[2] The Condominium Corporation sought its remedies in an Application for a Redemption Order in their foreclosure action for unpaid condominium fees. The property has been redeemed so that part of the relief is now moot. The costs of the foreclosure and of this application, as well as whether the Condominium Corporation is entitled to dismissal of the Counterclaim against it remain in issue.

[3] Mr. Bonner's Counterclaim seeks a declaration that the rental regulations of June, July and October, 2010 and bylaws 4.1(j) and 14.1(d), that empowered the Condominium Corporation to make them, to be of no force and effect. There is also a claim for damages for intentional interference with economic relations, or, for improper or oppressive conduct.

Issue 1 – Are the Condominium Fees Due and Payable?

[4] In this case, Mr. Bonner withheld his condominium fees to make a point because of what he felt were illegal rental regulations. (The fees ended up being paid into court.) They were withheld pending resolution of the Counterclaim. In my view, withholding these fees were, essentially, a self-help, pre-judgment remedy in anticipation of a successful Counterclaim. The grounds for this extraordinary remedy have not been made out. As a general rule, self-help remedies by unit owners are not to be encouraged.

[5] There is no dispute that the fees are otherwise due and owing. The Condominium Corporation is entitled to Summary Judgment for unpaid condominium fees.

Issue 2 – Should the fees be held?

[6] The answer to the first question also deals with the second issue.

Issue 3 – Declaration with Assessment to follow?

[7] The Condominium Board adopted Rental Rules and Regulations in June, 2010. They were amended in July 2010, and further amended in October 2010.

[8] First, they provided:

Regulations and Policies

The Owner shall not rent, lease or grant possession of a Unit to any Tenant unless:

a. the Owner provides the Board with the full name of the Tenant, the amount of the Tenant's rent for the Unit and a copy of the lease or rental agreement. Also, before any Tenant (including additional tenants to an existing lease) is permitted to move in, the following documentation is required:

   i. a favourable credit report, and

   ii. a favourable criminal record check

both of which will be reviewed by the board or its representatives and returned to the Owner.

[9] The July amendment provided:

Regulations and Policies

b. Before any tenant (including additional tenants to an existing lease) is permitted to move in, the following documentation is required:

i. A credit report, and

ii. A criminal record check

Both of which will be reviewed by the board or its representative and returned to the Tenant.

[10] The regulations provided for various fines for breach. The requirements for a credit report and criminal record check were removed in October.

[11] The gist of the Counterclaim is that Mr. Bonner suffered an economic loss as a result of these regulations. In the alternative, he says that these regulations amounted to oppressive conduct, though they didn't single him out. Mr. Bonner says that he gave up trying to rent his unit in the face of, what he felt, were unreasonably restrictive rules. That is why he withheld his condominium fees.

[12] The *bylaws* Mr. Bonner seeks to impugn are: 4.1(j), which gives the Board the power to make rental rules and rental regulations, and 14.1, which confers the power to make policies. Bylaw 2.3 affirms that where there is a conflict between the rights and obligations imposed by the Bylaws and the *Condominium Property Act*, RSA 2000 c C-22, the Act prevails, as does s 32(7) of the *Act*.

[13] Condominium corporations have an undoubted power to make regulations: ***Maverick Equities Inc v Owners: Condo Plan 9422336***, 2008 ABCA 221. Condominium Corporations operate through their bylaws and through the rules and regulations passed under them. The bylaws, rules and regulations, though they have different force, may affect the rights ordinarily enjoyed by landowners. That is one of the prices to be paid for condominium ownership.

[14] Rules or regulations can be passed with significantly less formality than bylaws. An amendment to bylaws requires a special resolution (Section 32(3)). As such, a rule or regulation cannot be used to replace a bylaw, or to usurp the democratic power of unit owners.

[15] Courts show deference to the decisions of properly elected boards and typically won't intervene unless the decision amounts to improper or oppressive conduct within the meaning of Section 67, or the decision is otherwise outside the powers granted by the *Act*. Condominium Corporations, cannot "pull themselves up by their bootstraps" by purporting to give themselves powers in a bylaw that go beyond the powers they are allowed to have under the *Act*.

[16] I acknowledge that there is a division in the decided cases about the approach that is to be brought to bear on whether bylaws are *ultra vires* a condominium corporation. (The cases are carefully reviewed in ***Bank of Montreal v Bala***, 2015 ABQB 166 (M). at para 9 et seq.) The division is along the line separating whether the Act should be given "wide and liberal" interpretation, or "narrow and strict" interpretation. (***Condo Corp No. 0312235 v Scott***, 2015 ABQB 171 per Ackerl, J. can now be added to the conservative school). The root case is ***Francis v Condo Plan No 8222909***, 2003 ABCA 234. In the present case, there is no question about the legality of the empowering bylaws, only the regulations passed under them.

[17] These regulations are problematic, especially in their original form as they appear to call for a value judgment on the part of the Board. It is not clear what a "favourable" credit report or criminal record check means. In other words, would a summary conviction offence be acceptable to the Board but more serious hybrid or indictable offences not? For that matter, it is unknown whether a prospective tenant should have a credit score over a certain number in order to be acceptable in the eyes of the Board. And, at the very least, collecting this information from prospective tenants and passing it along to the Board invites *Privacy Act* issues. The Board might just as well have tried to ban tradesmen and actors.

[18] "The right to alienate ones unit includes how one will rent it out" ***Scott*** (at para 32). Even though we are dealing with a regulation here, it runs afoul of s 32(5) of the *Act* and, *a fortiori*, is bad.

[19] The regulations were in place for a relatively short period of time: June through October, 2010. Mr. Bonner might well have lost an opportunity over that period but no particular damages have been shown.

[20] Apparently the regulations were adopted in response to an earlier high-profile police raid involving a tenant in the complex. It is understandable that the Board may have wished to take steps to try to avoid this happening again but a prospective tenant's credit score and past misdeeds are not the business of the board. What matters is that they obey the bylaws and don't damage the common property, as s 53 provides.

[21] Without more, simply passing an illegal bylaw or regulation may not, in itself, require a Court-ordered remedy under s 67(2) of the *Act*, especially when, as here, the regulation was withdrawn before there was any proven harm (note also ***Scott*** at paras 44 et seq).

[22] The Plaintiff by Counterclaim says he may have lost a rental opportunity because he gave up trying to rent out his unit in the face of what he thought were illegal rental regulations. There is no shown intent on the part of the board to cause harm (in fact the opposite is shown). There is no demonstrated interference with any identified third party. No damages have been shown, which is an essential part of the tort. The economic loss claim is not sustained.

Issue 4 – Limitations

[23] The conduct complained of arose over a five month period in 2010. The Counterclaim was not advanced until the end of July 2013 in response to the May 2013 foreclosure action. The Defendant by Counterclaim has raised a limitations defence though only in their Brief. It was fully argued by both sides.

[24] The Plaintiff by Counterclaim argues that the Counterclaim ought to be saved by section 6 of the *Limitations Act* which is as follows:

> Claims added to a proceeding
>
> 6(1) Notwithstanding the expiration of the relevant limitation period, when a claim is added to a proceeding previously commenced, either through a new pleading or an amendment to pleadings, the defendant is not entitled to immunity from liability in respect of the added claim if the requirements of subsection (2), (3) or (4) are satisfied.
>
> (2) When the added claim

> (a) is made by a defendant in the proceeding against a claimant in the proceeding, or
> (b) does not add or substitute a claimant or a defendant, or change the capacity in which a claimant sues or a defendant is sued.
>
> the added claim must be *related* to the conduct, transaction or events described in the original pleading in the proceeding. (emphasis added)

[25] In its Final Report on Limitations, the Alberta Law Reform Institute said (Report No. 5, December 1989):

> 12. The relationship requirement is designed to serve at least three purposes. First, it gives the courts ample latitude to adjudicate claims in a single proceeding whenever this is desirable under objectives of procedural policy. Second, it assists the claimant to exercise some control over the eventual size of the civil proceeding which he commenced. The conduct, transaction or events which the claimant describes in his original pleading will operate as a screen determining which added claims may remain subject to a limitations defence notwithstanding the exception provisions. Third, it prevents any possible prejudice to a defendant because of surprise by the addition of a claim after the expiration of the limitation period applicable to the added claim. *Because the defendant (unless the original claimant) must have been made a party to the action under a timely claim, he will know of the conduct, transaction or events described in the original pleading in the action, and he will be able to gather and preserve evidence as to any possible claims against him based on the described conduct, transaction or events.*

[26] And further:

> Even if the added claim contains internal substantive changes as well, it still must be related to the described conduct, transaction or events *the defendant will already know about*. (emphasis added)

[27] The relatedness requirement was considered by Madam Justice Hughes in ***Marlborough Ford Sales Ltd v Ford Motor Co. of Canada, Ltd*** 2003 ABQB 298. Unfortunately she did not give us a test of general application.

[28] In my view relatedness must be something more than two independent, or freestanding claims that might ultimately have been amenable to procedural setoff. These two claims appear only to have been artificially united by a self-help remedy long after the fact. There is nothing to suggest that the Board would (or should) have known about the claim in any way, shape or form prior to the Counterclaim being advanced. The relatedness requirement of s 6, is geared to evening the playing field, not to resurrecting the dead.

[29] The limitation issue was fully canvassed in the Briefs but the Court cannot confer an immunity unless it is pleaded. It has not been raised in the defence to Counterclaim. However, in the circumstances, I have no doubt an amendment would be allowed if requested.

Conclusion

[30] The elements of the Counterclaim have not been proved. There would be clear merit to the limitations defence raised by the Board if it were pleaded. The Counterclaim is dismissed.

Costs

[31] The bylaws of the Condominium Corporation empower the corporation to enforce the bylaws (clause 3.1), commence legal proceedings (clause 4.1), and take legal steps to enforce bylaws (clause 14.1). The bylaws do not use the phrase "solicitor and client costs".

[32] Section 42 of the *Act* provides:

> 42 Where a corporation takes any steps to collect any amount owing under section 39, the corporation may
>
> (a) Recover from the person against whom the steps were taken all reasonable costs, including legal expenses and interest, incurred by the corporation in collecting the amount owing, and
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> (b) If a caveat is registered against the title to the unit, recover from the owner all reasonable expenses incurred by the corporation with respect to the preparation, registration, enforcement and discharge of the caveat.

[33] In my view, where the Act and the bylaws simply say 'costs', the scale is in the discretion of the Court. Costs are subject always to the overriding principles in ***ATB v 14010507 Alberta Ltd.*** (Katch 22), 2013 ABQB 748.

[34] In my view, Column 1, Schedule C Costs are appropriate:

> ***Stagg v. Condominium Plan No 8222999***, 2013 ABQB 684 per Tilleman, J.; ***Condominium Corporation No 0425177 v Jessamine***, 2011 ABQB 644 per Smart, M.; ***Condominium Plan No 0526233 v Seehra***, 2014 ABQB 588 per Lee, J.; ***Cooper v Cooper***, 2013 ABQB 117 per Kenney, J. and; ***Marathon Canada Ltd v. Enron Canada Corp***, 2008 ABQB 770 per McMahon, J.

[35] If the parties are unable to agree, Costs are to be assessed on notice.

Dated at the City of Edmonton, Alberta this 29th day of April, 2015.

W. S. Schlosser
M.C.C.Q.B.A.

Appearances:

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