

COURT OF APPEAL FOR ONTARIO

CITATION: Carleton Condominium Corporation No. 396 v. Burdet,
2012 ONCA 234
DATE: 20120413
DOCKET: C54549

Cronk and Epstein J.J.A. and Strathy J. (*ad hoc*)

BETWEEN

Carleton Condominium Corporation No. 396

Plaintiff (Respondent in Appeal)

and

Claude-Alain Burdet, Claude Alain Burdet, in trust,
1457563 Ontario Corporation, 1457563 Ontario Corporation in trust,
Janet Sue Burdet, Nelson Street Law Offices,
L'Academie Christiane Sauve Inc. and International Beauty Depot

Defendants (Appellants)

Jonathan H. Fine and Claude-Alain Burdet, for the appellants

Janice B. Payne and Nancy Houle, for the respondent

Heard: March 22, 2012

On appeal from the order of Justice Paul Kane of the Superior Court of Justice,
dated September 30, 2011.

ENDORSEMENT

[1] The appellants, (the "Burdet Group"), appeal an aspect of the order of Kane J. dated September 30, 2011, granting partial summary judgment to the respondent, Carleton Condominium Corporation No. 396 ("CCC 396"). The judgment amount of \$109,440.16, represents arrears of common expense

charges ("condo fees") that the motion judge held the Burdet Group owed in respect of the 21 units it holds in the 33-unit condominium complex.

[2] This appeal is one of many court proceedings arising out of a long, bitter dispute between the Burdet Group and CCC 396 about voting rights and various financial matters. This dispute resulted in this court granting the Burdet Group majority voting control of the condominium corporation in 2000. In 2002, the Superior Court issued an order putting the condominium corporation under the operating control of an independent administrator, the Condominium Management Group Inc. ("CMG"). Among other things, the 2002 order stipulates that the Burdet Group is to pay its condo fees to CMG.

[3] In 2005, CCC 396 registered condominium liens against several of the Burdet Group's units in order to secure unpaid condo fees. CCC 396 issued notices of sale for the units in February 2009 alleging indebtedness in the amount of \$96,354.34. In response to the notices of sale, the Burdet Group paid \$104,185.16 to CCC 396's lawyers to be held in trust pending the resolution of issues raised in an outstanding motion. As of April 1, 2009, the Burdet Group stopped paying condo fees.

[4] In June 2009, CCC 396 commenced this action for, among other forms of relief, immediate possession of the Burdet Group's units and judgment for condo fee arrears. The Burdet Group defended the claim and counterclaimed for

various forms of relief based in part on allegations that CCC 396 was in breach of several provisions of the *Condominium Act, 1998*, S.O. 1998, c. 19. CCC 396 brought a motion for summary judgment, claiming judgment for condo fee arrears and payment out of the trust funds held by its lawyers.

[5] Concluding that a trial was needed to determine most of the issues between the parties, the motion judge denied the majority of the relief sought and ordered that the matter proceed to a trial of an issue under rule 20.04(3). However, since the evidence was clear that the Burdet Group had not paid condo fees since April 2009, the motion judge granted partial summary judgment of \$109,440.52 – the then current amount of unpaid condo fee arrears – and ordered CCC 396's solicitors to distribute the money in the trust account toward payment of the arrears. He also ordered the Burdet Group to pay its condo fees going forward.

[6] In this appeal, the Burdet Group submits that the motion judge erred in concluding that the claim for condo fee arrears could be resolved by way of partial summary judgment. The Burdet Group contends that all the issues raised should be considered at once, including issues involving its claims for various set-offs, and that the obligation to pay condo fees as of April 2009 should not have been separated from the larger issues. According to the Burdet Group, the real issue is whether any amount in fact is owing to CCC 396 and, if so, the quantum of that amount. The Burdet Group raises other issues, including the

applicability of the provisions of the *Condominium Act*, equitable estoppel, and set-off.

[7] We conclude that the appeal should be dismissed.

[8] In our view, the motion judge correctly concluded that there was no genuine issue requiring a trial in relation to the condo fee arrears from April 1 2009 through August 2011. The *Condominium Act* applies to this issue between the parties. The 2002 order did nothing to change that. In fact, all parties rely on the Act in their pleadings. Significantly, the Burdet Group itself invokes the Act in its statement of defence and counterclaim.

[9] Counsel for the Burdet Group candidly acknowledges that there is no statutory or jurisprudential authority for the proposition that the operation of the Act has somehow been suspended in relation to CCC 396, even taking into consideration the unique circumstances of CCC 396. He also candidly admits that if the Act applies, as in our view it does, then s. 84(3)(b) is a complete answer to this appeal. That provision states, in effect, that regardless of any other claims between the parties, condo fees must be paid.

[10] The Burdet Group has acknowledged that the condo fees for the period April 2009 to August 2011 have not been paid. There was no evidence to contradict CCC 396's evidence establishing the amount of the monthly condo fees that the motion judge used in calculating the amount of the judgment.

Applying the clear provisions of the Act, the motion judge correctly found that there was no issue requiring a trial with respect to the condo fee arrears.

[11] The motion judge was therefore entitled to order judgment in the amount of \$109,440.52 and that the money held in CCC 396's lawyers' trust account be released in partial satisfaction of this judgment. The money had been paid into trust on account of disputed condo fee arrears, past and future. Those arrears were in issue on the summary judgment motion. The trust fund, therefore, was properly released to be applied to this judgment.

[12] The issues the Burdet Group raises with respect to the ultimate accounting between the parties are the subject of the trial of an issue. The terms of this trial were established by the motion judge in his order of January 11, 2012. We specifically note para. 2 of that order, which provides that the issues to be tried include:

- a) The amount of liability to the plaintiff for common expenses of each unit owned by the defendants, based on a statement of accounts (the "Statement of Accounts"), including:
 - i. an account for each of the units owned by the defendants at the commencement of the appointment of the Administrator in 2002;
 - ii. the subsequent expenses and receipts of the plaintiff;
 - iii. the basis of any subsequent special assessments and the per unit share thereof;

- iv. the amount of each defendant's liability for the subsequent expenses and special assessments;
 - v. the periodic common expenses per unit;
 - vi. the defendants' payments on account.
- b) The calculation of each defendant's indebtedness to the plaintiff as of the date of registration of liens and Notices of Power of Sale by the plaintiff, if possession or sale are claimed by the plaintiff;
 - c) The validity of the registered liens and the notices of sale served on the defendants; and
 - d) Is the plaintiff entitled to possession of the subject units?

[13] While counsel for the Burdet Group has expressed concerns about the terms of this order, it has not been appealed and therefore is not a matter before this court.

[14] Finally, we see no merit in the Burdet Group's cost appeal and would therefore dismiss it.

[15] For these reasons, the appeal is dismissed. The parties' submissions as to costs demonstrate similar expectations as to quantum. We therefore order the Burdet Group to pay to CCC 396 the costs of this appeal, fixed in the amount of \$30,000, inclusive of disbursements and all applicable taxes.

"E.A. Cronk J.A."

"G.J. Epstein J.A."

"G.R. Strathy J. (*ad hoc*)"